United States of America, Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: United States of America v. Khalid Shaikh Mohammad *et al.*

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[Source: Military Commissions Trial Judiciary, Guantanamo Bay, Cuba: United States of America v. Khalid Shaikh Mohammad *et al*, Order on the Defense Motion to Compel Discovery in Support of Defense Motion for Appropriate Relief to Compel Defense Examination of Accused's Conditions of Confinement, AE 013BBB/108T, 6 November 2013, available at: http://media.miamiherald.com/smedia/2013/11/06/16/25/16cpHS.So.56.pdf; footnotes omitted; numbering of paragraphs amended**]**

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

1. PROCEDURAL HISTORY

[1]Messer's Hawsawi, Aziz Ali, bin al Shibh, and bin 'Attash filed a classified Motion to Compel the Examination of the Conditions of Their Detention […], joined by Mr. Mohammad […], to develop potential mitigation evidence and to ensure the conditions for detention are in compliance with international law agreements and standards. In its response […] the Government agreed to allow counsel to visit the current detention facility, and, in refuting the defense allegations of the need to assess the facilities in comparison to 'international law agreements and standards:

‘However, Defense counsel fails to offer any valid basis that monitoring law of war detention conditions for compliance with international standards is an obligation or duty for a criminal Defense attorney and *the Defense brief fails to note that representatives of the International Committee for the Red Cross conduct regular visits to the confinement facility.’* […]

[2] Prompted by the Government's reference to the International Committee for the Red Cross (ICRC), Messer's Hawsawi, Aziz Ali, bin Shibh, and bin 'Attash filed a Motion to Compel Discovery, joined by Mr Mohammad […], requesting the Commission:

‘Compel the Prosecution to produce all correspondence between the International Committee for the Red Cross and the Department of Defense (DoD) regarding the conditions of the Accused's' confinement at Guantanamo.’

[3] The Government response […] requested the Commission deny discovery of the ICRC materials as ‘irrelevant and immaterial to the determination [of the motion] and the production of these documents and communications will not lead to the discovery of any relevant or material evidence.’

[3] The Commission issued an Order […], which permitted each of the Accused’s legal teams a one-time inspection of the detention facility and held in abeyance compelling discovery of the ICRC materials ‘pending the Government's effort to provide discovery.’

[4] The ICRC filed a motion […] for leave to intervene in opposition to the Motion to Compel Production and requested the Commission issue a protective order both denying the defense request and protecting ICRC materials from ‘future disclosure.’ The ICRC's' pleading stated:

‘Confidential materials in the Government's possession that were generated in the course of the ICRC's activities are privileged under well established principles of customary international law. This absolute right to non-disclosure of the ICRC's confidential information, including the right not to be compelled to testify in judicial proceedings, has been recognized consistently by international tribunals and by the international community, which widely abides by the ICRC's privilege.’

[…]

2. ICRC's CLAIMED PRIVILEGE AND THE ACCUSEDS' RIGHT TO DISCOVERY

[5] The Defense contends ICRC reports, made over the course of a decade inspecting the detention facilities at the U.S. Naval Station, Guantanamo Bay, Cuba, will provide historical perspective to their mitigation efforts, should a sentencing case become necessary, as each of the Accused is facing capital charges. The Prosecution initially requested the Commission deny the Defense motions but, in a change of its position,

acquiesced in the need to provide discovery to the Defense subject to determinations of relevancy and materiality. This would have ended the controversy save for the intervention of the ICRC and the apparent refusal of other government agencies to provide the Prosecution with the ICRC reports.

[6] [Rule for Military Commissions] [(]R.M.C.[)] 703, provides the Defense 'reasonable opportunity to obtain […] other evidence' and sets forth a comparability standard as to the 'opportunity available to a criminal defendant in a court of the United States under Article III of the Constitution.' […] R.M.C. 703 (f) entitles 'each party [...] to the production of evidence which is relevant, necessary and noncumulative' specifically subject to limitations pertaining to classified evidence and guided by the general discovery parameters set out in R.M.C. 701. Unwritten, but germane to the ICRC challenge, are limitations on admissibility that run contrary to the truth-seeking function of our system of criminal justice by excluding unreliable or prejudicial evidence. Among these limitations are those considered as evidentiary privileges.

[7] Except for the Constitutional privilege against self-incrimination, federal evidentiary privileges originate from both common law and federal statute. Congress has never enacted specific federal evidentiary privileges; instead, Federal Rule of Evidence 501 provides for the application of privileges in Article III courts as an evolving and maturing growth of the common law. […]

[8] For both courts-martial and the Military Commissions, Congress took a different tack and specified some evidentiary privileges while also casting reliance on common law principles. Military Commission Rule of Evidence (M.C.R.E.) 501 specifies:

'(a) A person may not claim a privilege with respect to any matter except as required by or provided for in:

(1) The Constitution of the United States, as applicable;

(2) An Act of Congress applicable to trials by military commissions;

(3) These rules or this Manual; or

(4) The principles of common law generally recognized in the trial of criminal cases in the United States district courts pursuant to Rule 501 of the Federal Rules of Evidence […]'

[9] In its motion, the ICRC lays claim to an absolute privilege against involvement in a judicial proceeding citing consistent recognition by 'international tribunals and by the international community.' The ICRC is a non-governmental organization granted special recognition in the United States under 22 U.S.C. § 288f-3: Immunities for International Committee of the Red Cross and Executive Order 12643 - International Committee of the Red Cross, June 23, 1988, neither of which specifically provides for a privilege from disclosure of ICRC work product.

[10] Much of the common law cited in the ICRC's brief stems from intergovernmental relationships, or relationships developed on commercial interests, and do not directly go to the relationship between a nation-state and a non-governmental organization. The Commission is unaware of any court of a nation-state rendering a decision as to a specific evidentiary privilege for the ICRC. Additionally, no court of a nation-state has precluded discovery of correspondence between the ICRC and a nation-state, which is a party to a lawsuit.

[11] Article III courts have protected ICRC reports from public disclosure under exemptions of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000), but none have concluded there is a privilege from discovery in a criminal proceeding. In determining ICRC records were not required to be released under FOIA, courts did not find an evidentiary privilege for ICRC work product, but rather relied on an exemption established by statute. […]

[12] The ICRC cited *Prosecutor v. Simic*, [*See* Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel, *Document A*] (*Simic*), which provided an evidentiary privilege for ICRC work. Judge David Hunt issued separate opinions in both *Simic* and its companion case - 'the Motion by Todorovic for Order requesting Assistance of the International Committee of the Red Cross' Prosecutor v. Simic, Trial Chamber, IT-95-9/1, Separate Opinion of Judge David Hunt on Motion by Todorovic for Order Requesting Assistance of the International Committee of the Red Cross (ICTY June 7, 2000) *(Todorovic).*

[13] While upholding an ICRC privilege in these specific instances based on the facts before the Tribunal, Judge Hunt, in *Todorovic,* opined:

'[In *Simic*]I gave a Separate Opinion, stating that I was not persuaded that the ICRC's protection against disclosure was the absolute one which it asserted, but that it was unnecessary to come to any final conclusion upon that issue because, even assuming that the protection was *not* an absolute one, a balancing exercise between the powerful but competing public interests involved would necessarily result in the proposed evidence being excluded.'

[14] The ICRC also referenced *Prosecutor v. Brdjanin* (Appeals Chamber, Case No. IT-99-36, Decision on Interlocutory Appeal, (ICTY Dec. 11, 2002)) (*Brdjanin*), a case discussing the privilege of a war correspondent and alluding to *Simic* as an example of a recognized common law privilege without further discussion or decision.

[15] The *Simic, Todorovic,* and *Brdjanin* decisions were followed by a trilogy of decisions from the International Criminal Tribunal for Rwanda, which provided little support for a common law privilege for the ICRC. In *Prosecutor v. Pauline Nyiramasuhuko and Arsene Shalom Ntahobali*, (ICTR-97-21-T, Decision on Ntahobali's extremely urgent Motion for inadmissibility of Witness TQ's testimony (Trial Chamber), 15 July 2004) (*Ntahobali*), the status of a witness requested by the prosecution was in dispute. The issue concerned

the witnesses' affiliation with the ICRC or the Belgian Red Cross Society (BRCS). Both the ICRC and the BRCS were invited by the Tribunal to provide their views as to privilege. Neither the ICRC nor the BRCS were able to affirmatively determine who controlled the work of the witness in question, and in their Decision, the Tribunal noted:

'In this case, however, the BRCS found that the interests of the victims and international humanitarian law justify allowing Witness TQ to appear to testify before the Tribunal. Consequently BRCS is not opposed to Witness TQ testifying before the Chamber. The ICRC supported the BRCS decision not to oppose the appearance of Witness TQ.'

[16] The Tribunal, in taking no stance on the ICRC privilege claim, concluded:

'The parties and the interveners (the ICRC and the BRCS) have no doubt raised some interesting questions of law and fact in this matter. Considering, however, that the BRCS and the ICRC are not opposed to Witness TQ's testimony, the Chamber finds no need to make any pronouncements, on this occasion, in an attempt to resolve those questions of law and fact.'

[17] *Ntahobali* was followed by *Prosecutor v. Muvunyi* (ICTR-2000-55A-T, Reasons for the Chamber's Decision on the Accused's Motion to Exclude Witness TQ, 15 July 2005) (*Muvunyi*), in which the same witness was requested by the prosecution, and the accused asserted the ICRC privilege prevented such testimony. While making note of the ICRC's 'exceptional' privilege stemming from *Simic,* the Tribunal found the same witness in question was, differing from the decision in *Ntahobali,* not an employee of the ICRC and the issue of privilege never attached to his testimony and was therefore not specifically addressed by the Tribunal. *Muvunyi* was followed by *The Prosecutor v. Ildephonse Nizeyimana* (Case No. ICTR-00-55C-PT, Decision on Extremely Urgent and Confidential Motion Challenging the Admissibility of Witness TQ'S Testimony, 26 January 2011)(*Nizeyimana*), in which the International Criminal Tribunal for Rwanda, while noting *Simic,* followed the decision in *Muvunyi,* finding the witness was not an ICRC employee and likewise did not make a specific finding as to the applicability of an ICRC evidentiary privilege.

[18] The ICRC also cited Rule 73, Privileged communications and information of the International Criminal Court, which states:

[*See* **Case No. 214**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel, *Document B,* paras 4 and 6]

[19] No cases from the International Criminal Court provide judicial interpretation upon the interplay of these separate parts of the Rule, but Rule 73 seems to permit a balancing of interests similar to Judge Hunt's analysis in *Simic.*

[20] Judge Hunt's separate opinions in *Simic* and *Todorovic* described a balancing test much in line with that

discussed in *Trammel v. United States* (445 U.S. 40 (1980)), *United States v. Nixon* (418 U.S. 683 (1974)), and even as early as *United States v. Bur,* (25 F. Cas.30 (C.C.Va. 1807)). The test articulated by Wigmore (8 Wigmore, Evidence §§2191, 2192, 2285 (McNaughton rev. 1961)) serves as the predicate for much of our evidentiary privilege law:

'(1) The communications must originate in a confidence that they will not be disclosed.

(2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.

(3) The relation must be one which in the opinion of the community ought to be sedulously fostered.

(4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.'

[21] The first three factors clearly weigh heavily on the side of finding a privilege for the requested reports. The fourth factor, the 'injury' an Accused, in the case now before the Commission, might suffer is significantly greater than the ones faced by *Simic* or any of the successor cases. In those cases, a period of imprisonment for each accused was at stake, while in the case now before the Commission, each of the Accused potentially faces capital punishment if convicted.

[22] Seeking to alleviate ICRC concerns about having their reports concerning the detainees and the detention facility provided to the public, Mr. Aziz Ali proposed incorporating the ICRC reports into the frame work envisioned for classified material by *Amended* Protective Order #1. For differing reasons, both the ICRC and the Prosecution opposed the suggested remedy. The ICRC argued their work product existed under an absolute privilege, and the Prosecution relied upon its argument requiring a determination of relevance and materiality, as contemplated in R.M.C 703(t), before any disclosure to an Accused could be made.

3. FINDINGS

[23]The Commission finds the ICRC reports, while being treated by DoD as though they were classified, are not classified documents. As such, they are not incorporated within the statutory protections afford classified materials by the Classified Information Procedures Act (CIPA) (18 U.S.C. § 16) or M.C.R.E. 505. Consequently, the mandates and protections contemplated by *Amended* Protective Order #1 do not apply to ICRC reports or correspondence between the ICRC and United States governmental organizations. The defense motion asks the Commission to artificially offer protection to the ICRC reports. This would have the effect of supplanting the intent of CIPA by providing the protections offered properly classified information to pseudo-classified or sensitive information. Assuming *arguendo* the Commission decides disclosure of the ICRC reports is necessary based on relevancy and materiality, any protections afforded them will be under

the provisions of Protective Order #2, 'To Protect Unclassified Discovery Material Where Disclosure is Detrimental to the Public Interest'.

[24] The decisions by international tribunals on the issue of the existence of an absolute privilege for ICRC records are inconsistent as to whether such a privilege exists. Combining this with a lack of any precedent established in a court of the United States, or of any other nation-state, the Commission finds there is a lack of meaningful or longstanding international common law to serve as precedent for the determination currently before it.

[25] R.M.C. 703 tasks the Prosecution to assess discovery as to being 'relevant necessary and noncumulative' before being provided to the Defense. In cases of particular sensitivity, however, courts have taken it upon themselves to review the material at issue and make the necessary determinations as to providing it as part of discovery or in response to subpoena. […]

4. RULING

[26] The Defense motion […] to amend Protective Order# 1 is DENIED.

[27] The Government motion […] to permit the Government to fulfill legal obligations to review the ICRC materials is DENIED.

[28] The ICRC motion […] to deny the position advanced by the Prosecution in their response to review the materials in question and asserting an absolute privilege to any disclosure is DENIED.

[29] The Commission does not recognize an ICRC absolute privilege under the laws of the United States or the rules of discovery governing this proceeding. The ICRC motion […] for a protective order denying the defense request for discovery and protecting ICRC materials from 'future disclosure' is DENIED.

[30] The Defense motion to compel discovery […] of ICRC materials, acquiesced to by the Prosecution, is DEFERRED to accommodate an *In Camera* and Under Seal review of the material by the Commission using the standards set out in R.M.C. 703(f).

5. ORDER

[31] The Prosecution, as representative of the United States, is ORDERED to have all correspondence between the United States and the ICRC, in the possession of the United States pertaining to the ICRC inspections of, and work at, the detention facilities at the US Naval Station, Guantanamo Bay, Cuba, delivered to the Chief Clerk of the Trial Judiciary, Office of Trial Judiciary, not later than 1200 hours […]. In the course of so doing, the Prosecution will not inspect, copy, or otherwise view the materials under consideration.

(1) The materials in question may be provided in electronic or hard copy.

(2) An index of the ICRC documents will be provided.

[32] Records provided to the Commission pursuant to this Order will be held Under Seal until further directed by this Commission or higher judicial authority.[…]

Discussion

1. **Monitoring of Detention Facilities**
2. (*para. [1]*)
    1. Does IHL regulate the monitoring of detention facilities and the assessment of their conformity with international standards? Is any specific entity charged with carrying out such monitoring? Can access to detention facilities be denied to such actors? (CIHL, Rule 124; GCI-V, Art. 3; GCIII, Art. 126; GCIV, Arts 76 and 143; PI, Art. 81)
    2. Does International Human Rights Law (IHRL) require states to grant independent bodies access to places where persons are deprived of their liberty for the purposes of inspecting the facilities? Even if these facilities are used to detain persons captured in armed conflicts?
    3. Does IHL require states to grant legal counsel access to detention facilities in international armed conflicts? In non-international armed conflicts? (CIHL, Rules 99, 100 and 126; GCI-IV, Art. 3; PII, Arts 4-6; GCIII, Arts 99 and 105; GCIV, Arts 5, 72 and 116; PI, Art. 75)
    4. Does IHL create individual rights? Do persons deprived of their liberty in armed conflicts have a right to have access to a lawyer under IHL of international armed conflicts? Under IHL of non-international armed conflicts? Is the same true under IHRL? (CIHL, Rules 99, 100 and 126; GCI-IV, Art. 3; PII, Arts 4-6; GCIII, Arts 99 and 105; GCIV, Arts 5, 72 and 116; PI, Art. 75)
3. **Judicial Guarantees**
4. (*paras [1] and [6]*)
    1. Under IHL, which judicial guarantees should be observed while prosecuting persons captured in international armed conflicts? In non-international armed conflicts? How does your answer differ if the starting point of analysis is IHRL? (CIHL, Rule 100; GCI-IV, Art. 3; PII, Art. 6; GCIII, Arts 86, 99, 105 and 106; GCIV, Arts 71, 72 and 73; PI, Art. 75)
    2. Does IHL prohibit imposition of the death penalty? Is there a specific procedure to be observed in cases where a death penalty is to be imposed? (GCI-IV, Art. 3; PII, Art. 6; GC III, Arts 10, 101 and 107; GCIV, Arts 68 and 75; PI, Arts 76 and 77)
    3. Shall defendants be given a ‘reasonable opportunity to obtain the evidence' under IHL of international armed conflicts? Under IHL of non-international armed conflicts? (CIHL, Rule 100; GCI-IV, Art. 3; PII, Art. 6; GCIII, Arts 96, 99, 102 and 105; GCIV, Arts 71 and 72)
5. **Confidentiality of the ICRC Documents and Communications with National Authorities**
6. (*paras. [5], [9]-[11] and [18])*
    1. Why, in your opinion, does the ICRC seek to keep its documents confidential and its staff from testifying in courts? Is it not generally more effective to publicly denounce all violations of IHL committed in an armed conflict? Other organizations do resort to such public denunciations: what are the differences between the ICRC and such organizations? In terms of mandate, legal status,

effectiveness? Can it be said that they compete with each other, or are their roles complementary? (CIHL, Rule 124; GCI-V, Art. 3; GCIII, Art. 126; GCIV, Arts 76 and 143; PI, Art. 81)

2. Is confidentiality a principle like neutrality, impartiality or independence? Does it necessarily follow from those principles? Would an organization necessarily violate its neutrality or impartiality by allowing its staff to testify before international or domestic criminal tribunals?
3. What would be the consequence for the ICRC in the fulfillment of its mandate under IHL if governments knew that their courts may oblige them to make the reports they receive from the ICRC public? Would it make a difference if only defence lawyers were allowed to access those reports? (CIHL, Rule 124; GCI-V, Art. 3; GCI, Art. 9; GCII, Art. 9; GCIII, Arts 9 and 126; GCIV, Arts 10, 76 and 143; PI, Art. 81)

7. *(paras. [4], [5], [9]-[10] and [12]-[18])*
    1. What is the basis of the immunity from disclosure of ICRC documents and correspondence? (see also Case study, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel)
    2. What is a customary rule of international law? What value does the case law of international criminal tribunals have in international law?
    3. Can the ICRC contribute towards the formation of customary rules? With respect to IHL? With respect to its immunity from providing evidence in judicial proceedings? Can its practice constitute the objective element of the custom? The *opinio juris*?
8. *(paras [6]-[9])* Does IHL impose an obligation on states to incorporate the privilege of the confidentiality of the ICRC documents in domestic legislation? What would be the basis of such an obligation? (CIHL, Rules 124, 139 and 144; GCI-IV, Art. 1)
9. *(para. [18])* Might Rule 73 of the ICC's Rules of Procedure and Evidence implicitly acknowledge or confirm the customary nature of the ICRC's privilege to the confidentiality of its work? Why/Why not? [See Case study, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel, Document B, paras 4 and 6]
10. Do you think the interests of justice and the right of the defendant to have a 'reasonable opportunity to obtain the evidence' take precedence over this principle of non-disclosure? What could the direct or indirect consequences of the disclosure of the ICRC documents and communications with national authorities be?
11. *(paras [29]-[32])* Do you think that the implementation of the decision of the Military Commission will amount to the disclosure of the ICRC documents and communications? Do you think the way the Military Commission ordered the disclosure of ICRC documents and communication was appropriate?