MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 353AA** **RULING** **Defense Motion** to Strike AE 353V for Inclusion of Statements and Derivative Evidence Obtained by Torture or Cruel, Inhuman, or Degrading Treatment **18 May 2021**

1. **Procedural History**.

a. On 19 March 2021, in AE 353V, the Government filed notice that it completed preliminary review of materials related to Mohsen Al-Fadhli (hereinafter Fadhli) in compliance with the Commission's ruling in AE 353U. In a classified attachment to the pleading, the Government included reference to statements made by the Accused while he was in the custody of the Central Intelligence Agency (CIA) at a time when the Defense contends that he was "being actively and brutally tortured."

b. On 30 March 2021, in AE 353W, the Defense moved the Commission to strike AE 353V from the record "for its inclusion of, and reliance on, statements obtained by torture or cruel, inhuman, or degrading treatment."

c. On 14 April 2021, the Government responded in AE 353Y, requesting that the Commission deny the defense motion. On 20 April 2021, in AE 353Z, the Defense replied and renewed their argument to strike the contents of AE 353V.

2. **Oral argument**. The Defense requested oral argument. The Prosecution did not request oral argument. Rule for Military Commission (R.M.C.) 905(h) provides, "[t]he military judge may, in

the judge's discretion, grant the request of either party for an R.M.C. 803 session to present oral argument or have an evidentiary hearing concerning the disposition of written motions." The Commission finds that oral argument is not necessary to resolve this motion.

3. **Law and Analysis**.

a. The Military Commissions Act of 2009 (M.C.A.) provides, "[n]o statement obtained by the use of torture or by cruel, inhuman, or degrading treatment . . . whether or not under color of law, shall be *admissible in a military commission* under this chapter, except against a person accused of torture or such treatment as evidence that the statement was made." 10 U.S.C. § 948r(a) (emphasis added).

b. In their motion, the Defense argues that 10 U.S.C. § 948r(a) amounts to a "blanket prohibition" that goes beyond the potential admission into evidence of statements obtained through torture and applies instead to any reference to such statements for any purpose in a military commission, even if the Government does not intend to offer the statements into evidence. AE 353W at 2.[1] The Government argues in response that the rule in question is designed to preclude the admission of statements obtained by the use of torture into evidence at trial, but does not preclude a military judge from considering such statements on an interlocutory question, such as in reviewing and ruling on a discovery dispute between the parties. In this instance, the Government has not proposed to introduce the statements in question into evidence at trial. The Government has also indicated that they are not offering the statements for their truth, but only to provide context regarding the availability or existence of discovery pertaining to Fadhli and others.

[1] In their reply at AE 353Z, the Defense suggests that 10 U.S.C. § 948r(a) would not bar the Defense from introducing statements allegedly obtained from their client through torture either in mitigation or for other purposes at trial. The Commission need not reach that question to resolve the instant motion.

c. While the Defense offers several citations to case law in support of the proposition that American jurisprudence does not historically approve of the use of statements obtained from a defendant through torture to convict that defendant at trial, that fundamental and basic concept is not in dispute here. This issue is strictly one of statutory interpretation and what is meant by the phrase "admissible in a military commission" as it is used in 10 U.S.C. § 948r(a). The Commission is persuaded by the statutory analysis offered by the Government in their response and is convinced that a plain reading of 10 U.S.C. § 948r, when considered in context with other provisions of the M.C.A., as well as relevant provisions of the Uniform Code of Military Justice (UCMJ) and the Military Rules of Evidence (M.R.E.), clearly suggests that the phrase "admissible in a military commission" refers to the admissibility of evidence during the trial on the merits or during presentencing proceedings. The Commission is not persuaded by the Defense argument that the statutory language in question applies more broadly to all possible uses of such statements during military commission proceedings, such as consideration by a military judge of the types of statements in issue on interlocutory questions to which the statements may be relevant, to potentially include the admissibility of those same statements.

d. The provisions in 10 U.S.C. § 948r use the terms "admissible in a military commission" in subsection (a) with respect to statements obtained by use of torture and "admitted in evidence" in subsection (c) in reference to the potential exclusion of "other statements of the accused." There is no reason to believe that Congress intended to use those similar and related terms within the same provision of the statute to refer to substantially different procedures for handling statements made by an accused. Additionally, Congress also used nearly identical terminology in the M.C.A. when establishing the guidelines for determining the admissibility of hearsay evidence in a military commission. Specifically, 10 U.S.C. §

949a(b)(3)(D) provides that "hearsay evidence not otherwise *admissible* under the rules of evidence applicable in trial by general courts-martial may be *admitted in a trial by military commission* only if . . ." (emphasis added). The Commission finds no basis to conclude that Congress intended for the term "admissible" to mean one thing with respect to statements of the accused obtained by torture, and something else entirely with respect to hearsay statements. The context of the terms used in the provision establishing the admissibility of hearsay statements suggests that the term "admissible" is intended to refer to admitting evidence at trial, not to the consideration of evidence by a military judge on an interlocutory issue.

e. In addition to the statutory language at issue in the instant motion, the M.C.A. provides that "except as otherwise provided in this chapter or chapter 47 of this title, the procedures and rules of evidence applicable in trials by general courts-martial of the United States shall apply in trials by military commission under this chapter." 10 U.S.C. § 949a(a). Congress was almost certainly aware when drafting the M.C.A. that M.R.E. 304(a) existed and provided that, in a trial by court-martial, "an involuntary statement or any evidence derived therefrom may not be *received in evidence* against an accused who made the statement…" Manual for Courts-Martial, United States (2008) (emphasis added). Furthermore, in the UCMJ, Congress legislated the use of coerced statements in court-martial practice, stating in 10 U.S.C. § 831(d) (Article 31, UCMJ) that "[n]o statement obtained from any person . . . through the use of coercion . . . may be received in evidence against him in a trial by court-martial." Although there is no provision in Article 31, UCMJ, that specifically addresses the admission into evidence of statements "obtained by the use of torture," such statements would necessarily fall under the category of coerced or "involuntary" statements proscribed by Article 31 and M.R.E. 304 and would not be received in evidence against a service member at trial. Based on this historical context and

Congress' stated intent that the practice of military commission should resemble court-martial practice, one can only reasonably conclude that when Congress included in 10 U.S.C. § 948r(a) the phrase "admissible in a military commission" that the intent was that statements obtained through torture would not be received in evidence at trial on the merits or during presentencing proceedings, not that such statements couldn't be considered by a military judge in resolving an interlocutory question.

f. Additional relevant context may be gathered from M.R.E. 103(e), which provides, "In a court-martial composed of a military judge and members, to the extent practicable, the military judge must conduct a trial so that *inadmissible* evidence is not suggested to the members by any means." (Emphasis added).[2] This language suggests that the term "inadmissible" in court-martial practice (and therefore in military commissions practice) refers to evidence which may not be presented to court members at trial.

g. Despite the existence of decades of case law interpreting Article 31, UCMJ, and M.R.E. 304, the Defense has offered no case law to support the proposition that the terms "inadmissible" and "received in evidence," as used in the context of statements obtained through coercion, were meant to establish the type of "blanket prohibition" envisioned by the Defense in the context of 10 U.S.C. § 948r(a), precluding a military judge from considering allegedly coerced statements for any purpose during pretrial proceedings of a military commission, to include resolving interlocutory questions such as the admissibility of those very statements. In the absence of any case law or other authority that more persuasively supports the Defense position, the Commission concludes that the prohibition on statements obtained by torture

[2] A similar provision existed in the 2008 version of the Military Rules of Evidence, at M.R.E. 103(c), which was in effect at the time of the enactment of the M.C.A.

contained in 10 U.S.C. § 948r(a) applies to the admission of those statements into evidence at trial.

h. In AE 353V, by making reference to statements by the accused that were purportedly obtained through torture, the Prosecution has not sought the admission of those statements into evidence. Further, the Prosecution does not offer the statements by the Accused for their truth, but only to provide context on a discovery issue in dispute. While the Commission finds that 10 U.S.C. § 948r(a) does not bar the Commission from considering the statements referenced in AE 353W on relevant interlocutory issues, and the Commission will do so for the limited purpose for which they are offered by the Government in AE 353W, the Commission makes no ruling on the question of whether it will consider similar statements on other interlocutory issues or how much weight it would give such statements in resolving any future disputed factual issue raised in motion practice. Statements obtained through torture are necessarily of highly suspect reliability, and the parties are advised to proceed with caution when/if relying on such statements to support any factual assertion before the Commission.

4. **Ruling**. The Defense motion to strike AE 353V is **DENIED**.

So **ORDERED** this 18th day of May, 2021.

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LANNY J. ACOSTA, JR.
COL, JA, USA
Military Judge