
| | | |
|--------------------|---|--------------------------------|
| UNITED STATES |) | |
| |) | |
| v. |) | Prosecution Motion to Preclude |
| |) | Attorney and Legal Commentator |
| |) | Opinion Testimony Concerning |
| |) | Their Views of the Law |
| SALIM AHMED HAMDAN |) | |
| |) | |
| |) | October 8, 2004 |

1. Timeliness. This Motion is submitted within the time frame established by Presiding Officer Memorandum 4-2. The Prosecution requests that this motion be decided at the Commission’s first opportunity.

2. Relief Sought. That the Military Commission deny the Accused’s request to call attorneys and legal commentators as expert witnesses for the following reasons: 1) the personal viewpoints of legal commentators is not the type of evidence that falls within the parameters of “expert testimony” recognized by military, federal or international courts. 2) the Defense fails to meet a threshold showing that the offered testimony by the “expert witnesses” is relevant. The Prosecution submits that if Defense Counsel believe that the opinions of international law commentators would be beneficial to the process, they can incorporate the comments into the Defense submissions. The Prosecution does not oppose the reasonable appointment of expert consultants to the Defense to assist in such matters.

3. Overview. The Defense has listed 21 attorneys, legal commentators and law professors that it would seek to call as expert witnesses to voice their opinions regarding various legal issues. These include: opinions on U.S. law, including the applicability of the Equal Protection Clause of the U.S. Constitution and the Right to Speedy Trial under Article 10 of the Uniform Code of Military Justice (UCMJ); and aspects of international law, such as the applicability of the Geneva Conventions. In both U.S. and international courts, expert witnesses are generally permitted where they possess scientific, technical or other specialized knowledge that would assist the trier of fact in understanding the evidence or determining a fact in issue, *if* the testimony is based on the application of reliable principles and methods to sufficient relevant facts to allow the witness to form a reliable opinion. As a rule, legal commentators are not permitted to testify as experts, because the inherent subjective nature of their opinions do not meet the standards necessary to be admissible as expert testimony (e.g., see indefinite and qualified statements of proposed experts in para. 4). The Prosecution opposes a departure from this norm; a procession of opposing legal academics would not provide relevant evidence to the Commission and is contrary to the Military Commission Orders, international legal practice, and the law of the United States. The Defense has the ability to adequately present their positions on the law by engaging the assistance of these individuals and incorporating their thoughts into the submitted briefs and arguments.

The Prosecution is only aware of these proposed 21 experts on the law based upon the Defense motions filed on 1 October 2004. The Defense has not yet made any formal witness requests that meet the requirements of Presiding Officer Memorandum No. 10. Regardless, the Prosecution files this motion to ensure timely resolution of this issue based on logistical concerns and to avoid the monetary waste of transporting 21 individuals to Guantanamo who the Prosecution asserts should not be permitted to provide testimony.

4. Facts.

a. The Accused, through counsel, has filed eleven motions in this matter. Seven of these motions cite the need for expert witness testimony on the law and name the witnesses whom the Defense intends to call to testify before the Commission.

b. The Prosecution has contacted several of these proposed witnesses to ascertain their availability to testify and whether they can provide the testimony alleged by the Defense in their inadequate synopsis and proffer. The contacting of these witnesses resulted in the following:

(1) XXXX. is listed among the witnesses in support of the Defense motion to dismiss the charge for violation of Common Article 3 of the Geneva Conventions and motion to dismiss the charge for violation of Art. 103 of the Third Geneva Convention of 1949. XXXX's expert opinion, consistent with the Prosecution's position, is that members and associates of al Qaida, such as the Accused, are *not* protected by the Geneva Conventions.

(2) Professor XXXX. Professor XXXX, cited as a witness regarding the applicability of Article 3 of the Geneva Conventions, believes that ~~“both sides would have an equally strong argument”~~ on whether or not the Geneva Conventions would apply to the Accused.

(3) XXXX, is listed as another Defense witness on international law and the Geneva Conventions. He does not consider himself to be an expert on ~~the Law of War or the Geneva Conventions.~~

(4) XXXX, a purported Defense witness on the Geneva Conventions, has not been contacted by the Defense and has not formed an opinion on the applicable law in this matter.

(5) ~~Professor XXXX.~~ In support of their motion to dismiss under Article 10, UCMJ, the Defense states that they “intend to call Professor XXXX as an expert in the area of constitutional and statutory law, specifically discussing the speedy trial doctrine, in support of this motion.” (Hamden -- Motion to Dismiss Under Article 10 UCMJ, p. 5.)

When asked his opinion as to whether there were any speedy trial violations in Mr. Hamden's case, he responded: "Haven't entertained the thought."

5. The law supports the relief sought.

a. The President's Military Order of November 13, 2001 (PMO) Sec. 4(c) (2) mandates that all commissions be "full and fair." A full and fair trial requires that only witnesses who may present evidence that would assist the Commission in determining the relevant facts and issues should be permitted to testify. A parade of lawyers or legal commentators appearing before the Commission as "expert witnesses" to express their opinion on what the law is, or should be, is not consistent with recognized standards for expert witnesses or the notion of "full and fair" trials.

b. U.S. Law. Both federal and state law generally prohibit the testimony of lawyers regarding the law. In Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 US 1008 (1989), the Court reversed the trial court's decision to allow a lawyer to testify in a civil rights action because the lawyer's testimony consisted only of legal conclusions which supplanted the trial roles of both the court and jury. The Court in Sprecht, citing the law in the Second, Fourth, Fifth and Sixth Circuits, held that "an expert witness may not give an opinion on ultimate issues of law" for at least two reasons. *Id.* at 808. Primarily, an "expert" on the law supplants the judge's role as the source of the law and creates confusion. *Id.* at 807. Secondly, the trial process is such that if one side calls an expert on the law, the other will do so as well. The result is an inefficient process with lengthy testimony of multiple contradictory experts. *Id.* at 809. Similarly, the states have followed the federal courts in barring attorney experts on the law. See, e.g., Summers v. A.L. Gilbert Co., 69 Cal.App.4th 1155; 82 Cal.Rptr. 2d 162 (1999) ("California is not alone in excluding expert opinions on issues of law. ... At least seven circuit courts have held that the Federal Rules of Evidence prohibit such testimony.") *Id.* at 1179.

c. International Law. Consistent with U.S. holdings, the International Criminal Tribunal – Yugoslavia (ICTY) has disallowed expert testimony that interferes with the very role of the court. In Kordic and Cerkez (a matter involving Law of War violations before the ICTY) the Trial Chamber would not permit an expert to offer testimony that included legal conclusions. Persuaded by defense counsel that such testimony elevated the witness to the status of a "fourth judge" the Chamber denied the request, concluding that such testimony would impermissibly provide an opinion "on the very matters upon which this Trial Chamber is going to have to rule" and that doing so "invades the right, power and duty of the Trial Chamber to rule upon the issue." Furthermore, the Chamber concluded, "it's dealing with the matters which we have to deal with ultimately, drawing the conclusions and inferences which we have to draw, we think that it does not assist and is, therefore, not of probative value." Kordic and Cerkez, [IT 95-14/2-T](#), Transcript (January 28, 2000) at 13289-13290, 13306-13307.)

On the other hand, when unique or significant issues of law are before a court, both U.S. and International Courts have recognized the benefit of receiving written material from legal scholars and commentators. As indicated above, the permitted mechanism,

however, is not to vest these scholars or commentators with the mantle of “expert witness.” Instead, it is the obligation of the parties to develop the assistance of these scholars and incorporate their opinions into the parties submissions to the Court.

6. Analysis.

a. Offering attorneys as “expert witnesses” to testify on ultimate issues of law before the Commission runs afoul of the standards for expert witnesses recognized by both U.S. and International courts. Defense, in its pre-trial motions, all but states that the Military Commission lacks the ability to reach legal conclusions – something “beyond the training and expertise of lay persons” – without expert testimony, but offers no explanation as to why briefs, arguments of counsel and legal research are insufficient to state the Accused’s position on the law. The Prosecution strongly disagrees with the Defense position. The Prosecution submits that the Commission, like other courts and tribunals, is squarely suited to receive the submissions of counsel regarding the interpretation of applicable law and render an informed decision. Moreover, a U.S. Appellate Court explicitly warns that such over-reliance on opinions of academics can lead to incorrect conclusions about the actual content of customary law. Yousef, 327 F.3d 56 at 69-70. It stated, “scholars do not *make* law, and that it would be profoundly inconsistent with the law-making process within and between States for courts to permit scholars to do so by relying upon their statements, standing alone, as sources of international law.” Id. Standing for the same proposition, *see also* Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)

b. Evidence of Probative Value. Prior to the admission of any expert testimony, the Defense must make a showing that the proffered witness is qualified and has evidence of probative value to offer. The motions filed to date have made no such showing. Indeed, a survey of the proposed witnesses indicates that the Defense has not and cannot meet their burden of demonstrating probative value. Military Commission Order (MCO) No.1 (6)(D)(2)(a). Testimony which is not probative as to the facts at issue is not admissible. The Defense falls woefully short of meeting the burden of demonstrating why the requested testimony would be relevant. In fact, and ironically, many of the witnesses described have either not been contacted by the Defense, or offer potentially helpful information to the Prosecution. See paragraph 4 above.

7. Oral Argument. The Prosecution asserts that this motion can be resolved without the necessity of oral argument.

8. Legal Authority.

- a. United States v. Ramzi Ahmed Yousef, 327 F.3d 56 (2d Cir 2003)
- b. Sprecht v. Jensen, 853 F.2d 805 (10th Cir. 1988), *cert. denied*, 488 US 1008 (1989)
- c. Summers v. A.L. Gilbert Co., 69 Cal.App.4th 1155; 82 Cal.Rptr. 2d 162 (1999)
- d. Kordic and Cerkez, IT 95-14/2-T, Transcript (January 28, 2000)

- e. Military Commission Order No. 1
- f. Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995)
- g. In re Yamashita, 327 U.S. 1, 18 (1946)

XXXX
Commander, USN
Prosecutor
Office of Military Commissions