

UNITED STATES OF AMERICA

v.

MOHAMMED JAWAD

**D-007  
RULING ON DEFENSE MOTION  
TO DISMISS – LACK OF  
SUBJECT MATTER JURISDICTION**

1. On or about December 17, 2002, in Kabul, Afghanistan, the Accused allegedly threw a hand grenade into a vehicle in which two American service members and their Afghan interpreter were riding. All suffered serious injuries. The Accused was immediately apprehended, taken into U.S. custody, and subsequently transferred to Guantanamo Bay, Cuba on or about February 6, 2003. On October 14, 2004, a Combatant Status Review Tribunal (CSRT) determined the Accused to be an “unlawful combatant.”<sup>1</sup> On October 9, 2007, a Charge and three specifications of attempted murder<sup>2</sup> and a Charge and three specifications of intentional infliction of serious bodily injury in violation of 10 U.S.C. §§ 950t and 950v(b)(15) and (b)(13) of the Military Commissions Act (MCA)<sup>3</sup> were sworn against the Accused. The Convening Authority referred the Charges and specifications to trial by military commission on January 30, 2008.<sup>4</sup>

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<sup>1</sup> Rule 202 of the Manual for Military Commissions provides that military commissions have personal jurisdiction over alien unlawful enemy combatants (AUEC). See also 10 U.S.C. § 948c. To date, no CSRT or other competent tribunal has found the Accused to be an AUEC. This lack of status determination is the subject of a separate defense motion. See D-002 Ruling on Defense Motion to Dismiss for Lack of Personal Jurisdiction.

<sup>2</sup> Each specification alleges, in pertinent part, “in that, Mohammed Jawad, a *person subject to trial by military commission as an alien unlawful enemy combatant*, did...while in the context of, and associated with an armed conflict, attempt to commit murder in violation of the law of war, by throwing a hand grenade into the passenger compartment of a vehicle transporting U.S. or Coalition Forces...” [Emphasis added].

<sup>3</sup> Military Commissions Act of 2006, 120 Stat. 2600-2637 (Oct. 17, 2006), codified at 10 U.S.C. § 948a et seq. The plenary power given to Congress “to define and punish Piracies and Felonies committed on the high seas, and Offences against the Law of Nations” establishes the prima facie validity of the MCA. See U.S. Const. Art. 1, § 8, Cl. 10.

<sup>4</sup> On June 24, 2008, the Military Commission dismissed the Charge and three specifications alleging the intentional infliction of serious bodily injury in violation of the law of war as lesser included offenses of the

2. The defense asserts the Military Commission lacks subject matter jurisdiction over the offenses as the conduct allegedly committed by the Accused does not violate the law of war and moves to dismiss the Charge. The Government opposes the motion.

3. 10 U.S.C. § 950v(b)(15) states that “*Any person subject to this chapter who intentionally kills one or more persons, including lawful combatants, in violation of the law of war shall be punished by death or such other punishment as a military commission under this chapter may direct*” (emphasis added). Thus, there is a dual requirement for the government to prove beyond reasonable doubt (1) that the [attempted] killings in this case were committed by an unlawful enemy combatant AND (2) that the method, manner or circumstances used violated the law of war. Regarding the former, not only must the government prove by a preponderance of the evidence the Accused’s unlawful enemy combatant status to establish personal jurisdiction,<sup>5</sup> unlawful enemy combatant status is also a substantive component of the offenses and must be proven to the higher standard of beyond reasonable doubt.<sup>6</sup> As to the latter, the statute also requires proof as a separate element of the offense that the murder was committed in violation of the law of war. Congress must have intended each provision to have independent meaning. To accept otherwise

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three specifications alleging attempted murder in violation of the law of war. On September 23, 2008, the Convening Authority ratified her decision to refer the Charge and specifications to trial by military commission. See D-004 Ruling on Defense Motion to Dismiss for Unlawful Influence.

<sup>5</sup> See 10 U.S.C. § 948c.

<sup>6</sup> By including the language “a person subject to trial by military commission as an alien unlawful enemy combatant” in the charging instrument (*supra* note 2), the government itself invokes the issue of subject matter jurisdiction and makes the accused’s status as an AUEC an element of the offense.

would render that part of the statute requiring the murder be in violation of the law of war meaningless. If Congress intended to make any murder committed by an unlawful enemy combatant a law of war violation, they could have said so. They did not and for this Military Commission to do so now would contradict the canons of statutory construction which dictate that a court must construe the language of a statute so as to avoid rendering any words superfluous.<sup>7</sup>

4. Proof the Accused is an unlawful enemy combatant, by itself, is insufficient to establish that the attempted murders in this case were in violation of the law of war.<sup>8</sup> The government has not cited any persuasive authority for the proposition that acting as an unlawful enemy combatant, by itself, is a violation of the laws of war in the context of non-international armed conflict. In other words, that the Accused might fail to qualify as a lawful combatant does not automatically lead to the conclusion that his conduct violated the law of war and the propriety of the charges in this case must be based on the nature of the act, not simply on the status of the Accused.<sup>9</sup> At trial, the government cannot rely solely on the Accused's status as an alien unlawful enemy combatant to establish beyond reasonable doubt that the attempted murders, under all the circumstances, violated the law of war. That said, whether there is sufficient evidence to support a finding at trial that the government has proven this element beyond reasonable

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<sup>7</sup> See, e.g., *United States v. Gomez-Gomez*, 493 F.3d 562, 570 (5<sup>th</sup> Cir. 2007).

<sup>8</sup> The Accused may be subject to prosecution in United States Federal District Court for violations of 18 U.S.C. § 2332(b) (attempted homicide of a U.S. National outside the United States) or 18 U.S.C. § 1114 (attempting to kill an officer or employee of the United States). See, e.g., *United States v. Benitez*, 741 F.2d 1312, 1316-7 (11<sup>th</sup> Cir. 1094); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 202-03 (S.D.N.Y. 2000). Neither statute requires a showing the accused is an alien unlawful enemy combatant or that the conduct alleged was in violation of the law of war.

<sup>9</sup> *Ex Parte Quirin*, 317 U.S. 1, 31 (1942).

doubt cannot be resolved in this case by a pretrial motion to dismiss but instead is a fact for the members to decide as part of general findings or the military judge in ruling on RMC 917 motion.<sup>10</sup>

5. Accordingly, the defense motion to dismiss for lack of subject matter jurisdiction is DENIED.

So ordered this 24<sup>th</sup> day of September 2008:

/s/  
Stephen R. Henley  
Colonel, U.S. Army  
Military Judge

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<sup>10</sup> RMC 917 provides, in pertinent part, that “the military judge, on motion by the accused or *sua sponte*, shall enter a finding of not guilty on one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected.”