

**MILITARY COMMISSIONS TRIAL JUDICIARY  
GUANTANAMO BAY, CUBA**

**UNITED STATES OF AMERICA**

**v.**

**KHALID SHAIKH MOHAMMAD,  
WALID MUHAMMAD SALIH  
MUBARAK BIN ATTASH, RAMZI  
BINALSHIBH, ALI ABDUL AZIZ ALI,  
MUSTAFA AHMED ADAM AL  
HAWSAWI**

**AE 251A**

**Government Response**  
To Defense Motion To Dismiss Charges III  
and V as Barred by the Statute of  
Limitations

6 December 2013

**1. Timeliness**

This Response is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.c(1).

**2. Relief Sought**

The prosecution respectfully requests the Commission deny the defense motion.

**3. Overview**

None of the offenses charged, including Charges III and V, is subject to the statute of limitations provisions under either title 18 of the U.S. Code or Article 43 of the Uniform Code of Military Justice (“U.C.M.J.”) because the offenses are violations of the Military Commissions Act of 2009 (“M.C.A.”), a wholly separate criminal justice system from both the federal and court-martial judicial systems. The charges fall neither under title 18 nor the U.C.M.J. because they are alleged war crimes<sup>1</sup>, and, as such, are not subject to any limitations, a well-established norm in customary international law reflected in 10 U.S.C. § 950t. The M.C.A., therefore, is not

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<sup>1</sup> As set forth in detail in AE 107A (the prosecution response to the defense motion to dismiss for lack of jurisdiction), Charge III (Attacking Civilian Objects) and Charge V (Destruction of Property in Violation of the Law of War) are recognized violations of the international law of war. *See* AE 107A at 8-11, 14-16.

an attempt to resurrect extinguished prosecutions and, thus, does not violate the Ex Post Facto Clause of the Constitution of the United States.

#### **4. Burden of Proof**

As the moving party, the defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2).

#### **5. Facts**

On 11 September 2001, a group of al Qaeda operatives hijacked four civilian airliners in the United States. After the hijackers killed or incapacitated the airline pilots, a pilot-hijacker deliberately slammed American Airlines Flight 11 into the North Tower of the World Trade Center in New York, New York. A second pilot-hijacker intentionally flew United Airlines Flight 175 into the South Tower of the World Trade Center. Both towers collapsed soon thereafter. Hijackers also deliberately slammed a third airliner, American Airlines Flight 77, into the Pentagon in Northern Virginia. A fourth hijacked airliner, United Airlines Flight 93, crashed into a field in Pennsylvania after passengers and crew fought to reclaim control of the aircraft. As a result of these attacks, 2,976 people were murdered, and numerous other civilians and military personnel were injured.

On 25 January 2012, charges in connection with the 11 September 2001 attacks were sworn against Khalid Shaikh Mohammad, Walid Muhmmad Salih Mubarak Bin Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi. These charges were referred jointly to this capital Military Commission on 4 April 2012. Arraignment was held on 5 May 2012. The five co-accused are each charged with Conspiracy, Attacking Civilians, Attacking Civilian Objects, Murder in Violation of the Law of War, Destruction of Property in Violation of the Law of War, Hijacking an Aircraft, Terrorism, and Intentionally Causing Serious Bodily Injury. These charges are all enumerated offenses in the M.C.A.

## 6. Law and Argument

### I. **Charges III and V Are Alleged War Crimes Triable by Military Commission, Which Are Not Subject to the Statute of Limitations Provisions Under Title 18 or the Uniform Code of Military Justice**

The defense mistakenly asserts that 18 U.S.C. § 3282 and Article 43, U.C.M.J., are binding upon this Commission. AE 251 at 2-3. None of the offenses charged, however, is subject to the statutes of limitations under either Title 18 of the U.S. Code or the U.C.M.J. Rather Charges III and V are violations of the international law of war triable by military commission, a separate and distinct system, as enacted by Congress at 10 U.S.C. §§ 948a *et seq.*, from the federal and court-martial judicial systems. *Cf. United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000) (holding that generally applicable federal statutes, including statutes of limitations, are not automatically binding upon courts-martial because “the military and civilian justice systems are separate as a matter of law”). Just as courts-martial are “separate as a matter of law” from civilian criminal prosecutions in federal court, military commissions enjoy a similarly distinct status from both federal and court-martial prosecutions.

In *McElhaney*, the court considered the similarities between civilian and military criminal proceedings, but decided the two systems were “separate as a matter of law” because of the “distinct and comprehensive criminal code” evident in the U.C.M.J. and Congress’ intent to create two separate systems. *Id.* The rules of procedure and evidence for military commissions, while similar to the federal and courts-martial rules, are also a “distinct and comprehensive criminal code.” *See, e.g.*, 10 U.S.C. §§ 949a-o (delineating the trial procedure for military commissions); 10 U.S.C. §§ 950a-g (providing for the post-trial procedure for military commissions); 10 U.S.C. § 950t (listing offenses triable by military commissions). The changes and amendments to the latter two systems “do not directly affect proceedings” before military commissions. *McElhaney*, 54 M.J. at 124. Additionally, when Congress enacted the M.C.A. it explicitly intended to separate military commissions from federal and court-martial proceedings. *See, e.g.*, 10 U.S.C. § 948b(a) (“This chapter establishes procedures governing the use of military commission to try alien unprivileged enemy belligerents for violations of the law of war and

other offenses triable by military commission.”); 10 U.S.C. § 948b(c) (“Chapter 47 [U.C.M.J.] of this title does not, by its terms, apply to trial by military commission except as specifically provided therein . . . . The judicial construction and application of chapter 47 of this title, while instructive, is therefore not of its own force binding on military commissions established under this chapter.”).

Congress also did not intend for the federal or court-martial statutes of limitations to apply to military commissions. An examination of the text of 18 U.S.C. § 3282 reveals that it governs only federal prosecutions, as the statute refers to terms and concepts not contained in the M.C.A. 18 U.S.C. § 3282(b)(1) (“In any *indictment* for an offense under *chapter 109A* . . .”) (emphasis added); 18 U.S.C. § 3282(b)(2) (“the provisions of *chapter 208* . . .”) (emphasis added). In military commissions, like in courts-martial, the charging documents are known as “charge sheets,” not “indictments.” Further, chapters 109A and 208 of title 18 do not exist in the M.C.A., but instead are references specific to federal criminal prosecutions concerning sexual abuse offenses and speedy trial rules. Similarly, Article 43, U.C.M.J., is clear on its face that it applies only to courts-martial. First, the article lists offenses that are not triable by military commission. *See, e.g.*, 10 U.S.C. § 843(a) (“A person charged with absence without leave or missing movement in time of war . . . rape of a child . . .”); 10 U.S.C. § 843(b)(2) (discussing child abuse as a violation of Article 120, maiming as a violation of Article 124, sodomy as a violation of Article 125, and assault as a violation of Article 128); 10 U.S.C. § 843(b)(3) (describing the rules governing non-judicial punishment or article 15 violations). Second, subsection (b) specifically provides only for courts-martial jurisdiction. 10 U.S.C. § 843(b)(1) (“[A] person charged with an offense is not liable to be tried by *court-martial* if the offense was committed more than five years before the receipt of sworn charges . . .”) (emphasis added). As well, Article 43 contains no language extending its reach to military commissions.

As the war crimes alleged in Charges III and V do not fall under either Title 18 or the U.C.M.J., they are not subject to those statutes of limitations.

## II. The M.C.A. Reflects the Customary International Law Norm That War Crimes Are Not Subject to Statutes of Limitations

Because the charges fall neither under title 18 nor the U.C.M.J., they are *sui generis*. The absence of a limitation in the M.C.A. noted at 10 U.S.C. § 950t—that any offense can be tried “at any time without limitation”—is consistent with the status of the offenses as alleged war crimes. See AE 107A at 12-13 (Charge III), 14-16 (Charge V).

Under customary international law, it has long been recognized that there is no statute of limitations on war crimes. See, e.g., Control Council Law No. 10 art. II(5) (Dec. 20, 1945), in 3 OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY 50, 51 (Jan. 31, 1946) (“In any trial or prosecution for a crime herein referred to, the accused shall not be entitled to the benefits of any statute of limitation in respect of the period from 30 January 1933 to 1 July 1945 . . . .”); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity pmbl., Nov. 26, 1968, 754 U.N.T.S. 73 (“[I]t is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity . . . .”); Rome Statute of the International Criminal Court art. 29, July 17, 1998, 2187 U.N.T.S. 90 (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”); United Nations Transitional Administration in East Timor Regulation No. 2000/15 art. 17(1) (June 6, 2000) (These offenses—genocide, war crimes, crimes against humanity, and torture—“shall not be subject to any statute of limitations.”); Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia arts. 4-8, Doc. NS/RKM/1004/006 (Oct. 27, 2004) (Genocide, crimes against humanity, and grave breaches of the Geneva Conventions shall “have no statute of limitations.”); 1 J.-M. HENCKAERTS & L. DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW Rule 160, at 614 (2005) (“State practice established this rule [statutes of limitation may not apply to war crimes] as a norm of customary international law applicable in relation to war crimes committed in both international and non-international armed conflicts.”).<sup>2</sup>

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<sup>2</sup> The lengthy period of time that has elapsed between alleged misconduct and indictment in international war crimes prosecutions indicates an acknowledgement of the non-applicability of

United States practice has consistently mirrored customary international law on this issue. *E.g.*, *In re Yamashita*, 327 U.S. 1, 11-12 (1946) (“The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed.”); *id.* at 12 (“We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances, the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial. . . . No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended.”); United States, Statement Before the Third Committee of the U.N. General

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such limitations on war crimes prosecutions. At the International Criminal Tribunal for the former Yugoslavia (“ICTY”), indictments have ranged from 8 years, from the date of the alleged conduct to initial charges, to 16 years, from the date of the alleged conduct to the final amended indictment. *Prosecutor v. Ademi*, Case No. IT-01-46-I, Indictment (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2001); *Prosecutor v. Mladić*, Case No. IT-09-92-PT, Fourth Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Dec. 16, 2011). Similarly, the International Criminal Tribunal for Rwanda approved indictments ranging from 11 to 13 years from the date of the alleged conduct to the date of final charges. *Prosecutor v. Ntawukurirayo*, Case No. ICTR-2005-82-I, Indictment (May 26, 2005); *Prosecutor v. Nshogoza*, Case No. ICTR-2007-91-I, Indictment (Dec. 24, 2007). Indictments before the Special Court for Sierra Leone range from 6 years for the initial indictment to 8 years for the final indictment. *Prosecutor v. Fofana*, Case No. SCSL-03-14-I, Indictment (Feb. 4, 2004); *Prosecutor v. Taylor*, Case No. SCSL-03-01-PT, Second Amended Indictment (May 29, 2007). The Extraordinary Chambers in the Courts of Cambodia approved indictments with the longest delay—nearly 30 years. *Prosecutor v. Guek Eav*, Case No. 001/18-07-2007-ECCC-OCIJ, Closing Order (Approved Indictment) (Aug. 8, 2008); *Prosecutor v. Ieng Thirith*, Case No. 002/19-09-2007-ECCC-OCIJ, Closing Order (Approved Indictment) (Sept. 15, 2010).

Assembly, U.N. Doc. A/C.3/SR.1517 (Nov. 16, 1967) (“Her delegation supported the basic human rights objectives sought through the adoption of a convention on the non-applicability of statutory limitation to the kinds of crimes of which Nazi criminals were prosecuted and convicted at Nürnberg, namely war crimes and crimes against humanity . . . .”); 1977 DIGEST OF UNITED STATES PRACTICE IN INTERNATIONAL LAW 927 (“It is the view of the United States Government that neither the [1945 London Agreement] . . . nor [Control Council Law No. 10] . . . contain any provisions setting a time limit for prosecution or punishment.”); United States Diplomatic Note to Iraq, U.N. Doc. S/22122, Annex 1 (Jan. 21, 1991) (“The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions . . . or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations.”). The M.C.A. provision, 10 U.S.C. § 950t, is simply a reflection of this well-established principle in customary international law that war crimes are triable “at any time without limitation.” 10 U.S.C. § 950t.

**III. Because No Pre-Existing Statute of Limitations Exists for War Crimes Triable by Military Commissions, the M.C.A. Does Not Violate the Ex Post Facto Clause**

The Ex Post Facto Clause prohibits statutes from resurrecting previously time-barred prosecutions. *Stogner v. California*, 539 U.S. 607, 611-13 (2003) (relying on *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389-91 (1798)). As discussed above, there is no pre-existing statute of limitations governing either military commissions or alleged war crimes. The Accused, accordingly, have never been safe from punishment, contrary to the defense’s assertion. AE 251 at 3. The M.C.A., therefore, is not an attempt to resurrect extinguished prosecutions and thus does not violate the Ex Post Facto Clause.

**7. Conclusion**

Contrary to the defense’s assertion, neither 18 U.S.C. § 3282 nor Article 43, U.C.M.J., is applicable to these proceedings because military commissions are a separate and distinct criminal



# ATTACHMENT A

