

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

AE251B(AAA)

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

13 December 2013

1. **Timeliness**: This reply is timely filed.
2. **Argument**:

In its initial motion, Mr. al Baluchi pointed out that Charges III and V are time-barred by the the five-year statute of limitations found in 18 U.S.C. § 3282 and Article 43 of the Uniform Code of Military Justice (“UCMJ”).<sup>1</sup> He further showed that, assuming that Congress intended to extend the five-year limitations period in the Military Commissions Act of 2006 (“2006 MCA”), that attempt was to no effect because it violated the *Ex Post Facto* clause.<sup>2</sup>

The government’s response makes two points. First, it argues that neither the federal nor the UCMJ five-year limitations periods apply to the military commissions, because the commission system is “separate as a matter of law”<sup>3</sup> from civilian and regular military justice, and because the law-of-war charges brought in the commissions are “*sui generis*.”<sup>4</sup> Second, it argues that at customary international law, violations of the law of war are not subject to a statute of limitations. The first argument is incorrect and the second is beside the point.

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<sup>1</sup> 10 U.S.C. § 843 (2001).

<sup>2</sup> AE251 at 1-3. In addition, Mr. al Baluchi has moved to dismiss Charge V because the conduct it does not state a war crime that was subject to prosecution by military tribunal at the time of the alleged conduct. AE107(MAH,AAA) Defense Motion to Dismiss for Lack of Jurisdiction; AE107B(KSM et al.) Reply at 6-7.

<sup>3</sup> AE251A Government Response to Motion to Dismiss Charges III and V as Barred by the Statute of Limitations at 3.

<sup>4</sup> *Id.* at 5.

**A. The crimes charged in Charges III and V were and are subject to a five year limitations period.**

At the outset, the government's contention that military commissions are "separate as a matter of law" from the military and civilian justice systems is belied by the plain language of the Act itself and other federal statutes.

As the Chief Prosecutor has explained, "[r]eformed military commissions are not the special, separate, and exclusive terror court that some have sought and others have feared, and that is because these military commissions are fully integrated within our federal framework of criminal justice."<sup>5</sup> Apart from their many statutory<sup>6</sup> and practical similarities,<sup>7</sup> the MCA expressly incorporates principles and provisions from Article III prosecutions. Commission accused are entitled to an "opportunity to obtain witnesses and evidence comparable to the opportunity available to a criminal defendant in a court of the United States under article III of the Constitution,"<sup>8</sup> for example, and the Act repeatedly requires commission practice with respect to classified information to comport with the Classified Information Procedures Act.<sup>9</sup>

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<sup>5</sup> BG Mark Martins, Remarks at Harvard Law School (3 April 2012) (reprinted at [www.lawfareblog.com/2012/04/mark-martins-address-at-harvard-law-school/](http://www.lawfareblog.com/2012/04/mark-martins-address-at-harvard-law-school/)) ("Remarks at Harvard").

<sup>6</sup> The official Military Commissions includes a comparative chart attempting to demonstrate that the military commissions share almost all of the rules and procedural protections afforded in the civilian and UCMJ systems. See <http://www.mc.mil/ABOUTUS/LegalSystemComparison.aspx>.

<sup>7</sup> Just because it is a hybrid of civilian and military practice, the prosecution team includes Department of Justice as well as military attorneys. See Remarks at Harvard ("But despite . . . personal experiences with the federal process, day-to-day we military lawyers are all too pleased to be able to consult the eight federal prosecutors assigned to our office on comparative legal questions.").

<sup>8</sup> 10 U.S.C. § 949j(a)(1).

<sup>9</sup> 10 U.S.C. §§ 949p-2(b), 949p-4(a)(2), 949p-4(b)(2), 949p-7(c)(2), 949p-7(d)(2); see Classified Information Procedures Act, 18 U.S.C. App. 3.

Military commission judgments are also reviewed by an Article III court (the D.C. Circuit)<sup>10</sup> which, Congress was certainly aware, is far more conversant with federal law than military law.

The “integration” of the MCA with the UCMJ system is even clearer. Under the MCA, “[e]xcept 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.”<sup>11</sup> It would therefore be contrary to Congress’s plain intention to interpret the Military Commissions Act as if it was not “fully integrated within our federal framework of criminal justice.”<sup>12</sup>

From this mistaken premise the government apparently concludes that the crimes charged in Charges III and V are neither federal crimes nor military crimes—that they are “*sui generis*”<sup>13</sup>—and therefore were not subject to either the federal or military statutes of limitations at the time the crimes were allegedly committed. It is clear, however, these crimes were not (and still are not) *sui generis*, at least if *sui generis* means that they could not be tried in any system but the military commissions.<sup>14</sup> Both the federal criminal justice system and the UCMJ had statutes criminalizing violations of the law of war at the time of the alleged crimes, and Charges III and

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<sup>10</sup> 10 U.S.C. § 950g.

<sup>11</sup> 10 U.S.C. § 949a(a).

<sup>12</sup> Remarks at Harvard, *supra*. The government’s citation to *United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000), is inapposite. AE251A at 3. Contrary to the government’s suggestion, *McElhaney* recognizes that courts-martial apply general federal statutes of limitation in appropriate circumstances. 54 M.J. at 124 (citing *United States v. Dowty*, 48 M.J. 102, 106 (1998)). In any event, the question here is not whether the MCA incorporates a federal statute of limitations – it evidently does not, *see* 10 U.S.C. § 950t – but whether it violates the *Ex Post Facto* clause by permitting prosecution of the defendants beyond five years from the date of their alleged crimes.

<sup>13</sup> AE251A at 5.

<sup>14</sup> A fact that, again, the Chief Prosecutor has recognized. Remarks at Harvard (“the unlawful activities of our adversaries can in many cases be fairly characterized both as terrorism offenses under our federal criminal code and as violations of the law of war”).

V (assuming they could be prosecuted at all<sup>15</sup>) could have been be prosecuted in either of them. In the federal system, a non-capital prosecution under the War Crimes Act<sup>16</sup> would have been subject to 18 U.S.C. § 3282. In the military system, a non-capital prosecution by court-martial under the UCMJ's war crime jurisdiction<sup>17</sup> would have been subject to Article 43's five-year period.

Accordingly, at the time of their alleged commission, both crimes were subject to a five year limitations period in venues that had jurisdiction to prosecute them. Because that period had run before its enactment, Congress's attempt in the MCA to make these crimes triable "at any time"<sup>18</sup> violates the *Ex Post Facto* clause,<sup>19</sup> and the charges should be dismissed.

**B. It is domestic law, not customary international law, that governed the statute of limitations applicable to Charges III and V at the time of the alleged offenses.**

The government argues that because Charges III and V charge the defendants with violations of the laws of war, on the date of their crime they were subject to the customary international law ("CIL") principle that recognizes no limitations period for war crimes.<sup>20</sup> As it has done before, the government paints with a broad brush that elides the differences between international armed conflicts and non-international armed conflicts, as well as between various war crimes offenses. These important distinctions are not important here, however, because domestic law governed the limitations period on that date. For the reasons provided in the first section, they were triable then under domestic federal and military law, and those bodies of law both dictated a five-year period for these non-capital crimes.

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<sup>15</sup> See AE107(MAH,AAA) Defense Motion to Dismiss for Lack of Jurisdiction; AE107B(KSM et al.) Reply at 6-7.

<sup>16</sup> 18 U.S.C. § 2441 (2001)

<sup>17</sup> Article 18. 10 U.S.C. § 818 (2001).

<sup>18</sup> 10 U.S.C. § 950t.

<sup>19</sup> *Stogner v. California*, 539 U.S. 607, 611-13 (2003); AE251 at 3-4.

<sup>20</sup> *Id.* at 5-7.

Indeed, it is surprising to see the government leaning so heavily on CIL after arguing so strenuously in other contexts that it is irrelevant where domestic law controls.<sup>21</sup> All of the governments' citations to case authority<sup>22</sup> and statutes<sup>23</sup> are from international courts applying international law. All of its references to United States arguments against statutes of limitations on war crimes come from State Department submissions to international bodies concerning international law, not the domestic law of the United States.<sup>24</sup> Regardless of the applicability of CIL to other aspects of these proceedings where domestic law is silent, it does not override Congress's clear intention to apply the same limitation period to war crimes across justice systems.

In this instance, moreover, the CIL principle is not only inconsistent with domestic law but has been expressly considered and rejected by both the Executive and Congress. Thus, the government cites the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity<sup>25</sup> for the proposition that there is no limitations period for war crimes at customary international law. Yet the United States never signed this treaty and Congress never ratified it.<sup>26</sup> Moreover, when Congress enacted the War Crimes Act of 1996, it was clearly aware of the CIL principle against limitations for war crimes. Similarly, Congress was aware that Article 43's five year limitation for non-capital war crimes tried under Article 18

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<sup>21</sup> See, e.g., AE200F Government Response To Defense Motion to Dismiss Because Amended Protective Order #1 Violates the Convention Against Torture at 11.

<sup>22</sup> See AE251A at 5-6 n.2 (case citations)

<sup>23</sup> *Id.* at 5.

<sup>24</sup> *Id.* at 6-7.

<sup>25</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73, entered into force 11 November 1970; AE251 at 5.

<sup>26</sup> Nor has Congress ratified the Rome Treaty of the International Criminal Court, which eliminates limitations periods for war crimes and crimes against humanity. See Statute of the International Criminal Court, July 17, 1998, art. 29, U.N. Doc. A/Conf. 183/9 (1998) (entered into force July 1, 2002).

was inconsistent with this principle. Yet it adopted the five year period regardless. The United States has thus been a persistent objector to the principle since it was first formalized, and is therefore exempt from its reach.<sup>27</sup> In short, both the Executive and Congress have rejected the government's argument, and this Commission should reject it as well.<sup>28</sup>

Accordingly, Charges III and V must be dismissed with prejudice.

**3. Attachments:**

**A. Certificate of Service**

Very respectfully,

//s//  
JAMES G. CONNELL, III  
Learned Counsel

Counsel for Mr. al Baluchi

//s//  
STERLING R. THOMAS  
Lt Col, USAF  
Defense Counsel

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<sup>27</sup> *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 715 (9<sup>th</sup> Cir. 1992) (“A state that persistently objects to a norm of customary international law that other states accept is not bound by that norm.”).

<sup>28</sup> In any event, CIL itself recognizes that not every violation of international humanitarian law (“IHL”) constitutes a war crime subject to the no-limitations rule – only “serious” violations are subject to individual criminal punishment at all. *See e.g.* Jean-Marie Henckaerts and Louise Doswald-Beck, *CUSTOMARY INTERNATIONAL LAW, VOL. I (RULES) (“ICRC Rules”)* 568 (2009), Rule 156 (“Serious violations of international humanitarian law constitute war crimes.”). The Geneva Conventions, moreover, define “grave breaches” as attacks against “protected persons and property,” even though attacks against civilian property is generally prohibited under IHL. *Compare* Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (“GC I”), art. 50; GC II, art. 51; GC III, art. 130; and GC IV, art. 147) *with* ICRC Rules 32, Rule 151 (Definition of Civilian Object), Summary (“[O]nly those objects that qualify as military objectives may be attacked; other objects are protected against attack.”).

# **Attachment A**

**CERTIFICATE OF SERVICE**

I certify that on the 13th day of December, 2013, I electronically filed the foregoing document with the Clerk of the Court and served the foregoing on all counsel of record by email.

*//s//*  
JAMES G. CONNELL, III  
*Learned Counsel*