MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 168C** **Government Response** To Defense Motion to Dismiss Charges IX-XI [sic][1] For Lack of Jurisdiction Under International Law 9 September 2013

1. Timeliness

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

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion to dismiss all charges related to the MV *Limburg*, specifically Charges VII-IX[1] for lack of jurisdiction under international law.

3. Overview

It is well-established under international law that belligerent States may try captured unprivileged enemy belligerents for violations of the law of war committed in the context of hostilities against them. Thus, this Commission has jurisdiction over the offenses related to the attack on MV *Limburg* under both the M.C.A. and international law. The defense motion to dismiss for lack of jurisdiction should therefore be denied.

[1] Although the charges related to the attack on the MV *Limburg* were numbered IX-XI on the original charge sheet, subsequent pen-and-ink changes to the referred charges dated 28 September 2011 have resulted in the renumbering of these charges to VII-IX. Referred Charges at 12 (Sept. 28, 2011).

4. Burden of Proof

As the moving party, the defense typically is required to demonstrate by a preponderance of the evidence that the requested relief is warranted. R.M.C. 905(c)(1)-(2). However, to the extent the defense motion poses a jurisdictional challenge, the government bears the burden of demonstrating jurisdiction by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri ("the accused") is charged with multiple offenses under the M.C.A. relating to terrorist attacks against the United States and its coalition partners. These include the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000, and the attacks on USS COLE (DDG 67) on 12 October 2000 and on the French supertanker MV *Limburg* on 6 October 2002, which together resulted in the deaths of 18 people, serious injury to dozens of others, and significant property damage, including the spillage of approximately 90,000 barrels of oil into the Gulf of Aden.

On 6 October 2002, the French flagged double-hulled supertanker MV *Limburg* approached Al Mukalla, Yemen. At that time, MV *Limburg* was carrying roughly 397,000 barrels of crude oil. MV *Limburg* was traveling to Yemen to obtain and transport additional barrels of oil to a company in Malaysia. As MV *Limburg* prepared for mooring operations, a small boat approached the supertanker. Once the small boat was alongside MV *Limburg's* starboard, two suicide bombers in the small boat detonated explosives. The resulting explosion ripped through the starboard ballast tank and cargo tank, creating a hole ten-meters wide and eleven-meters high in the supertanker's hull. The blast caused crude oil to spill into the water, ultimately resulting in a massive fire.

The smoke generated by the fire engulfed the supertanker, causing the crew to evacuate the MV *Limburg* by escaping into the water. One crewmember died while trying to evacuate from the supertanker. A subsequent investigation into the attack on MV *Limburg* revealed pieces of fiberglass on wood, aluminum components consistent with a boat motor, and pieces of flesh consistent with human remains—all found onboard MV *Limburg*. In addition to killing one crewmember, the attack caused tens of thousands of barrels of crude oil to spill into the Gulf of Yemen.

6. Law and Argument[2]

The exercise of jurisdiction by the United States for the accused's alleged offense against the MV *Limburg* is lawful under any relevant standard. As someone who chose to join al Qaeda and engage in hostilities against the United States, the accused should "reasonably anticipate being haled into court in this country." *United States v. Ali*, 718 F.3d 929, 943 (D.C. Cir. 2013) (quoting *United States v. Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998)).

The accused does not dispute that the text of the M.C.A. authorizes Charges VII-IX. Instead, in this motion, the accused argues that the application of Charges VII-IX in this case violate international law by exceeding the limits that international law imposes on the United States' exercise of its criminal jurisdiction abroad.

[2] The defense continues to assert—as it now does in nearly all of its pleadings—that denying the motion will violate various rights of the accused. *See* AE 168 at 2. The defense, however, persists in omitting any explanation of how those rights are implicated in the present case. Absent any explanation as to how those rights are implicated in this request and under these facts, the Commission should reject this boilerplate language. *See Harding v. Illinois,* 196 U.S. 78, 87 (1904) (dismissing writ of error because no federal question properly was raised in the state court where the Illinois Supreme Court concluded that "no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional" and thus the "point, if it could otherwise be considered, was deemed to be waived"); *United States v. Heijnen,* 215 F. App'x 725, 726 (10th Cir. 2007) ("We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings . . . . [A]ppellant's issues are not supported by any developed legal argument or authority, and we need not consider them.").

At the outset, the accused's motion raises serious legal questions concerning the proper application of customary international law in U.S. courts. The Supreme Court has long observed that resort to customary international law is warranted "where there is no treaty, and no controlling executive or legislative act or judicial decision." *The Paquete Habana*, 175 U.S. 677, 700 (1900). Here, a controlling legislative act—the M.C.A.—would seem to preempt the need for a *de novo* assessment of customary international law by the Commission. To be sure, under the *Charming Betsy* canon, customary international law can play an important role in the construction of domestic law, including the M.C.A. But, "[t]he Charming Betsy canon comes into play only where Congress's intent is ambiguous." *United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003); *Serra v. Lappin*, 600 F.3d 1191, 1199 (9th Cir. 2010) (same); *see also F. Hoffmann-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 164 (2004) ("Court ordinarily construes *ambiguous* statutes to avoid unreasonable interference with the sovereign authority of other nations") (emphasis added). The text of the M.C.A. is clear in granting jurisdiction for Charges VII-IX in the present case. Such clarity may very well "instance [a] situation[] where the legislative and executive branches of government agree on what that international law is," *Nguyen Thang Loi v. Dow Chem. Co.* (*In re Agent Orange Prod. Liab. Litig.*), 373 F.Supp.2d 7, 110 (E.D.N.Y. 2005), as opposed to an encouragement for the Commission "to conform the law of the land to norms of customary international law." *United States v. Yunis*, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

Moreover, unlike *Hamdan II*, in which one party raised a serious question concerning whether prosecution for the offenses might violate the Ex Post Facto Clause and thus triggered the application of the canon of construction that seeks to avoid constitutional issues, here the accused raised a potential of conflict with customary international law. *See Hamdan v. United*

States, 696 F.3d 1238, 1247 n.6 (D.C. Cir. 2012) (Kavanaugh, J., concurring) ("international-law considerations are not *constitutional* constraints incorporated into the Article I war powers clauses and thereby enforceable in U.S. courts.").

Although the defense raises questions regarding the application of customary international law, these questions need not be addressed because the defense's claim that "international law provides no basis for the assertion of military [commission] jurisdiction over the accused for the alleged attack on the MV *Limburg* . . . ." is incorrect. AE 168 at 3. Indeed, international law fully supports prosecuting the accused on these charges and, accordingly, the defense motion to dismiss these charges should be denied.

Customary international law recognizes five principle bases for jurisdiction: (1) territoriality (either occurring within a State's territory or having a substantial effect within the territory), (2) nationality (of the alleged offender), (3) protective principle (threat to State security or government function), (4) passive personality (nationality of victim), and (5) universality (any State has jurisdiction). Curtis A. Bradley & Jack L. Goldsmith, Foreign Relations Law 534 (2003); *United States v. Yunis*, 681 F. Supp. 896, 899-903 (D.D.C. 1988); Restatement §§ 402, 404 & *cmt. a.*

This Commission has jurisdiction over the offenses related to the attack on MV *Limburg* under international law. First, prosecution of the accused for crimes related to the MV *Limburg* is fully justified by the protective principle. Second, the protective principle has long been applied in armed conflict to justify a belligerent State's prosecution of unprivileged enemy belligerents in custody for alleged war crimes or other serious offenses. Third, World War II practice makes clear that a belligerent may prosecute enemy belligerents for violations of the law of war, even when the victim was not a national of that belligerent.

I. The Protective Principle Fully Supports the Prosecution of the Accused for the Alleged Attack on the MV *Limburg*

First, the prosecution of the accused for offenses related to the attack on the MV *Limburg* is fully supported by the protective principle, which "recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of government functions that are generally recognized as crimes by developed legal systems, *e.g.*, espionage . . . ." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 cmt. f (1987); *see*, *e.g.*, *United States v. Ayesh*, 702 F.3d 162, 166 (4th Cir. 2012) (describing "the protective principle of international law, which 'permits a nation to assert subject matter criminal jurisdiction over a person whose conduct outside the nation's territory threatens the national interest.'") (quoting *United States v. Alomia-Riascos*, 825 F.2d 769, 771 (4th Cir. 1987)). The government will show that the conduct here was part of a broader al Qaeda plot to conduct terrorist attacks against U.S. interests. The United States' interest in punishing those who seek to harm its national security would suffice under protective principle. *See United States v. Yousef*, 327 F.3d 56, 110 (2d. Cir. 2003) (the protective principle justified the prosecution of a defendant for a terrorist plot to attack U.S. aircraft in order to influence U.S. foreign policy); *cf. United States v. Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003) ("Congress, under the 'protective principle' of international law, may assert extraterritorial jurisdiction over vessels in the high seas that are engaged in conduct that 'has a potentially adverse effect and is generally recognized as a crime by nations that have reasonably developed legal systems.'").

That al Qaeda attacked a non-U.S. flagged vessel and injured non-U.S. nationals as part of its campaign against the United States does not diminish the interest of the United States in

punishing offenses related to the attack on MV *Limburg*, which occurred as part of the hostilities between the United States and al Qaeda.

II. It is Well-Established that Belligerents May Prosecute Unprivileged Enemy Belligerents in their Custody for Alleged Violations of the Law of War

In accordance with the protective principle, a State that is engaged in hostilities is entitled to exercise jurisdiction to punish unprivileged enemy belligerents for war crimes and other serious offenses committed against it during hostilities. This principle reflects the time-honored principle that a State engaged in hostilities may exercise jurisdiction over suspected "offenders" (including enemy belligerents) for "offenses" (*i.e.*, war crimes) committed during hostilities. *See In re Yamashita*, 327 U.S. 1, 11 (1946) ("An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war."); *Ex parte Quirin* 317 U.S. 1, 28 (1942) (same); *see also* U*nited States v. List, et al.* (Hostage Case), XI TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 1241 (1950) (war crimes "are punishable by the *belligerent* into whose hands the criminals have fallen . . .") (emphasis added); *United States v. Ohlendorf, et al.* (*Einsatzgruppen* Case), IV TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS 460 ("[t]here is no authority which denies any *belligerent* nation jurisdiction over individuals in its actual custody charged with violations of international law."); H. Lauterpacht, 2 Oppenheim's International Law: Disputes, War and Neutrality 587 (7th ed. 1952) ("The right of the belligerent to punish, during the war, such war criminals as fall into his hands is a well-recognised principle of International Law."); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) ("[T]he *charges and specfications* before us clearly state *an offense* of unlawful belligerency, contrary to

the established and judicially recognized law of war—*an offense* within the jurisdiction of the duly constituted Military Commission with power to try, decide and condemn") (emphasis added).

The United States is at war with al Qaeda, the Taliban, and associated forces. *See*, *e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 628-32 (2006) ("*Hamdan I*"); *Hamdan v. United States*, 696 F.3d 1238, 1240 (D.C. Cir. 2012) ("*Hamdan II*"); President Barack Obama, Remarks at the National Archives and Records Administration, 1 Pub. Papers 689 (May 21, 2009) ("Now let me be clear: We are indeed at war with Al Qaida and its affiliates."); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). The government will show that the accused is an unprivileged enemy belligerent and that Charges VII-IX are violations of the law of war committed in the context of, and associated with, these hostilities against the United States. These facts are sufficient to establish jurisdiction under international law.

III. World War II Precedents Make Clear that a Belligerent May Prosecute Enemy Belligerents for Violations of the Law of War Even if Their Own Nationals Are Not the Actual Victim of the Violations

The attack on the MV *Limburg* was part of an al Qaeda plot against U.S. interests and part of its war against the United States and its coalition partners, so it is of no moment that a U.S. national or vessel was not directly harmed in this specific attack. Moreover, World War II precedent makes clear that the accused may not escape accountability from the United States for his participation in the attack on MV *Limburg* simply because the accused's conduct in Charges VII-IX did not directly injure the United States or U.S. nationals. Rather, that precedent establishes that a belligerent State may exercise jurisdiction to prosecute an unprivileged enemy belligerent for an offense against nationals of cobelligerents or allies.

The question whether it was permissible for a belligerent to punish enemy belligerents for war crimes where the victim was not a national of that State was presented during a World War II trial. The United States took the position that such a prosecution was justified. *See*, *e.g.*, Memorandum Opinion from Maj. Gen. Myron C. Cramer, U.S. Army, The J. Advoc. Gen., to the Joint Intelligence Committee, The Joint Chiefs of Staff, Jurisdiction To Punish War Criminals (Dec. 13, 1943) ("The right to punish for such an offense against an ally proceeds upon the well-established principle that allies or cobelligerents constitute but a single side of an armed struggle. This office has heretofore properly held that 'cobelligerents fighting a common enemy are considered as constituting but a single side (2 Halleck, Int. Law (3d ed.) 503; Vattel, Law of Nations, Ch. XIV, sec. 207 (Carnegie trans.) p. 313)' (SPJGW 1943/5930, 4 June).").

The Department of Army Field Manual 27-10 reflects the World War II practice and explains that "[t]he jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons." FM 27-10, ¶ 507a ("Universality of Jurisdiction"). Congress endorsed this view in the M.C.A. by defining unprivileged belligerent to include "an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners." 10 U.S.C. § 948a(7)(A); R.M.C. 103(a)(29)(A). A coalition partner is defined as "any State or armed force directly engaged along with the United States in such hostilities or providing direct operational support to the United States in connection with such hostilities." 10 U.S.C. § 948a(3); R.M.C. 103(a)(8).

Thus, the fact that the accused's attack against the MV *Limburg* only directly injured coalition partners, such as France, can in no way be a basis for depriving this Commission of jurisdiction.

7. Conclusion

The government respectfully requests that this Commission deny the defense motion to dismiss Charges VII-IX, as these charges are clearly authorized by the M.C.A. and international law.

8. Oral Argument

The defense has requested oral argument on this motion. The government joins that request.

9. Witnesses and Evidence

The government does not anticipate relying on any witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 9 September 2013.

Respectfully submitted,

//s//

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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 9th day of September 2013, I filed **AE 168C, Government Response** To Defense Motion to Dismiss Charges IX-XI [sic][1] For Lack of Jurisdiction Under International Law, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
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