MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED ABDU AL-NASHIRI

AE 168D

DEFENSE MOTION TO FILE AN OUT-OF-TIME REPLY AND REPLY TO GOVERNMENT RESPONSE TO DEFENSE MOTION TO DISMISS CHARGES VII-IX FOR LACK OF JURISDICTION UNDER INTERNATIONAL LAW

September 17, 2013

1. **Timeliness**: This reply is filed outside the timeframe established by Rule for Military Commission (R.M.C.) 905. The defense respectfully moves to file this reply out-of-time. The government does not oppose this request.

2. **Overview**: Both the Uniform Code of Military Justice (UCMJ) and the Military Commissions Act (MCA) incorporate international norms into U.S. domestic law, and thus international law has become enforceable U.S. law. *Hamdan II v. United States*, 696 F. 3d 1238, 1241 (D.C. 2012); *Al-Bihani v. Obama*, 619 F. 3d 1, 13 (D.C. Cir. 2010) (*en banc*). The alleged bombing of the *MV Limburg* did not constitute hostilities against the U.S., and France was neither engaged in hostilities in the Gulf of Aden on October 6, 2002, nor a "coalition partner" of the United States outside of Afghanistan. Accordingly, international law does not provide the United States with jurisdiction to proscribe the alleged conduct in Charges VII-IX. The alleged bombing of the *MV Limburg* was one of many "isolated and sporadic acts of violence not within the context of an armed conflict." *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1189 (Ct. Mil. Comm. Rev. 2011).

3. Argument:

A) Leave should be granted to file this Out-of-Time Reply.

The defense failed to note on its in-house tracking system that AE 168C was filed on 9 September 2013, a day before the prosecution's 14-day deadline; thereby making the defense reply due one day earlier than anticipated. Additionally, the defense moves to file this out-of-time reply so that the military judge will be able to decide AE 168 with the benefit of full briefing. Providing full briefing is of critical importance given this commissions' limitation of oral argument to those only areas previously briefed. Furthermore, the government does not oppose the defense request to file out-of-time.

B) This Commission Cannot Ignore International Legal Norms that Have Been Expressly Incorporated into the UCMJ and Prospectively Adopted in the MCA.

In binding precedent, the D.C. Circuit has held that Article 21, UCMJ and international law—not the MCA—govern the alleged conduct before this military commission.[1] *Hamdan II v. United States*, 696 F. 3d 1238, 1241 (D.C. 2012). With respect to military commissions, Congress explicitly referred to international law and explicitly incorporated international norms into U.S. domestic law. *Hamdan II v. United States*, 696 F. 3d 1238, 1249 n.8 (D.C. 2012). "[W]hen international-law principles are incorporated into a statute or a self-executing treaty…they become domestic U.S. law enforceable in U.S. Courts." *Al-Bihani v. Obama*, 619 F. 3d 1, 13 (D.C. Cir. 2010) (*en banc*). The MCA does not "preempt the need for a *de novo*

[1] The defense's argument is not dependent upon the application of the UCMJ to Mr. Al-Nashiri's case as the MCA also expressly incorporates international law into domestic law. 10 U.S.C. § 949a-d.

assessment of customary international law by the Commission"; it requires it. Prosecution Response at 4.

Even if this Commission were to ignore the holding in *Hamdan II* that international norms are incorporated into the relevant statute, "[c]ustomary international law is legally enforceable unless superseded by a clear statement from Congress." *Guaylupo-Moya v. Gonzales*, 423 F. 3d 121, 134 (2nd Cir. 2005) (citation omitted). "Such a statement must be unequivocal. Mere silence is insufficient to meet this standard." *Id.* Assuming for the sake of argument that Congress had not expressly incorporated international law into the UCMJ and MCA, neither statute contains the clear statement that Congress intended to disregard international law by enacting those statutes.

Accordingly, this Commission "should interpret legislation in harmony with international law and norms wherever possible." *Id.* "Though it clearly has constitutional authority to do so, Congress is generally presumed not to have exceeded those customary international-law limits on jurisdiction to prescribe." *Hartford Fire Ins. Co. v. Cal.*, 509 U.S. 764, 815 (1993). Consistent with that presumption, "statutes should not be interpreted to regulate foreign persons or conduct if that regulation would conflict with principles of international law." *Id.* Because customary international law provides the United States no authority to proscribe the alleged war crimes in Charges VII-IX, and because the jurisdictional provisions in the UCMJ and MCA must not be interpreted to conflict with international law, Charges VII-IX should be dismissed for lack of jurisdiction.

C) International Law Does Not Provide the United States with Jurisdiction to Proscribe the Conduct Alleged in Charges VII-IX.

The Prosecution argues this Commission has jurisdiction under the protective principle. Prosecution Response at 6. But the "application of the protective principle is limited to situations where there is at least a potentially adverse effect on the sovereign's security or its governmental functions." *United States v. James-Robinson*, 515 F. Supp. 1340, 1345 (S.D. Fl. 1981); RESTATEMENT OF FOREIGN RELATIONS (THIRD) §§ 402(3). The protective principle requires a showing that the "particular conduct endangered the United States." *Beyond the Article I Horizon: Congress' Enumerated Powers and Universal Jurisdiction over Drug Crimes*, 93 Minn. L. Rev. 1191, 1229-31 (2009).

Aside from a general reference to a "broader al Qaeda plot," the prosecution makes no attempt to explain how French shipping, Bulgarian nationals, or commerce between Iran and Malaysia critically endanger the security of the United States or the functioning of its government. Prosecution Response at 6. Instead, it argues that cases involving the hijacking of U.S. airliners, theft from the United States by U.S. embassy employees, and smuggling of narcotics into the United States, support the application of the protective principle here. Prosecution Response at 6; *United States v. Yousef*, 327 F. 3d 56 (2nd Cir. 2003) (hijacking U.S. Airliners); *United States v. Alomia-Riascos*, 825 F. 2d 769 (4th Cir. 1987) (narcotics smuggling into the United States); *United States v. Ayesh*, 702 F. 3d 162 (4th Cir. 2012) (theft of $243,416 by employee of U.S. embassy in Iraq); *United States v. Rendon*, 354 F. 3d 1320 (11th Cir. 2003)(narcotics smuggling into the United States). All these cases involve conduct occurring in or targeted at the United States, its territory, or its nationals, and are illustrative of why this Commission lacks jurisdiction. *United States v. Robinson*, 843 F. 2d 1, 7 (1st Cir. 1988) ("[H]ow can this principle justify prohibiting foreigners on foreign ships 500 miles offshore from

possessing drugs that, as far as the statute (and clear proof here) are concerned, might be bound for Canada, South America, or Zanzibar?") .

"Congress cannot punish dog-fighting by Indonesians in Java because Congress has not been authorized by the Constitution to make such laws." *United States v. Cardales-Luna*, 632 F. 3d 731, 741 (1st Cir. 2011)(Torruella, J. dissenting) (citing *Beyond the Article I Horizon*, at 1194). Neither can Congress punish the bombing of a French ship in the Yemeni harbor. "Such interpretation would result in a protective principle which swallows the principle of universal jurisdiction." *United States v. Angulo-Hernandez*, 576 F. 3d 59, 61 (Torruella, J. dissenting from the denial of *en banc* review).

D) Assuming *arguendo* that International Law Permits a State to Exercise Jurisdiction over War Crimes Committed against a Coalition Partner, France was not a Coalition Partner in America's War off the Coast of Yemen on 6 October 2000.[2]

On 6 October 2002, France's status as a "coalition partner" was limited to Afghanistan, and did not extend to Yemen or Iraq. At that time, the French were highly critical of the spatial and temporal limitlessness of the war on terror, and the United States cannot assert this prosecution is being conducted to protect the interests of a fictional "coalition partner." "Like most European countries, France favors a judicial approach over the U.S.-style war on terror." *How the French Fight Terror*, Foreign Policy (Jan. 19, 2006). By contrast, the United States "'War on Terror' has no definable boundaries, making the world its battlefield with no likelihood

[2] The only authority the prosecution cited for the proposition that a state may punish war crimes committed against its allies is a 1943 Memorandum Opinion from the U.S. Army's Judge Advocate General, General Henry "Old Brains" Halleck's 1878 *International Law*, Emer de Vattel's 1797 *Law of Nations*, and the 1956 Army Field Manual on the Law of Land Warfare. This Commission need not resolve the conflict between these authorities and the Restatement of Foreign Relations because France was not a coalition partner of the United States off the coast of Yemen on 6 October 2002.

of a definitive conclusion.'" *A "Full and Fair" Trial: Can the Executive Ensure it Alone? The Case for Judicial Review of Trials by Military Commissions at Guantanamo Bay*, 15 Duke J. Comp. & Int'l L. 387, 396 (2005); *Enemy Combatants After Hamdan v. Rumsfeld: Rendered Meaningless: Extraordinary Rendition and the Rule of Law*, 75 Geo. Wash. L. Rev. 1333, 1405 (2007)("It is generally agreed that there are no territorial boundaries to the 'war on terror'—it occurs anywhere an al Qaeda operative can be found.").

Importantly, on 6 October 2002, France's status as "coalition partner" was confined to Afghanistan. "France approved of, and participated in, the attacks on Afghanistan after 9/11, agreeing with the United States that the Taliban's support of Al-Qaida made the terrorist attacks on the United States imputable to Afghanistan." *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 Me. L. Rev. 565, 576 (2006). But like the prosecution before this Commission, "the Bush administration then started talking about a 'war on terror' as if it were paired with the same legality as the attacks on Afghanistan." *Id.* "[F]rance rejects the idea that NATO, through 'non-article 5' missions, should become a little U.N., encompassing all security problems, with a mandate to intervene without limit anywhere in the world." *France, Europe, The United States*, 58 Me. L. Rev. 377, 386 (2006); *France's Man on*

Horseback, The Economist (May, 22 2003) ("The French still insist that the UN is the only source of legitimacy for armed conflict or for international recognition of a government.").

Although the prosecution now claims France to have been a "coalition partner" at the time of the attack on the *MV Limburg*, France famously refused to participate in the war on terror when it extended outside of Afghanistan and into Iraq. France's foreign minister, Domique de Villepin traveled to Africa to "rally opposition to the United States at the U.N." *Id.* And he refused to say if France wanted the "coalition of the willing"—which did not include France—to prevail in Iraq. *Id.* Referring to the United States policies in the Middle East, Mr. de Villepin presciently stated, "The Americans have a lit a match in a room full of gas." *Id.*

The prosecution has already been permitted to manufacture an unending war encompassing a global battlefield and war crimes that did not exist when they were allegedly committed. It should not now be permitted to populate battlefield earth with Potemkin allies, and then assert jurisdiction in their defense.

4. Oral Argument: **The defense requests oral argument on this motion.**

5. Additional Witnesses: None.

6. List of Additional Attachments: None.

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CERTIFICATE OF SERVICE

I certify that on the day of filing I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail this 17th day of September 2013.

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