MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 169E** **ORDER** **Defense Motion to Dismiss Charge IX: Hijacking or Hazarding a Vessel Does Not Violate the International Law of War** 28 **April 2014**

1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009, 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009) (hereafter "M.C.A."). He was arraigned on 9 November 2011.

2. Procedural History. The Defense filed AE 169, requesting the Commission dismiss Charge IX claiming 10 U.S.C. § 950t(23), Hijacking or Hazarding a Vessel or Aircraft, does not violate the international law of war. The Prosecution responded (AE 169C) requesting the motion be denied asserting the charge was and is a violation of the international law of war as it is based on norms firmly grounded in international law. The Defense filed a reply (AE 169D). The motion was argued on 19 February 2014.[1]

3. Issue. The issue is whether the charge of Hijacking or Hazarding a Vessel or Aircraft as codified in 10 U.S.C. § 950t(23) states an offense based on norms firmly grounded in

[1] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing, Dated 19 February 2014 from 1:09 PM to 2:35 PM at 2660 - 82.

international law. Stated slightly differently, does the conduct at issue[2] violate a well-established and universally recognized norm of international law? *See Hamdan v. United States*, 696 F.3d 1238, 1248 (D.C. Cir. 2012)

4. Law. Because the issue before the Commission involves a jurisdictional challenge, the prosecution has the burden of demonstrating jurisdiction by a preponderance of the evidence. Rules for Military Commissions (R.M.C.) 905(c)(2)(B). 10 U.S.C. § 821 allows military commissions to try law of war crimes.[3] The "body of law encompassed by the term 'law of war'…is the international law of war." *Hamdan v. United States,* 696 F.3d at 1248. In commenting on the scope of the law of war, the Supreme Court said, "That law derives from 'rules and precepts of the law of nations:' it is the body of international law governing armed conflict." *Hamdan v. Rumsfeld*, 548 U.S. 557, 641 (2006) (citations omitted) (plurality opinion).

5. Under the international law of war, a charged offense does not have to be a named offense at the time the conduct is committed. *Id*. at 563 (citing *Ex Parte Quirin*, 317 U.S. 1, 30 (1942)). In that regard, the Supreme Court in 1942 in the context of reviewing a *habeas* petition filed by German citizens who infiltrated the United States to sabotage key military facilities and who were pending trials by a military tribunal for war crimes, commented on the definition of the law of war. The Court distinguished between charging specified conduct and charging conduct proscribed by the body of international law when it said, "It is no objection that Congress in

[2] Charge IX alleges the Accused "in the context of and associated with hostilities, intentionally endanger[ed] the safe navigation of a vessel, *MV Limburg*, not a legitimate military objective, to wit: by causing an explosives-laden civilian boat to detonate and explode alongside *MV Limburg*, causing damage to the operational ability and navigation of *MV Limburg*, and resulting in the death of one crew member…"

[3] "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals. This section does not apply to a military commission established under chapter 47A of this title." 10 U.S.C. § 821, Art. 21, U.C.M.J., *Jurisdiction of courts-martial not exclusive* (October 17, 2006) (originally enacted August 10, 1956, 70A Stat. 44).

providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns." *Ex parte Quirin*, 317 U.S. 1, 29 (1942). Therefore, the Court held, Congress clearly chose to adopt a system rather than create an all-inclusive code. "Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course." *Id.* at 30.

6. The standard courts use to determine whether an act is a violation of the international law of war is based on a plain interpretation approach of the applicable international law. "Imposing liability on the basis of a violation of 'international law' or the 'law of nations' or the 'law of war' generally must be based on norms firmly grounded in international law." *Hamdan v. United States*, 696 F.3d at 1250, n.10. However, the Supreme Court cautioned, "Although the common law of war may render triable by military commission certain offenses not defined by statute, the precedent for doing so with respect to a particular offense must be plain and unambiguous." *Hamdan v. Rumsfeld*, 548 U.S. at 563 (internal citation omitted).

7. The language used in the M.C.A. definition of Hijacking or Hazarding a Vessel or Aircraft is similar to the language used in the Convention for the Suppression of Unlawful Acts of Violence Against the Safety of Maritime Navigation (SUA Convention).[4] The SUA Convention is a United Nations Convention adopted by 156 nations, including Yemen on 30 June 2000. It was adopted by the United States on 6 December 1994. Article 3 of the SUA Convention provides:

"1. Any person commits an offence if that person unlawfully and intentionally:

[4] *Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation*, Art. 3, 1678 U.N.T.S. 221, 27 I.L.M. 668 (1988), *entered into force* March 1, 1992.

a. seizes or exercises control over a ship by force or threat thereof or any other form of intimidation; or
b. performs an act of violence against a person on board a ship if that act is likely to *endanger the safe navigation of that ship*; or
c. destroys a ship or causes damage to a ship or to its cargo which is likely to *endanger the safe navigation of that ship*; or
d. places or causes to be placed on a ship, by any means whatsoever, a device or substance which is likely to destroy that ship, or cause damage to that ship or its cargo which *endangers or is likely to endanger the safe navigation of that ship;* or
e. destroys or seriously damages maritime navigational facilities or seriously interferes with their operation, if any such act *is likely to endanger the safe navigation of a ship*; or
f. communicates information which he knows to be false, thereby *endangering the safe navigation of a ship*; or
g. injures or kills any person, in connection with the commission or the attempted commission of any of the offences set forth in subparagraphs (a) to (f)" (emphasis added).

The M.C.A. prohibits conduct that "endangers the safe navigation of a vessel." The similarity between the M.C.A. and the SUA Convention is plain and unambiguous. The SUA Convention proscribes the same conduct the M.C.A. proscribes and of which the Accused is charged.

8. Findings and Conclusion. The Commission finds by a preponderance of the evidence the Prosecution has demonstrated the crime of Hijacking or Hazarding a Vessel or Aircraft is based on norms firmly grounded in international law and can be plainly drawn from established precedent. Therefore, the Commission concludes the offense of Hijacking or Hazarding a Vessel or Aircraft was an international law of war crime at the time the Accused allegedly engaged in the conduct, thus conferring jurisdiction over the offense. It remains the obligation of the Prosecution to establish the factual assertions of the charge and its specification beyond a reasonable doubt at trial on the merits.

9. Accordingly, the Defense Motion is **DENIED**.

So ORDERED this 28th day of April 2014.

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JAMES L. POHL
COL, JA, U.S. Army
Military Judge