

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

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 174C</p> <p>ORDER</p> <p>Defense Motion to Dismiss Charge IV, Specification 2 and Charges VII-IX for Failure to State an Offense</p> <p>28 April 2014</p>
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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 “2009 M.C.A.”). He was arraigned on 9 November 2011.

2. Procedural History. The Defense filed AE 174, requesting the Commission dismiss Specification 2 of Charge IV and Charges VII-IX claiming they fail to state an offense. The Defense’s theory was the MV Limburg was a lawful target at the time it was allegedly attacked, and the alleged attackers held the status of lawful combatants at the time of the alleged attack. The Prosecution responded (AE 174A) requesting the motion be denied because the issue before the Commission is simply whether or not the charge sheet as it relates to the offenses at issue properly state an offense. The Defense filed a reply (AE 174B). The motion was argued on 19 February 2014.¹

3. Issue. The issue is whether the particular specifications and charges state offenses.

4. Law. Rule for Military Commissions (R.M.C.) 307(c)(3) states,

“A specification is a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication. Except for

¹ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 19 February 2014 from 1:09 P.M. to 4:16 P.M. at pgs 2682 - 2705.

aggravating circumstances under R.M.C. 1001(b)(2), facts that increase the maximum authorized punishment must be alleged in order to permit the possible increased punishment. No particular format is required.”

In reviewing Rule for Courts-Martial (R.C.M.) 307(c)(3),² the Court of Appeals for the Armed Forces (C.A.A.F.) announced the standard for stating an offense by writing, “[T]he standard for determining whether a specification states an offense is whether the specification alleges ‘every element’ of the offense either expressly or by implication, so as to give the accused notice and protect him against double jeopardy.” *United States v. Sutton*, 68 M.J. 455, 457 (C.A.A.F. 2010) (citing *United States v. Crafter*, 64 M.J. 209 (C.A.A.F. 2006)).

5. Findings and Conclusion. The Commission finds the Prosecution has satisfied the requirements of R.M.C. 307(c)(3) and has met the aforementioned standard announced by C.A.A.F. Specification 2 of Charge IV and Charges VII-IX properly state an offense in compliance with the legal requirements. The additional matters concerning the MV Limburg’s and the Accused’s legal status at the time of the alleged attack, which were raised in the pleadings and discussed during oral argument, are questions of fact and must be resolved by the fact-finder.³

6. 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

² With the exception of the citations to the sentence enhancement portions of the rule, the R.M.C and R.C.M. are identical.

³ See Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 19 February 2014, from 1:09 P.M. to 4:16 P.M. at pgs 2686 - 92.