

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 246J</p> <p>RULING</p> <p>GOVERNMENT MOTION TO RECONSIDER AE 246B TO INCLUDE CERTAIN FOREIGN NATIONALS AS PERSONS OTHER THAN THE VICTIM UNDER CHARGE I (PERFIDY) BECAUSE THEIR LIVES WERE UNLAWFULLY AND SUBSTANTIALLY ENDANGERED BY THE ACCUSED'S ILLEGAL ATTACK ON USS COLE (DDG 67)</p> <p>16 DECEMBER 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). He was arraigned on 9 November 2011.

2. The Prosecution in AE 246C requested the Commission reconsider its ruling in AE 246B¹ wherein the Commission determined “the ‘victims’ in Charge I to be the 17 deceased and 39 injured Sailors referred to and listed by name on the charge sheet.” And ruled “[t]he Prosecution is limited to introducing evidence and arguing the remaining crewmembers onboard the USS COLE at the time of the attack are who were unlawfully and substantially endangered as a result of the alleged perfidious attack.” AE 246B at 3. The Prosecution asserted it “does not interpret the Commission’s ruling to prohibit the government from presenting evidence and testimony that foreign nationals located on or around the refueling dolphin or USS COLE (DDG 67) were unlawfully and substantially endangered as a result of the attack. The lives of those foreign nationals—not per se victims of the attack—were unlawfully and substantially endangered by the

¹ RULING, Defense Motion to Strike Aggravator #1 from Charge I for Failure to Charge Facts in Aggravation Under R.M.C. 1004(C)(1), dated 20 October 2014.

accused's illegal acts that killed 17 United States Sailors, thereby making the accused's illegal acts more deserving of death. Accordingly, the government intends to present evidence and testimony—and it should be allowed to do so—proving that the accused unlawfully and substantially endangered the foreign nationals located on or around the refueling dolphin and USS COLE (DDG 67).” AE 246C at 2. The Prosecution's desired result is for “the Commission [to] define ‘persons other than the victim,’ under R.M.C. 1004(c)(1), for Charge I (Using Treachery or Perfidy), to include the foreign nationals who were located on or around the refueling dolphin or USS COLE (DDG 67) at the time of the attack.” AE 246C at 1. The Defense response (AE 246G) argued against reconsideration for two reasons. First, the Prosecution failed to establish the existence of a manifest error of law or some change in or new fact. Second, “[t]he inclusion of ‘certain foreign nationals ’ to define ‘persons other than the victim’ for consideration under Aggravator #1 is a substantive change to Charge I, and is unsupported in the record of this Commission. (AE246C, AE182, Charge Sheet). The Commission should reject the proposed language modification from the government.” AE 246G at 2-3. A reply was not filed.

3. The Prosecution did not request oral argument. The Defense requested oral argument. “In accordance with Rule for Military Commission (R.M.C.) 905(h) the decision to grant oral argument on a written motion is within the sole discretion of the Military Judge.”² In this instance, oral argument is not necessary to the Commission's consideration of the issue before it. The Defense request for oral argument is **DENIED**.

4. The Commission disagrees with the Defense assertion that the aggravating factor must be included in the charge and its specification. This is not the state of the law in relation to providing notice of and then proving aggravating factors. (*See* AE 246C). A change in the factual basis underlying an aggravating factor is not a substantial change in a charge and its

² Military Commissions Trial Judiciary Rule of Court 3(5)(m) (May 2014).

specification. The Commission, in reconsidering its ruling, cannot factually distinguish those foreign nationals on board the USS COLE (DDG 67) from crewmembers on board the USS COLE (DDG 67) not otherwise listed as deceased or injured in the charge. This could be viewed as error and should be corrected.

5. The “persons other than the victim” for consideration under Aggravator #1 as to Charge I can include the following individuals: Crewmembers on board the USS COLE (DDG 67), not otherwise referred to in Charge I as being deceased or injured during the alleged attack and those foreign nationals on board the USS COLE (DDG 67) at the time of the alleged attack. However, the “persons other than the victim” for consideration under Aggravator #1 as to Charge I does not include those foreign nationals located on or around the refueling dolphin. The Prosecution will not attempt to introduce evidence of these foreign nationals being endangered in either its case in chief or during sentencing.

Accordingly, AE 246C is **GRANTED** in part and **DENIED** in part.

So **ORDERED** this 16th day of December, 2014.

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VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary