

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

<p><b>UNITED STATES OF AMERICA</b></p> <p><b>v.</b></p> <p><b>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</b></p>	<p><b>AE 247J</b></p> <p><b>RULING</b></p> <p><b>GOVERNMENT MOTION TO RECONSIDER AE 247B AND INCLUDE THE INJURED SAILORS ONBOARD USS COLE (DDG 67) AS “PERSONS OTHER THAN THE VICTIM” UNDER CHARGE II (MURDER) BECAUSE THEIR LIVES WERE UNLAWFULLY AND SUBSTANTIALLY ENDANGERED BY THE ATTACK ON USS COLE (DDG 67)</b></p> <p><b>16 DECEMBER 2014</b></p>
--	---

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 247C requested the Commission “reconsider its ruling in AE 247B<sup>1</sup> so that it may apply the plain language of R.M.C. 1004(c)(1) and permit testimony and evidence from the injured crewmembers onboard USS COLE (DDG 67).” AE 247C at 1. The Prosecution further requested “that, upon reconsideration and with the benefit of the new matters provided herein, the Commission define “persons other than the victim,” under R.M.C. 1004(c)(1), for Charge II (Murder in Violation of the Law of War, pursuant to 10 U.S.C. § 950t(15)), to include the Sailors who were injured onboard USS COLE (DDG 67) and the foreign nationals who were located on or around the refueling dolphin or USS COLE (DDG 67) at the time of the attack.” AE 247C at 1-2. The Defense response (AE 247G) argued the Commission deny the relief

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

requested by the Prosecution AE 247C because the Commission's ruling contains no manifest error of law or fact in its definition of "persons other than the victim," and the Prosecution presented no new facts or new case law to support a change to the Commission's ruling.

3. Both the Prosecution and 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."<sup>2</sup> In this instance, oral argument is not necessary to the Commission's consideration of the issues before it. The 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 247C). A change in the factual basis underlying an aggravating factor is not a substantial change in a charge and its specification. The Commission, in reconsidering its ruling, cannot factually distinguish foreign nationals on board the USS COLE (DDG 67) from crewmembers on board the USS COLE (DDG 67) not otherwise listed as deceased in Charge II or injured in Charge I. Excluding the injured crewmembers on board the USS COLE (DDG 67) from the definition of "persons other than the victim" as to Charge II could be viewed as error and should be corrected.

5. The "persons other than the victim" for consideration under Aggravator #1 as to Charge II can include the following individuals: All crewmembers on board the USS COLE (DDG 67), not otherwise referred to in Charge II as being deceased, but including those listed as injured in Charge I 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 II does not include those foreign nationals located on or around the refueling

---

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

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 247C is **GRANTED** in part and **DENIED** in part.

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

*//s//*

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