

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

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 256K

**DEFENSE REPLY TO GOVERNMENT
RESPONSE TO DEFENSE MOTION TO
STRIKE AGGRAVATOR #5 AS
OVERBROAD AND/OR MOTION IN
LIMINE TO LIMIT THE SCOPE OF
AGGRAVATOR #5 TO THE ACCUSED'S
SPECIFIC INTENT TO INTIMIDATE OR
TERRORIZE THE CIVILIAN
POPULATION OF THE UNITED STATES**

2 July 2015

1. **Timeliness:** This reply is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
2. **Reply:** The prosecution's response to Defense Motion to Strike Aggravator #5 or limit application of that aggravator demonstrates why the defense motion must be granted. The prosecution argues that: a) it is immaterial whether the attack on the USS COLE had any impact upon any of the 2.5 billion civilians who the prosecution claims the accused intended to terrorize; b) it is only the accused's subjective intent that aggravates the offense and therefore it is immaterial whether the civilians resided in countries that were allegedly "attacked" were involved in hostilities subject to the law of war; and c) that because the accused was allegedly a co-conspirator with a host of others, it is really the intent of Osama Bin Laden or perhaps any other unnamed co-conspirator, rather than of the accused that makes the defendant's actions death worthy. Because the prosecution's position fundamentally distorts death penalty law and the law governing Military Commissions, the accused's motion must be granted.

A few fundamental principles are worth revisiting. *First*, a valid aggravator must genuinely aggravate a crime beyond the typical homicide committed in violation of the law of war. *Second*, the prosecution must allege the aggravator with sufficient clarity that the accused knows what allegations he must defend against, the parties can discuss the aggravator with the prospective members during *voir dire*, and that the members can be instructed on how to evaluate that aggravator based on the evidence adduced at trial. *Third*, the aggravator must be supported by sufficient evidence and that evidence must be demonstrated to be sufficient prior to trial. As presently alleged, and based upon the discovery provided to date, Aggravator #5 fails all three of these tests.

A. An Aggravator Must Genuinely Aggravate a Crime.

In a weighing jurisdiction, the role of an aggravator is to separate the instant homicide from all other homicides. *Zant v. Stephens*, 462 U.S. 862, 877 (1983). This narrowing separates the death penalty worthy homicides from all other homicides. What makes this homicide, allegedly in violation of the law of war, different and more death worthy than other homicides prosecutable in Guantanamo? While the prosecution's position has been ever changing, the prosecution now says that *this* accused deserves death because *someone* in a vaguely defined conspiracy had the intent to terrorize civilians. In other words, the accused must die even if the prosecution brings forward no evidence to prove that he had this particular aggravating intent or even if there was no actual impact on any civilians.

To be a permissible aggravator, the aggravator must have factual support. It is hopefully self-evident that the prosecution cannot allege aggravators in this Commission that are not true. While it may be remotely plausible and thus arguable that the attack on the USS COLE was intended to terrorize the civilian population of the United States, it is neither plausible nor

arguable that the attack on the USS COLE was done to terrorize the populations of Iceland, Poland, India, or any of the 2.5 billion individuals “identified” by the prosecution. The prosecution has brought forward no evidence to show that these individuals, absent some discernible connection to the United States, enjoy a victim status that individuals from un-named countries like as Romania and Argentina do not. The prosecution, quite simply, has offered this Commission nothing to support the allegation, despite multiple opportunities to do so.

B. Countries Other Than The United States Cannot Have Victim Status In This Military Commission.

This Commission is based upon the allegation that in 2000 the United States was engaged in hostilities subject to the law of war. The statute authorizing this Commission claims the right to protect the United States and coalition partners. The government, recognizing the obvious, has specifically abandoned its earlier claim that these nations were “partners” in any recognized “coalition”. Instead, it has sought to fashion a false category of protection over the citizens or residents of any country with which the United States has engaged in any level of security cooperation. This category lacks any textual support in the statute, which speaks *only* of coalition partners, 10 U.S.C. § 948(3), and it also lacks any basis in the law of jurisdiction. *The Apollon*, 9 Wheat. 362, 370-71 (1824) (“The laws of no nation can justly extend beyond its own territories except so far as regards its own citizens...”).

Unless this Commission is to create some new doctrine of *Pax Americana*, the United States remains a discrete nation-state with a specific and identifiable population that is distinct from that of Poland, India or Iceland. If those countries wish to vindicate the interests of its population against the accused’s alleged intent to intimidate them, then those independent nation-states remain free to do so.

Because the 2.5 billion people that the government has identified as its putative victim class were not a party to any hostilities as coalition partners, this Commission has no authority to vindicate their interests. Just as this Commission has no jurisdiction to adjudicate the destruction of Iranian oil bound for Malaysia on a French vessel, this Commission has no claim to protect the interests of civilians in a country who did not know about, much less have any meaningful interest in the USS COLE attack. Accordingly, application of this aggravator must be limited to the protection of U.S. civilians.

C. The Commission Has The Responsibility to Order the Prosecution To Identify The “Facts” Which It Will Use to Prove the Aggravator.

In his original motion, the accused argued that the prosecution had an obligation to demonstrate prior to trial that this aggravator had factual support. See AE 256I p. 8 -10. The government has had multiple opportunities to explain what evidence it will use to support the aggravation that it has alleged. It has failed to do so. The prosecution suggests that it can wait until some future hearing between the guilt/innocence phase and the penalty phase. See AE 256J at 11-12. That is clearly improper. During *voir dire*, both parties must have the opportunity to probe the members’ views on the specific aggravation and mitigation involved in the case. This determines in part whether they are qualified to serve as members at all. One who does not believe that aggravation, if proven, is actually aggravating or mitigation, if proven, is actually mitigating cannot be said to be following the law and is thus *per se* disqualified. *Morgan v. Illinois*, 504 U.S. 719 (1992).

The defense has carefully reviewed the discovery and the government has produced *nothing* that could support the conclusion that the attack on the USS COLE was intended to influence the civilian population of any country other than, perhaps, the United States. Until the

prosecution produces such evidence and can demonstrate that a substantial majority of the civilian population of any of these nations was “terrorized”, this aggravator must be stricken.

As discussed in the original motion there is ample precedent in the Federal system for requiring the prosecution to demonstrate the factual basis for an aggravator before the issue is referred to a jury. *See, e.g., United States v. Hammer*, 2011 WL 6020157 (M.D.Pa. 2011) (“In order to ensure that Defendant's due process rights are protected and that the Court can properly screen the information the parties will introduce at the sentencing proceeding, the Court will order the Government to provide Defendant with Informational Outlines of the information it plans to present in support of the intent factors, the statutory aggravating factor of substantial planning and premeditation and the non-statutory factors of future dangerousness and victim impact. The Government should provide in the outline the general nature of the evidence it will seek to introduce in support of the threshold findings and specified aggravating factors.”); *United States v. Lujan*, 530 F. Supp. 2d 1224, 1271-1272 (D.N.M. 2008) (ordering government to submit (1) an “outline of its anticipated victim impact evidence”; (2) a “written informative outline” of evidence on its “lack of remorse” aggravator; (3) an “outline” of the acts of institutional misconduct it will offer in support of “low rehabilitative potential” aggravator; and (4) notice of crimes government will rely on to support “pattern of violence” aggravator); *United States v. Llera Plaza*, 179 F. Supp. 2d 464, 470-475, 492 (E.D. Pa. 2001) (ordering government to provide outline of anticipated evidence in support of future-dangerousness and victim-impact aggravating factors, and more specific notice for aggravating factors of “grave risk of death to additional persons” and “defendant’s participation in another killing.”).

D. Only the Intent of The Accused May Be Aggravating.

The prosecution suggests that because Osama Bin Laden may have had the intent to terrorize the civilian population of half the world, it may kill the accused without proof that that was also the accused's intent. The prosecution cites no capital authority for this astounding proposition for the simple reason that there is none. The prosecution may not use the alleged intent of Osama bin Laden or other alleged "co-conspirators" to render the accused in this case death eligible.

As an initial matter, the accused disputes that conspiracy is within the jurisdiction of this military commission at all. *Bahlul v. United States*, 2015 WL 3687457 (D.C. Cir. 2015). But even assuming *arguendo* that conspiracy was prosecutable in this Commission, the intent of one conspirator may not be used to aggravate a crime allegedly committed by another. "The focus must be on his culpability, not on that of those who committed [the actual offense], for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' ... which means that we must focus on 'relevant facets of the character and record of the individual offender.'" *Edmund v. Florida*, 458 U.S. 782, 789 (1982) (citations omitted).

The death penalty is premised upon individual moral responsibility. The accused can face death for acts he did, but death must be imposed upon him for his individual moral blameworthiness. The prosecution must show that he personally had the "intention of participating in or facilitating" the terrorization of the specific civilian populations the prosecution has enumerated. *Id.* at 789. He may not be made a scapegoat through which the members may impose the death penalty for the thoughts, beliefs, and actions of others. *Tison v. Arizona*, 481 U.S. 137 (1987).

If the prosecution can prove, beyond a reasonable doubt, that the accused personally intended terrorize a particular civilian population and that the attack did terrorize the civilian

population, then that intent may perhaps be considered by the members as an aggravating factor. However, he cannot face death because of the intent of another. Absent proof, presented pretrial, that Bin Laden or other co-conspirators intended to terrorize civilians in countries other than the United States *and* that the accused consciously and purposefully adopted that intent as his own, this aggravator must be stricken, so that the accused can defend his own actions and not carry the burden of defending others in this capital case.

3. Additional Witnesses: None

4. Additional Attachments:

A. Certificate of Service, dated 2 July 2015 (1 page)

Respectfully submitted,

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ATTACHMENT

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Filed with TJ
2 July 2015

Appellate Exhibit 256K (Al-Nashiri)
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CERTIFICATE OF SERVICE

I certify that on 2 July 2015, I electronically filed the forgoing document with the Trial Judiciary and served it on all counsel of record via e-mail.

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