MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI**	**AE 289B** **RULING** **DEFENSE MOTION TO DISMISS CHARGE III, SPECIFICATION 1 FOR *TU QUOQUE* BECAUSE THE UNITED STATES HAS A PRACTICE OF USING CONCEALED BOATS** **22 August 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). He was arraigned on 9 November 2011.

2. Procedural History. Defense filed AE 289 and requested the Commission dismiss Specification 1 of Charge III, a Violation of 10 USC §950t(28) Attempted Murder in Violation of the Law of War because, as alleged, using a unmarked boat to approach enemy vessels for the purposes of an attack is not a violation of the law of war, as evidenced by the United States' acceptance of the practice. The Defense asserted the "doctrine of *tu quoque* prevents the United States from punishing such conduct as a violation of customary international law."(AE 289 at 9) The Prosecution response (AE 289A) requested the relief be denied because, *"[t]u quoque* has been universally rejected as a defense to individual criminal liability" (AE 289A at 1), and the Accused engaged in recognized cognizable war crimes. A reply was not filed. The motion was argued on 6 August 2014.[1]

3. Issue. Whether the doctrine of *tu quoque* has any applicability to these Military Commissions.

4. Law. "The Latin phrase *tu quoque* means 'thou also' or 'you to.' An accused raising the *tu quoque* defense claims justification for his or her acts as a response to the actions of the State or rebuts the

[1] *See* Unofficial/Unauthenticated Transcript of the al Nashiri (2) Motions Hearing Dated 6 August 2014 from 09:08 A.M. to 10:23 A.M. at pp. 5018-40.

charges of the State by claiming that the State cannot prosecute him or her since the State behaved in a similar culpable manner as the accused." *See* Michael P. Scharf & Ahran Kang, *Symposium: Milosevic & Hussein on Trial: Panel 3: The Trial Process: Prosecution, Defense and Investigation: Errors and Missteps: Key Lessons the Iraqi Special Tribunal Can Learn from the ICTY, ICTR, and SCSL*, 38 Cornell Int'l L. J. 911, 935 (2005).

5. The Defense was unable to provide the Commission citations to cases where this doctrine was successfully argued in any United States or international court. The closest is the prosecution of Admiral Dönitz at the International Criminal Tribunal at Nuremberg,[2] which is inapplicable here because there both parties engaged in the same conduct, submarine warfare against armed merchant vessels, in the same war effort. Here, the Defense did not demonstrate the United States and the Accused engaged in the same conduct in the same conflict or that the United States has ever actually engaged in the charged conduct. The video[3] published to the Commission by the Defense during oral argument discussed the detailed planning and testing of a disguised explosive laden boat by the United States in the 1940's, but did not indicate the United States ever took any action beyond planning and testing.

6. As noted above, the Defense failed to demonstrate the United States has ever actually used explosive boats in a concealed manner, either lawfully or unlawfully. While *Operation Javaman*[4] and *Operation Jaywick*[5] are interesting in a historical context, they do not demonstrate the United States actually engaged in a practice of using concealed explosive boats in violation of the Law of War.

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[2] *See* International Military Tribunal (Nuremberg) Judgment of 1 October 1946, pp 127-31 last accessed at http://crimeofaggression.info/documents/6/1946_Nuremberg_Judgement.pdf on 20 August 2014 and Proceedings of the International Military Tribunal sitting at Nuremberg, Germany, part. 22, pp 310-15 (22 August 1946 – 1 October 1946) last accessed at http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf on 20 August 2014.

[3] AE 287B, CD Presentation - OSS Campbell Missile 1944.

[4] *Operation Campbell* was renamed *Operation Javaman*. Attachment A, AE 287 and the video at AE 287B provide information on the planning and testing of disguised explosive laden watercraft by the United States.

[5] *Operation Jaywick*, was an Australian and British special operations raid conducted during World War II on Japanese shipping in Singapore harbor. An article about it is at http://www.dva.gov.au/aboutDVA/publications/commemorative/jaywick/Pages/index.aspx, accessed on 20 August 2014.

7. The International Criminal Tribunal for the Former Yugoslavia ("ICTY") clearly rejected the doctrine of *tu quoque* as a defense for individual criminal liability. *Prosecutor v. Kupreskic*, Case No.: IT-95-16-T, Trial Judgment, ¶ 511, 515-17 and 765 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000) and *Prosecutor v. Kupreskic*, Case No.: IT-95-16-A, Appeals Judgment, ¶ 25 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 23, 2001).

8. The doctrine was also rejected in the Nuremberg Tribunals. *See United States v. von Leeb* (High Command Case), *11 Trials of War Criminals Before the Nuremberg Military Tribunals* 462, 482 (1950). There, the Tribunal made clear an accused does not exculpate himself from a crime by showing that another, even the accusing party, has committed a similar crime.

9. Findings and Conclusion. The Commission concludes the doctrine of *tu quoque* has no applicability in these Commissions. If an appellate court were to determine this doctrine is in some way applicable in a case involving individual criminal liability, the Defense in this case was unable to demonstrate that the United States has any practice of actually using concealed explosive boats in a manner in violation of the law of war or, frankly, in any manner.

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

So **ORDERED** this 22nd day of August, 2014.

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