

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

UNITED STATES OF AMERICA

v.

ENCEP NURJAMAN;
MOHAMMED NAZIR BIN LEP;
MOHAMMED FARIK BIN AMIN

AE 0043.002 (GOV)

Government Response
To AE 0043.001 (NUR),
Defense Motion to Dismiss For
Failure To State An Offense

30 November 2022

1. Timeliness

The Prosecution timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.

2. Relief Sought

The Prosecution respectfully requests that the Commission deny the requested relief set forth within AE 0043.001 (NUR), Defense Motion to Dismiss for Failure to State an Offense, without oral argument.

3. Burden of Proof

As the moving party, the Defense must demonstrate by a preponderance of the evidence that the requested relief is warranted. *See* Rule for Military Commissions (R.M.C.) 905(c)(1)–(2).

4. Facts

The Prosecution charged, and can prove beyond a reasonable doubt, that 202 people were killed during the October 12, 2002 attacks at or near Bali, Indonesia, that an additional 11 people were killed at or near Jakarta, Indonesia, and that an additional 31 people were injured in both attacks. Specifically, the Prosecution alleges eight separate charges against the Accused, set

forth in great detail in 32 single-spaced pages. The charges are alleged under the Military Commissions Act (“MCA”), 10 U.S.C. §§ 950t and 950r, and encompass a conspiracy involving the Accused and 53 named co-conspirators, among whom are numerous well-known and identified al Qaeda operatives, including Usama bin Laden, Khalid Shaikh Mohammad, Abu Hafs al Masri, and Majid Shoukat Khan. The charges allege that the Accused is subject to trial by military commissions because he is an alien unprivileged enemy belligerent and committed offenses in the context of and associated with hostilities. A summary of the charges against the Accused is as follows:

Charge I, Violation of 10 U.S.C. § 950t(15), Murder in Violation of the Law of War, charges two specifications. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally and unlawfully killing one or more persons on October 12, 2002, in violation of the law of war by intentionally detonating explosives in Paddy’s Pub on Legian Street in front of the Sari Club on Legian Street, located in or around Bali, Indonesia. Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally and unlawfully killing one or more persons on August 5, 2003, in violation of the law of war by intentionally detonating a vehicle laden with explosives in front of the J.W. Marriott Hotel, located in or around Jakarta, Indonesia.

Charge II, Violation of 10 U.S.C. § 950t(28), Attempted Murder in Violation of the Law of War, charges two specification. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with attempt to intentionally and unlawfully kill one or more persons on October 12, 2002, in violation of the law of war by intentionally detonating explosives in Paddy’s Pub on Legian Street in front of the Sari Club on

Legian Street, located in or around Bali, Indonesia. Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with attempting to intentionally and unlawfully kill one or more persons on August 5, 2003, in violation of the law of war by intentionally detonating a vehicle laden with explosives in front of the J.W. Marriott Hotel, located in or around Jakarta, Indonesia.

Charge III, Violation of 10 U.S.C. § 950t(13), Intentionally Causing Serious Bodily Injury, charges two specifications. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally causing and inflicting serious injury to the body and health of one or more persons on October 12, 2002, in violation of the law of war by intentionally detonating explosives in Paddy's Pub on Legian Street in front of the Sari Club on Legian Street, located in or around Bali, Indonesia. Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally causing and inflicting serious injury to the body and health of one or more persons on August 5, 2003, in violation of the law of war by intentionally detonating a vehicle laden with explosives in front of the J.W. Marriott Hotel, located in or around Jakarta, Indonesia.

Charge IV, Violation of 10 U.S.C. § 950t(24), Terrorism, charges two specifications. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally killing and inflicting great bodily harm on one or more protected persons and engaging in an act that evinced a wanton disregard for human life, in a manner calculated to influence and affect the conduct of government and civilian population by intimidation and coercion, and to retaliate against government conduct, on October 12, 2002, in violation of the law of war by intentionally detonating explosives in Paddy's Pub on Legian

Street in front of the Sari Club on Legian Street, located in or around Bali, Indonesia.

Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally killing and inflicting great bodily harm on one or more protected persons and engaging in an act that evinced a wanton disregard for human life, in a manner calculated to influence and affect the conduct of government and civilian population by intimidation and coercion, and to retaliate against government conduct, on August 5, 2003, in violation of the law of war by intentionally detonating a vehicle laden with explosives in front of the J.W. Marriott Hotel, located in or around Jakarta, Indonesia.

Charge V, Violation of 10 U.S.C. § 950t(2), Attacking Civilians, charges two specifications. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally engaging in an attack on a civilian population to wit: the civilian population of Bali, Indonesia, on October 12, 2002, by intentionally detonating explosives in Paddy's Pub on Legian Street in front of the Sari Club on Legian Street, located in or around Bali, Indonesia, intending the object of the attack to be, and the object of the attack in fact was, a civilian population as such, and individual civilians not taking direct or active part in hostilities, and knew or should have known of the factual circumstances that established the civilian status. Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally engaging in an attack on a civilian population to wit: the civilian population of Jakarta, Indonesia, on August 5, 2003, by intentionally detonating a vehicle laden with explosives in front of the J.W. Marriott Hotel, located in or around Jakarta, Indonesia, intending the object of the attack to be, and the object of the attack in fact was, a civilian population as such, and

individual civilians not taking direct or active part in hostilities, and knew or should have known of the factual circumstances that established the civilian status.

Charge VI, Violation of 10 U.S.C. § 950t(3), Attacking Civilian Objects, charges two specifications. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally engaging in an attack on a civilian property on or about October 12, 2002, to wit: Paddy's Pub on Legian Street, the Sari Club on Legian Street, and near the U.S. Consulate located in Bali, Indonesia, that is, property that was not a military objective, intending such property to be an object of the attack, knowing or having reason to know that such property was not a military objective. Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, with intentionally engaging in an attack on a civilian property on or about August 5, 2003, to wit: the J.W. Marriott Hotel located in or around Jakarta, Indonesia, that is, property that was not a military objective, intending such property to be an object of the attack, knowing or having reason to know that such property was not a military objective.

Charge VII, Violation of 10 U.S.C. § 950t(16), Destruction of Property in Violation of the Law of War, charges two specifications. Specification 1 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, and in violation of the law of war, on or about October 12, 2002, with intentionally destroying property belonging to another person, without that person's consent, to wit: Paddy's Pub on Legian Street and the Sari Club on Legian Street in Bali, Indonesia. Specification 2 charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, and in violation of the law of war, on or about August 5, 2003, with intentionally destroying property belonging to another person,

without that person's consent, to wit: the J.W. Marriott Hotel located in or around Jakarta, Indonesia.

Charge VIII, Violation of 10 U.S.C. § 950t(29), Conspiracy, charges one specification. The one specification charges Mr. Nurjaman, Mr. bin Lep, and Mr. bin Amin, in the context of and associated with hostilities, from on or about August 1996 to on or about August 2003, at multiple locations in or around Afghanistan, Southeast Asia, and elsewhere, with knowingly conspiring and agreeing with Usama bin Laden, Khalid Shaikh Mohammad, Abu Bak'r Ba'aysir, Abdullah Sungkar, and numerous others, known or unknown, as referenced on an Appendix B incorporated into the charge sheet, to commit one or more substantive offenses, including murder in violation of the law of war, attempted murder in violation of the law of war, intentionally causing serious bodily injury, terrorism, attacking civilians, attacking civilian objects, and destruction of property in violation of the law of war.

This specification further incorporates paragraphs numbered 1-60, listed in the section entitled "Common Allegations," which allege, among other things, that named co-conspirators agreed to partner with al Qaeda in jihad; that a named co-conspirator called for attacks on U.S. military personnel; that named co-conspirators arranged for and engaged in training with al Qaeda, including military training and the handling of explosives, in Afghanistan and elsewhere; that a named co-conspirator issued a fatwah declaring it a duty to kill American and their allies, both civilian and military, in any country where it is possible; that co-conspirators discussed a plan to attack U.S. Navy warships; that named al Qaeda co-conspirators provided financial means to conduct surveillance for purposes of identifying, among other things, U.S. military targets; that named al Qaeda co-conspirators directed and participated in attacks on U.S. civilian and military targets on September 11, 2001; that Mr. bin Lep and Mr. bin Amin swore allegiance

to Usama bin Laden; that al Qaeda selected Mr. bin Lep and Mr. bin Amin, among others, to participate in a terrorist operation in the United States; and that a named al Qaeda co-conspirator provided financial support to conduct terrorist attacks against westerners in Indonesia.¹

5. Law and Argument

I. **The Charges and Specifications Provide Sufficiently Particularized Notice to the Accused that He Is Charged with Murdering 211 Persons, Seriously Injuring at Least 31 Other Persons, and Committing Other Offenses Under the Law of War.**

American military tribunals, including military commissions, have a long and well-established history of charging offenses “in violation of the law of war,” without need to resort to a specific statute or article of a treaty. *See* WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 842 (rev. 2d ed. 1920) (explaining that the charge in a military commission need only state “by simple terms of description” a law of war violation, or may, alternatively, state “simply Violation of the Law of War,” with the “specification indicating the species of the violation”); *see also* Rule for Courts-Martial 307(c)(2), Discussion at (D) (“In the case of a person subject to trial by general court martial for violations of the law of war . . . the charge should be ‘Violation of the Law of War.’”). The Supreme Court of the United States has expressly approved such a manner of charging violations of the law of war, stating, “Obviously charges of violations of the law of war triable before a military tribunal need not be stated with

¹ A ninth charge alleges one specification against Mr. bin Lep and Mr. bin Amin, but not Mr. Nurjaman. Charge IX alleges violation of 10 U.S.C. § 950r, Accessory After the Fact. It charges Mr. bin Lep and Mr. bin Amin, knowing that Mr. Nurjaman committed various offenses, including murder in violation of the law of war, attempted murder, intentionally causing serious bodily injury, terrorism, attacking civilians, attacking civilian objects, and destruction of property in violation of the law of war, did, between on or about October 12, 2002 and on or about June 30, 2003, in Thailand, Cambodia, and elsewhere, in order to hinder or prevent the apprehension, trial or punishment of Mr. Nurjaman, assist Mr. Nurjaman by obtaining and providing false documents, weapons, and funds, and by arranging for Mr. Nurjaman transportation and safe house lodging.

the precision of a common law indictment.” *In re Yamashita*, 327 U.S. 1, 17 (1946). The Prosecution has met this minimal notice requirement, given that the challenged charges describe various violations of the law of war along with detailed specifications such that the Accused can sufficiently prepare his defense.

First, every element for the challenged charges is described in the specification to each charge using the language of the statute, the MCA, and the Defense does not argue otherwise.² Second, each of the challenged specifications state a time and place of the offense. Third, the Defense also does not contest this, and, under controlling case law, these two facts alone are enough to inform the Accused about the charges against him and allows him to protect his double-jeopardy rights. *See* R.M.C. 307(c)(3) (“A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication.”); *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (“[E]ach specification will be found constitutionally sufficient only if it alleges, ‘either expressly or by necessary implication,’ ‘every element’ of the offense, ‘so as to give the Accused notice [of the charge against which he must defend] and protect him against double jeopardy.’ (internal quotation marks omitted) (quoting Rule for Courts-Martial (R.C.M.) 307(c)(3))”).

Ultimately, the Accused’s central claim is that “[n]one of the specifications or the un-numbered ‘common allegations’ provide essential facts that identify the hostilities or the nexus between the alleged offense and such hostilities,” AE 0043.001 (NUR), at 3. However, the Commission need only look at the language of the specifications to make the determination that the charged language alleges every element of the charged offense, expressly or by “necessary

² *Compare* Manual for Military Commissions at Part IV-11, 13 (2019 ed.) (listing elements), *with* Charges I through VIII in the Charge Sheet.

implication.” *See* R.M.C. 307(c)(3). Specifically, the charges and common allegations, as set forth in the Charge Sheet, allege facts establishing, *at the very least*, that the armed conflict between the United States and al Qaeda is an armed conflict subject to the law of war, that these hostilities existed between al Qaeda and the United States at all times relevant to the charged conduct, and that the Accused and his co-conspirators supported and conspired with the al Qaeda organization as principals and co-conspirators in the October 12, 2002 and August 5, 2003 attacks as part of al Qaeda’s on-going war with the United States. Moreover, the charging document as alleged does not otherwise preclude the Prosecution from presenting additional facts and evidence at trial to prove the element of hostilities beyond the Accused’s membership or affiliation with al Qaeda. For instance, the Prosecution may also present facts and evidence at trial regarding the Accused’s membership or affiliation with Jemaah Islamiyah and its attacks on United States and Western interests.

II. The Existence of Hostilities Is an Issue for the Fact-Finder at Trial.

For the reasons discussed above, the charges as alleged provide the Accused with sufficiently particularized notice of the violations of the law of war of which he is charged. The general allegation that the Accused’s violations occurred “in the context of and associated with hostilities,” even apart from the specific allegations detailed in the lengthy “Common Allegations” and the numbered charges, is sufficient to inform the Accused of the charges against him with sufficient particularity so that he knows what he is defending himself against and can prepare a defense. As the charges are adequately alleged, further specification and proof is a matter for the factfinder at trial.

The offenses in this case are made punishable under Title 10, U.S. Code, “Chapter 47A—Military Commissions.” Subchapter VIII of the MCA, entitled “Punitive Matters,”

10 U.S.C. § 950p(c), provides that a nexus to “hostilities”³ is one of the “common circumstances” for all offenses triable by military commissions under Chapter 47A, Military Commissions. *United States v. Al Nashiri*, 2016 U.S. CMCR LEXIS 1, *20, 191 F. Supp. 3d 1308 (U.S.C.M.C.R. 2016).⁴ In *Al Nashiri*, the U.S. Court of Military Commissions Review (CMCR) determined the Commission has power to proceed, provided the charged offenses are punishable under the MCA and the Accused does not challenge his alien unprivileged enemy belligerent (“AUEB”)⁵ status. *See id.* at *19-20. Here, the charged offenses are punishable under the MCA, and there is no current challenge to the Accused’s status as AUEBs.

The CMCR further held in *Al Nashiri* that the common circumstance of “in the context of and associated with hostilities,” should be determined at trial, unless the Government has made a full proffer of the evidence it intends to present at trial or has stipulated to the facts. *See id.* at *43-44 (“Assuming arguendo that if an offense ‘committed in the context of and associated with hostilities’ could be construed as a ‘jurisdictional element,’ we concur with those courts holding that when the jurisdictional requirement is also a substantive element of the offense, the issue should be determined at trial.”). Because the Accused’s motion “raises factual questions that are interwoven with the issues on the merits” and the Government has not

³ The MCA defines “hostilities” as “any conflict subject to the laws of war.” 10 U.S.C. § 948a(9).

⁴ The CMCR’s ruling in *United States v. Al Nashiri* has been deemed to be controlling by other commissions. See AE 488I, *United States v. Khalid Shaikh Mohammad, et al.*, May 31, 2017.

⁵ The MCA defines “alien” as “an individual who is not a citizen of the United States.” 10 U.S.C. § 948a(1). The MCA defines the term “unprivileged enemy belligerent” as “an individual (other than a privileged belligerent) who—(A) has engaged in hostilities against the United States or its coalition partners; (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or (C) was a part of al Qaeda at the time of the alleged offense.” 10 U.S.C. § 948a(7).

made a full proffer of its evidence or stipulated to the facts, “resolution of those factual questions must be deferred until trial.” *Id.* at *50-52.

At trial, the Government must prove beyond a reasonable doubt that, at the time of the charged offenses, a state of hostilities existed and the charged offenses were committed in the context of and associated with those hostilities. As noted above, the lengthy list of common allegations in the charge sheet, as well as the charges themselves, are sufficient to inform the Accused of the charges against him with sufficient particularity so that he knows what he is defending himself against and can prepare a defense.

Mr. Nurjaman states in his motion, “[t]he identification of a specific armed conflict, and a nexus between the alleged offenses and that armed conflict, are essential elements in every charge levied against Mr. Nurjaman.” AE 0043.001 (NUR) at 16. The Government agrees and notes from the CMCR’s ruling in *Al Nashiri* that the “nexus to hostilities is an element of the charges,” and that “the military judge is foreclosed from requiring the Government to prove an element of the offense prior to the presentation of evidence on the merits.” *Al Nashiri* at 32, 37. The Accused’s motion, therefore, should be denied.

6. Conclusion

The Commission should deny the Defense Motion to Dismiss for Failure to State an Offense, as the charges and specifications provide sufficient notice to the Accused as to what they must be prepared to meet at trial.

7. Oral Argument

The Prosecution does not request oral argument. Furthermore, the Prosecution respectfully moves this Commission to dispense with oral argument as the facts and legal contentions are adequately presented in the material now before the Commission and argument

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 30th day of November 2022, I filed AE 0043.002 (GOV), Government Response to AE 0043.001 (NUR), Defense Motion to Dismiss For Failure To State An Offense, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

//s//

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