MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA **v.** **ENCEP NURJAMAN;** **MOHAMMED NAZIR BIN LEP;** **MOHAMMED FARIK BIN AMIN**	**AE 0046.002 (GOV)** **Government Response** To AE 0046.001 (NUR) Motion to Dismiss Based on the Government's Violation of Mr. Nurjaman's Right to a Speedy Trial 14 February 2023

1. Timeliness

The Government timely files this Response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.

2. Relief Sought

The Government respectfully requests that the Commission deny the requested relief set forth in AE 0046.001 (NUR), Mr. Nurjaman's Motion to Dismiss Based on the Government's Violation of Mr. Nurjaman's Right to a Speedy Trial.

3. Burden of Proof

With respect to alleged delay under Rule for Military Commissions (R.M.C.) 707, the Government has the burden of persuasion under R.M.C. 905(c)(2)(B). As to any other factual issues, the Defense, as the moving party, has the burden under a preponderance of the evidence standard in accordance with R.M.C. 905(c)(1)-(2).

4. Facts

On 12 October 2002, a suicide bomber entered Paddy's Pub, a nightclub located in Bali, Indonesia, and detonated a bomb. As the patrons of Paddy's Pub fled into the street, a second bomb, hidden inside of a Mitsubishi van parked on the street, detonated outside of the Sari Club,

another nightclub across the street from Paddy's Pub. The attacks killed 202 civilians, including seven Americans, and injured countless others. *See* Charge Sheet, Common Allegations.

Almost one year after the Bali Bombing, on 5 August 2003, a bomb inside of a truck detonated outside the front entrance of the J.W. Marriott Hotel in Jakarta, Indonesia. *Id*. The resulting explosion killed 11 and wounded 81 civilians. *Id.*

In August 2003, Mr. Nurjaman was captured by the United States Government. *Id*. On 21 January 2021, the Convening Authority referred 8 charges and 15 specifications against Mr. Nurjaman under the Military Commissions Act of 2009 (2009 M.C.A.). *Id*. The charges include murder, attempted murder, terrorism, causing serious bodily injury, attacking civilians and civilian objects, destruction of property, and conspiracy. *Id*.

The service of charges took place on 24 January 2021. Before arraignment in this case, Mr. Nurjaman filed a motion to "to stay indefinitely the arraignment and the proposed hearings pursuant to R.M.C. 707," citing COVID-19-related concerns, manning and resources, and discovery. AE 0002.002 (NUR) at 1. The Government and Mr. Bin Amin also filed motions to continue. The Commission granted a continuance under R.M.C. 707(b)(4)(E), which provides that "[a]ll such periods of delay resulting from a continuance granted by the military judge . . . shall be excludable." AE 0002.007 (TJ) at 4–5, 7; R.M.C. 707(b)(4)(E)(ii).

5. Law and Argument

I. R.M.C. 707 Is the Applicable Source of Mr. Nurjaman's Speedy Trial Rights and Adequately Protects Those Rights

The accused in a military commission enjoy robust rights substantially similar to the accused in all other American judicial fora. These include, *inter alia*, the right to be brought to trial within 30 days of service of charges and the right to the assembly of the military commission within 120 days of the service of charges. R.M.C. 707.

In passing the M.C.A., Congress authorized the Secretary of Defense to prescribe "[p]retrial, trial, and post-trial procedures, including elements and modes of proof, for cases triable for military commission under [the M.C.A.]." 10 U.S.C. § 949a(a). Pursuant to that authority, the Secretary of Defense promulgated R.M.C. 707, which affords an accused a right to a timely trial by specifically providing:

> (1) Within 30 days of the service of charges, the accused shall be brought to trial. An accused is brought to trial within the meaning of this rule at the time of arraignment under R.M.C. 904 or, if arraignment is not required (such as in the case of a sentence-only rehearing), at the time of the first session under R.M.C. 803.
>
> (2) Within 120 days of the service of charges, the military judge shall announce the assembly of the military commission, in accordance with R.M.C. 911.
>
> (3) As soon as practicable after the service of charges, the military judge shall set an appropriate schedule for discovery.

R.M.C. 707(a)(1)–(3).

The Rule also permits the military judge to grant a continuance to any party for "such time, and as often, as may appear to be just," for "reasonable cause," and states that "[a]ll such periods of delay resulting from a continuance granted by the military judge . . . shall be excludable." R.M.C. 707(b)(4)(E)(i)–(ii). R.M.C. 707 establishes speedy trial rights by requiring prosecutorial and judicial action within designated time periods. R.M.C. 707 simultaneously protects these rights by permitting the military judge to grant a continuance only "for such time, and as often, as may appear to be just." *Id.* It therefore addresses the "general concern" surrounding speedy trial rights that "all accused persons be treated according to decent and fair procedures." *Barker v. Wingo*, 407 U.S. 514, 519 (1972). Likewise, R.M.C. 707 comports with the generally accepted practice that "a defendant's right to a speedy trial should be formally recognized and protected by rule or statute that establishes outside limits on the amount of time that may elapse from the day of specific event until the commencement of trial or

other disposition of the case." American Bar Association, *ABA Standards for Criminal Justice: Speedy Trial and Timely Resolution of Criminal Cases* § 12-2-1 (3d ed. 2006).

There is no meaningful distinction between the general protections available under international law and the speedy trial rights Mr. Nurjaman enjoys under R.M.C. 707. The Commission therefore need not delve into the precise manner by which international law applies to alien unprivileged enemy belligerents (AUEBs) in order to deny Mr. Nurjaman's motion. Assuming *arguendo* that speedy trial rights are among the specific features of a "regularly constituted court" or an "indispensable judicial guarantee[],"[1] nothing in Common Article 3 of the 1949 Geneva Conventions dictates or otherwise demands a specific method by which those rights are provided. Indeed, R.M.C. 707, like the rest of the R.M.C.s, provides "the accused all the judicial guarantees which are recognized as indispensable by civilized peoples as required by Common Article 3 of the Geneva Conventions of 1949." Manual for Military Commissions, Part I (Preamble), para. 2 (2019 ed.); *see also* Sixth Periodic Rep. of the United States to the Comm. Against Torture Concerning the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ¶ 90 (Sept. 24, 2021) ("All current military commission proceedings at Guantanamo incorporate fundamental procedural guarantees that meet or exceed the fair trial safeguards required by Common Article 3 of the 1949 Geneva Conventions and other applicable law, and are consistent with those in the 1977 Additional Protocol II to the 1949

[1] To the extent the Commission would look to Additional Protocol (AP) I, Article 75, for guidance to define "indispensable judicial guarantees," despite the fact that AP I applies only in international armed conflicts not at issue here, paragraph 3 of that provision similarly makes it clear that the speedy trial rights afforded to Mr. Nurjaman under R.C.M. 707 satisfy such requirements. *See, e.g.*, AP I, Art. 75, ¶ 3 (requiring that a detained person be "informed promptly" of the reasons for the detention); *id.* ("Except in cases of arrest or detention for penal offences," requiring detained persons to "be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or interment have ceased to exist.").

Geneva Conventions as well."). Although some foreign interpretations of the Geneva Conventions and customary international law may imply broader rights than those afforded by the M.C.A. or R.M.C., domestic authorities control. *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 738 (2004) ("Whatever may be said for the broad principle Alvarez advances, in the present, imperfect world, it expresses an aspiration that exceeds any binding customary rule having the specificity we require"); *see also Bin Lep v. Trump*, 2020 U.S. Dist. LEXIS 234033, at *25 (D.D.C. 2020) (Bates, J.) (concluding that neither the 1990 Senate Report nor the 2000 Executive Branch Report interpreting the United States' Convention Against Torture obligations, upon which the petitioner relied to substantiate his claims, "likely suffice to ground a parallel speedy trial right for Guantanamo detainees in the [Detainee Treatment Act]"). No matter the specific speedy trial rights that might be derived from Common Article 3, the rights and procedural protections afforded to Mr. Nurjaman by R.M.C. 707 surpass basic international law requirements.

II. The Logical and Purposeful Exclusion of Article 10, U.C.M.J. from the M.C.A. Is Not an Affirmative Denial of Speedy Trial Rights to a Law-of-War Detainee Being Tried Pursuant to the M.C.A.

Military commissions convened pursuant to the 2009 M.C.A. apply only the provisions of the Uniform Code of Military Justice (U.C.M.J.) that (1) specifically state in the provision that it applies to military commissions or (2) the M.C.A. expressly incorporates. *See* 10 U.S.C. §§ 948b(c), 948b(d)(2). The general inapplicability of the U.C.M.J. to military commissions comports with the fact that only certain persons are subject to the U.C.M.J., *see* 10 U.S.C. § 802 ("Persons subject to this chapter"), and that courts-martial may only try certain persons, *see id.* § 803 ("Jurisdiction to try certain personnel"). AUEBs subject to military commissions under the M.C.A., such as Mr. Nurjaman, are not subject to the U.C.M.J. *See id.* § 802(a) ("The

following persons are subject to this chapter: . . . Individuals belonging to one of the eight categories in Article 4 of the Convention Relative to the Treatment of Prisoners of War, done at Geneva August 12, 1949 (6 UST 3316), who violate the law of war"); *see also id.* §§ 948(a)(4)–(7), 948c (exempting privileged belligerents from military commissions convened under the M.C.A.).

When drafting the 2009 M.C.A., Congress expressly excluded specific portions of the U.C.M.J. *See City of Boerne v. Flores*, 521 U.S. 507, 535 (1997) ("When Congress acts within its sphere of power and responsibilities, it has not just the right but the duty to make its own informed judgment on the meaning and force of the Constitution."); *United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others."). In so doing, Congress undoubtedly applied the same analytical framework it authorized the Secretary of Defense to apply when prescribing procedures for military commissions: deviating from court-martial procedures only "as may be required by the unique circumstances of the conduct of military and intelligence operations during hostilities or by other practical need consistent with [the M.C.A.]." 10 U.S.C. § 949a(b)(1). Article 10 was one such provision that Congress explicitly excluded from the M.C.A. *See* 10 U.S.C. § 948b(d)(1)(A) ("The following provisions of this title shall not apply to trial by military commission under this chapter: (A) Section 810 (article 10 of the Uniform Code of Military Justice) relating to speedy trial, including any rule of courts-martial relating to speedy trial.").

Article 10 is a distinct trial right for service members who are subject to the U.C.M.J. Article 10 provides that "when a person subject to this chapter [the U.C.M.J.] is *ordered* into

arrest or confinement before trial, immediate steps shall be taken . . . to try the person or to dismiss the charges and release the person." *Id.* § 810(b) (emphasis added). For Article 10 to apply, "confinement must be related to specific charges." *United States v. Cooley*, 75 M.J. 247, 257 (C.A.A.F 2016). Under Article 10, "once an [accused] is placed in pretrial confinement the Government is required to exercise 'reasonable diligence' in bringing the accused to trial." *United States v. Danylo*, 73 M.J. 183, 186 (C.A.A.F. 2014) (quoting *United States v. Kossman*, 38 M.J. 258, 262 (C.M.A. 1993)). "Pretrial confinement" is in this context a term of art defined by the U.C.M.J. as "physical restraint, imposed by order of competent authority, depriving a person of freedom *pending disposition of offenses*." Rule for Courts-Martial 304(a)(4) (emphasis added). Article 10 thus contemplates only situations in which pending courts-martial are the *sole* authority for confinement.

It is inapposite to apply this pretrial confinement protection to AUEBs who have been detained under the law of war in order to prevent their return to the battlefield or to gain valuable intelligence to help win the war. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) ("The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are 'important incident[s] of war.' The purpose of detention is to prevent captured individuals from returning to the field of battle and taking up arms once again.") (quoting *Ex parte Quirin*, 317 U.S. 1, 28, 30 (1942)). It is likewise misguided to consider law-of-war detainees like Mr. Nurjaman as detainees "*ordered*" into confinement solely for the disposition of offenses. 10 U.S.C. § 810 (emphasis added); *see also Quirin*, 317 U.S. at 31 ("Unlawful combatants are likewise subject to capture and detention, but *in addition*, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.") (emphasis added). As such, it would have been unreasonable to

incorporate Article 10 into a military commission practice limited to trying AUEBs detained pursuant to the law of war. As a result, Congress's decision to explicitly exclude Article 10 of the U.C.M.J. from the M.C.A. due to Article 10's inapplicability to law-of-war military commissions does not affirmatively deny law-of-war detainees being tried under the M.C.A. the right to a speedy trial, and it does not render the M.C.A. facially invalid, especially where law-of-war detainees who have charges referred against them for the "acts which render their belligerency unlawful" gain express speedy trial guarantees at the time of referral.

III. The 2009 M.C.A. Does Not Violate the *Ex Post Facto* Clause

To the extent the Accused challenges the logical and purposeful exclusion of Article 10 from the M.C.A. as an *ex post facto* violation, the Commission should similarly reject that claim. *See* AE 0046.001 (NUR) at 13 ("[T]he statutory language [of the 2009 M.C.A.] does not claim to be retroactive, nor could it properly be retroactive in light of the ex post facto clause of the United States Constitution and the Principle of Legality under international law."). In the seminal *ex post facto* case—*Calder v. Bull*—Justice Chase explained that the *Ex Post Facto* Clause means that legislatures:

> shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it. The prohibition considered in this light, is an additional bulwark in favour of the personal security of the subject, to protect his person from punishment by legislative acts, having a retrospective operation.

Calder, 3 U.S. at 390.

Justice Chase then enumerated the enduring four categories of laws that violate the *Ex Post Facto* Clause: (1) a law that criminalizes acts that were not criminal at the time they were committed; (2) a law that aggravates a crime or makes it greater than it was at the time it was committed; (3) a law that imposes additional punishment for a crime that would have not been so punished at the time committed; or (4) changes to the rules of evidence that require less

or different evidence to convict than would have been required at the time the act was committed. *Id.* Taken together, these four categories bar retroactive application of a "statute which punishes as a crime an act previously committed, which was innocent when done; which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with a crime of any defense [previously] available according to the law when the act was committed." *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (quoting *Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925)).

The exclusion of Article 10 by Section 948b(d)(A) of the M.C.A. does not fall within any of the four *Calder* categories. Mr. Nurjaman does not articulate a cognizable, *ex post facto* violation in the instant motion. As the Supreme Court has recognized, "it [is] a mistake to stray *beyond Calder*'s four categories," and the Commission should decline the Mr. Nurjaman's invitation to do so here. *Carmell v. Tex.*, 529 U.S. 513, 539 (2000) (citing *Collins*, 497 U.S. at 46).

IV. The Commission Need Not Address the Application of Constitutional Fifth and Sixth Amendment Protections Because R.M.C. 707 Satisfies Those Standards

As the M.C.A. is the authority for the provision of rights to the Accused in this Commission, R.M.C. 707 is the applicable source of law under which to analyze any speedy trial claim. A review of the facts demonstrates that there has been no violation of R.M.C. 707 during any period Mr. Nurjaman claims, as there has never been a time when its time requirements were violated. Furthermore, even assuming *arguendo* that the proper lens through which to analyze the Accused's speedy trial rights is *Barker v. Wingo*, there has been no violation of that standard. Any delay of proceedings in this Commission has been justified by its extreme complexity and the enormous logistical burdens of an international terrorism case with roots in active military operations spanning the globe.

The Supreme Court has formulated a four-factor balancing test for evaluating a defendant's claim that his speedy trial rights have been violated. *Barker*, 407 U.S. 514 (1972). Specifically, a court must consider: (1) the length of the delay; (2) the reasons for the delay; (3) whether the defendant asserted his [speedy trial] right in the run-up to the trial; and (4) whether the defendant was prejudiced by the failure to bring the case to trial more quickly. *Id*. at 530.

1. The Length of the Delay

Charges were referred on 21 January 2021 and served on Mr. Nurjaman on 24 January 2021. The Commission set the arraignment for 22 February 2021. AE 0002.001. Mr. Nurjaman filed a Motion for a Continuance on 30 January 2021. AE 0002.001. That request was ultimately granted, and the Commission counted the delay as excludable for purposes of calculating time in accordance with the rule. AE 002.008 (Amended Arraignment Order); AE 002.007 (Interim Order Granting Excludable Delay). The calculation for purposes of this rule from service of charges until arraignment is, therefore, 218 days, all of which is excludable.

Mr. Nurjaman analyzes this factor by measuring "between arrest and trial," arguing the length of delay here is long enough to trigger the remaining *Barker* analysis. This analysis is fundamentally flawed.

First, Mr. Nurjaman mischaracterizes the term "arrest." Mr. Nurjaman was captured in August 2003 in the midst of active combat operations, not arrested in anticipation of criminal proceedings. Thus, not only was there not an "arrest" effectuated in August 2003, but Mr. Nurjaman's subsequent detention from 2003 until service of charges in January 2021 was authorized under law-of-war detention and did not constitute pretrial restriction or confinement. *See Quirin*, 317 U.S. at 31.

To trigger a speedy trial analysis, an accused must allege that the interval between accusation and trial has crossed the threshold dividing ordinary from "presumptively prejudicial" delay since, by definition, he cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with "customary promptness." *See Doggett v. United States*, 505 U.S. 647, 651–52 (1992) (citation omitted). If the accused makes this showing, the court must then consider, as one factor among several, the extent to which the delay stretches beyond the bare minimum needed to trigger judicial examination of the claim.

Given the extraordinary complexities of prosecuting this case, and the reasonable continuances sought by both parties, the length of time to prosecute this case falls within all notions of "customary promptness." The Government has progressed within the lower range of complex, terrorism prosecutions. As *Doggett* makes clear, the period of "customary promptness" covers "the interval between accusation and trial." Assuming Mr. Nurjaman was "accused" for purposes of the *Barker* analysis when the current charges were sworn in April 2019,[2] and Comparing this case with cases of comparable complexity, the current timeline is consistent with "customary promptness."[3]

[2] This start date necessarily needs to be distinguished from the R.M.C. 707 clock, which begins at service of referred charges.

[3] *See, e.g.*, *United States v. Stevens*, No. 04-cr-222S, 2009 U.S. Dist. LEXIS 66926 (W.D.N.Y. Aug. 3, 2009) (holding that in light of the complex nature of the case, the numerous venues and jurisdictions involved, the extensive motion practice by all defendants and the numerous changes of counsel by the defendants, the government was not to blame for the delay in the case); *United States v. Camello Gomez*, No. S91-cr-451, 1991 U.S. Dist. LEXIS 18719, at *1, 17 (S.D.N.Y. Dec. 26, 1991) (stating that there were legitimate reasons for delay in the case, including the size and complexity of the case); *see also United States v. Smith*, No. NMCCA 200300497, 2006 CCA LEXIS 33, (N-M. Ct. Crim. App. Feb. 16, 2006) (stating that "our superior court has recognized that the reasons for delay" in analyzing whether the government has proceeded with reasonable diligence under an Article 10, U.C.M.J. claim may include: (1) the complexity of the case; (2) logistical impediments and operational considerations unique to the military; and (3) ordinary judicial impediments such as crowded dockets, unavailability of judges, and attorney caseloads); *Kossman*, 38 M.J. at 261–62.

2. The Reasons for the Delay

Perhaps the most important factor to consider is the reason for any such delay. *See United States v. Loud Hawk*, 474 U.S. 302, 315 (1986) (noting that "[t]he flag all litigants seek to capture is the second factor, the reason for delay").

As *Barker* made apparent, "[t]he speedy-trial right is 'amorphous,' 'slippery,' and 'necessarily relative.'" *Barker*, 407 U.S. at 522. The right is "consistent with delays and depends upon circumstances." *Id*. Further, "because of the imprecision of the right to speedy trial, the length of delay that will provoke such an inquiry is necessarily dependent upon the peculiar circumstances of the case. To take but one example, the delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Id*. at 530–31.

Applying this rationale to analogous cases where, "the logistical challenges of a world-wide system that is constantly expanding, contracting, or moving can at times be daunting," *Kossman*, 38 M.J. at 261, courts have upheld delays of five, six, and seven years where circumstances, including national security concerns, trial logistics, and complex litigation necessitated such delays.[4]

[4] *See United States v. Ghailani*, 733 F.3d 29, 48 (2d Cir. 2013) (finding that a five-year delay in a federal criminal case that was initially a military commission case was justified based on national security concerns and preparations for a complex international terrorism case and observing that "nothing in the text or history of the Speedy Trial Clause that requires the government to choose between national security and an orderly and fair justice system"); *see also United States v. Muhtorov*, 20 F.4th 558 (10th Cir. 2021) (upholding a six-and-a-half year delay in international terrorism case involving a large amount of classified discovery); *see also Loud Hawk*, 474 U.S. at 317 (upholding five-year delay when lengthy interlocutory appeals were needed to answer complex questions of law); *Barker*, 407 U.S. at 533 (upholding a delay of "well over five years" where the public interest weighed in favor of prosecuting a co-defendant first due to evidentiary issues); *Rayborn v. Scully*, 858 F.2d 84, 89 (2d Cir. 1988) (upholding delay of over seven years); *United States v. Lane*, 561 F.2d 1075, 1078 (2d Cir. 1977) (upholding delay of nearly 5 years); *United States v. Saglimbene*, 471 F.2d 16, 17 (2d Cir. 1972) (upholding delay of six years); *United States v. Lin*, 78 M.J. 850, 860–63 (N-M. Ct. Crim. App.

Under this framework, the reasons for delay are paramount, and the public interest can allow for several-year delays where necessary. Considering that this is a large and complex investigation and criminal trial, involving thousands of pages of classified discovery that have required careful review and litigation; witnesses and evidence from multiple countries; multiple governmental agencies; and multiple accused with interrelated cases—this case certainly satisfies the "reason for delay" prong of the *Barker* framework. This is especially appropriate given the Government's persistence toward a fair trial and expeditious resolution of this case. *See McCullough*, 60 M.J. at 585 ("[W]e hold that the government exercised reasonable diligence in the processing of appellee's case in the fact of three obstacles: (1) operational requirements, (2) unavailability of critical witnesses, which made prosecution more complex, and (3) defense-requested delay.").

3. The Accused's Assertion of His Right to Speedy Trial

The third factor involves Mr. Nurjaman's assertion of his right. At the service of charges on 24 January 2021, the Government was ready to proceed with arraignment. The Government had begun its lengthy discovery obligations when Mr. Nurjaman asked for the arraignment to be "indefinitely stayed." AE 0002.002 (NUR). The Court granted a continuance and allowed a lengthy excludable delay. AE 0002.007. Mr. Nurjaman not only accepted that delay but actively advocated for it. AE 00002.002 (NUR). Indeed, in setting a trial schedule, Mr. Nurjaman "respectfully propose[d] a conditional trial date no earlier than 1 February 2029." AE 0024.027

2019) (allowing for delay in spying case where the accused requested delay and his chosen civilian defense counsel needed time to acquire the requisite security clearance and review the classified discovery); *United States v. McCullough*, 60 M.J. 580, 585 (A. Ct. Crim. App. 2004) ("[M]ilitary exigencies may constitute a legitimate reason for delay under Article 10, UCMJ. . . . [D]elay, for example, may be justified, in part, simply by operational demands of field exercises . . . . [T]he prosecution is permitted a reasonable amount of additional time . . . because of extraordinary operational requirements and personnel turbulence resulting from deployment of significant portions of the division overseas.").

(NUR) at 1. Simply put, Mr. Nurjaman has not adequately asserted any speedy trial right when the opportunity to do so would seem to be most present.

4. Prejudice

The pre-referral hardships implied by Mr. Nurjaman in this motion are not rightly considered under a *Barker* framework. Instead, "[p]rejudice … must be ow[ed] to the delay." *Barker*, 407 U.S. at 534. More specifically "the relevant interval is the period between the date by which the trial should have begun absent unexcused delay and the actual date of the trial." *See, e.g.*, *United States v. Gregory*, 322 F.3d 1157, 1163 (9th Cir. 2003) (holding that "[t]he prejudice with which we are concerned is prejudice caused by the delay that triggered the *Barker* inquiry, not simply any prejudice that may have occurred before the trial date but unrelated to the fact of the delay itself"); *United States v. Holyfield*, 802 F.2d 846, 848–49 (6th Cir. 1986) (assessing possible prejudice resulting from a five-month period of "unexcusable delay" rather than the entire fifteen-month period between indictment and trial); *United States v. Guerrero*, 756 F.2d 1342, 1350 (9th Cir. 1984) (rejecting a speedy trial claim despite a significant delay because the appellant had "not sufficiently shown any causal relationship between the delay and the unavailability of two witnesses" without whose testimony he alleged he was prejudiced).

In light of the foregoing factors, Mr. Nurjaman is not entitled to relief on a speedy trial claim.

6. <u>Conclusion</u>

For the above reasons the Commission should deny the Motion to Dismiss.

7. <u>Oral Argument</u>

The Government does not request oral argument.

8. Witnesses and Evidence

The Government will not rely on any witnesses or additional evidence in support of this response.

9. Attachment

Certificate of Service, dated 14 February 2023.

Respectfully submitted,

//s//
George C. Kraehe
COL USA
Trial Counsel

//s//
Joshua S. Bearden
LTC USA
Deputy Trial Counsel

//s//
Jeffrey M. Larson
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ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 14th day of February 2023, I filed AE 0046.002 (GOV), Government Response to AE 0046.001 (NUR) Motion to Dismiss Based on the Government's Violation of Mr. Nurjaman's Right to a Speedy Trial, with the Office of Military Commissions Trial Judiciary, and I served a copy on counsel of record.

//s//
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