

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 168

**UNCLASSIFIED NOTICE OF
DEFENSE CLASSIFIED FILING**

**DEFENSE MOTION TO DISMISS
CHARGES 9-11 FOR LACK OF
JURISDICTION UNDER
INTERNATIONAL LAW**

26 August 2013

In accordance with the Military Commission Trial Judiciary Rules, the defense provides this unclassified notice that it has filed a classified motion with the Trial Judiciary. The classified motion (AE 168) has been filed by electronic delivery via SIPR to the Clerk of Court and to the prosecution.

//s// Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

//s// Allison Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

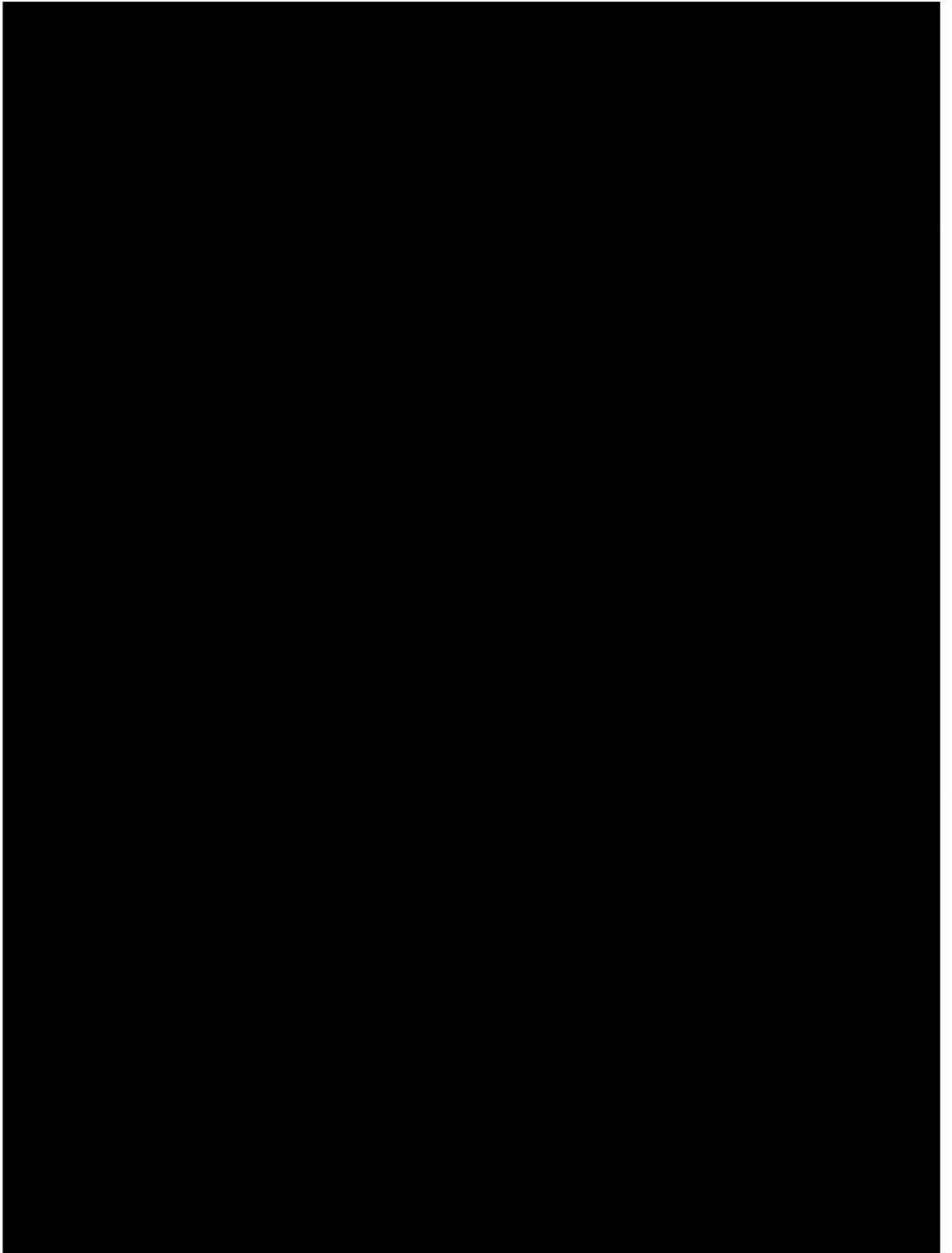
//s// Daphne Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

//s// Richard Kammen
RICHARD KAMMEN
Civilian Learned Counsel

CERTIFICATE OF SERVICE

I certify that on 26 August 2013, I electronically filed the forgoing document with the Clerk of the Court and served the forgoing on all counsel of record by e-mail.

//s// Daphne Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel



MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE 168

**DEFENSE MOTION TO DISMISS
CHARGES IX-XI FOR LACK OF
JURISDICTION UNDER
INTERNATIONAL LAW**

August 26, 2013

1. **Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905 and is timely pursuant to Military Commissions Trial Judiciary Rule of Court (R.C.) 3.7.b.(1).
2. **Relief Requested:** The Defense respectfully requests the dismissal of all charges related to the *MV Limburg*, specifically Charges IX-XI.
3. **Overview:**

“The Due Process Clause requires that a defendant prosecuted in the United States ‘should reasonably anticipate being haled into court in this country.’” *United States v. Lei Shi*, 525 F. 3d 709, 722 (9th Cir. 2008) (citing *United States v. Moreno-Morillo*, 334 F. 3d 819, 827 (9th Cir. 2003)). Accordingly, in order to be prosecuted by the United States there must be a “sufficient nexus between the defendant and the United States....” *United States v. Davis*, 905 F. 2d 245, 248-49 (9th Cir. 1990); *See also United States v. Brehm*, 691 F. 3d 547, 552 (4th Cir. 2012). This is consistent with international law, which authorizes a state to exercise criminal jurisdiction for conduct occurring within its territory (territorial principle) or conduct by its own nationals (nationality principle). *United States v. Hasan*, 747 F. Supp. 599, 606-07 (E.D. Va. 2010). A state may also proscribe criminal conduct that has a substantial effect within its

territory (effects principle) or if the conduct has a substantial effect within its territory (protective principle). *Id.* Because international law provides no basis for the assertion of military jurisdiction over Mr. Al-Nashiri for the alleged attack on the *MV Limburg*, and because the expansive jurisdictional provisions found in 10 U.S.C. §§ 948c and 948d must be construed so as not to conflict with international law, this Commission lacks jurisdiction to try Mr. Al-Nashiri for crimes related to the *MV Limburg*.

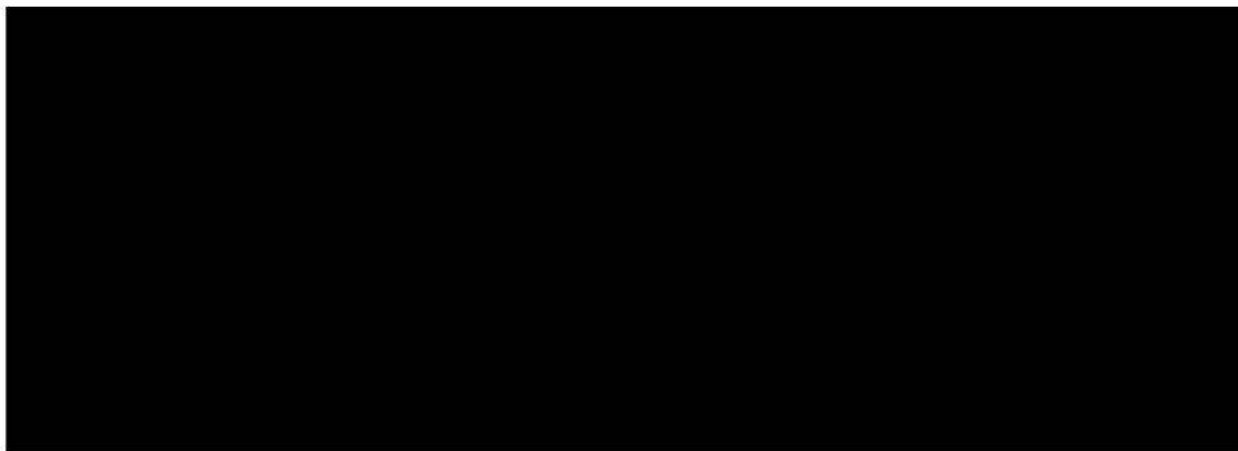
4. **██████████ Burden of Proof and Persuasion:** Because this motion challenges the jurisdiction of the Commission, the government bears the burden of demonstrating that jurisdiction over the accused is lawful by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

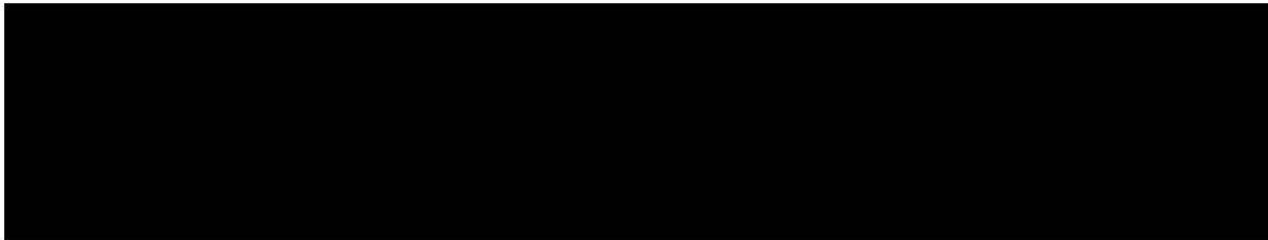
5. **██████████ Statement of Facts:**

a. ██████████ In October 2006, the Malaysian firm Petronas contracted the French-flagged vessel *MV Limburg* to deliver a shipment of crude oil from Iran to Malaysia.

b. ██████████ On October 6, 2002, the *Limburg* was approaching a mooring in Yemeni waters off the coast of Yemen, where she was to take on additional oil.

c. ██████████ As she approached the mooring, she was allegedly struck by an explosive-laden boat on her starboard side.





f. [REDACTED] When American investigators arrived on the *Limburg* four days later, they were met by agents of the French Accident Investigations Bureau.

f. [REDACTED] The French investigators informed their American counterparts that they were on French sovereign territory, and all evidence would be the property of France.


g. [REDACTED] The *Limburg* remains in service.

h. [REDACTED] She has been renamed the *Maritime Jewel*, and is registered in Liberia.

6. [REDACTED] **Argument:**

A) [REDACTED] **Norms of International Law Limit this Commission's Jurisdiction.**

"The sources of military jurisdiction include the Constitution and international law." *Hamdan II v. United States*, 696 F. 3d 1238, 1249 n.18 (D.C. Cir. 2012) (quoting MANUAL FOR COURTS-MARTIAL UNITED STATES, at I-1 (2012)). With respect to military commissions, Congress explicitly referred to international law and explicitly incorporated international norms into U.S. domestic law. *Id.* When Congress incorporates international law into a statute, a court must determine both whether the conduct at issue violates a norm of international law that is well-established and universally recognized, and whether customary international law provides some basis for the exercise of jurisdiction over the conduct. *United States v. Bellaizac-Hurtado*, 700 F. 3d 1245, 1259 (11th Cir. 2012) (Barkett, J., concurring). "Only conduct that violates a



norm of customary international law and is subject to United States jurisdiction under customary international law principles may be prosecuted in United States courts as an ‘Offence against the Law of Nations.’” *Id*; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 401-16. “Thus, in the absence of an explicit Congressional directive, courts do not give extraterritorial effect to any statute that violates principles of international law.” *United States v. Vasquez-Velasco*, 15 F. 3d 833, 839 (9th Cir. 1994); *see also United States v. Martinez*, 599 F. Supp. 2d 784, 799 (W.D. Tex. 2009).

B) ~~██████████~~ The *Charming Betsy* Canon Requires that the MCA be Construed in Conformity with International Law.

This Commission must presume that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804). While the so-called *Charming Betsy* canon imposes no substantive limit on Congress’s legislative authority, it does constrain this Commission’s inquiry into a statute’s scope. *United States v. Ali*, 718 F. 3d 929, 935 (D.C. Cir. 2013). Absent contrary indication, Congress intends its enactments to comport with international law. *Id*. But there can be no argument that Congress did so with respect to the MCA, which “*explicitly* incorporated international norms into domestic U.S. law in 10 U.S.C. § 821...” *Hamdan II*, at 1249 n.8.

C) ~~██████████~~ International Law Provides no Basis for Assertion of Military Jurisdiction over MV Limburg³

“Punishing a crime committed on foreign soil...is an intrusion into the sovereign territory of another nation. As a matter of comity and fairness, such an intrusion should not be

³ The defense does not concede the Charges IX-XI were established war crimes at the time they were allegedly committed, and it will address that issue in a separate motion. This motion is confined to the second requirement of international law “whether customary international law provides some basis for the exercise of jurisdiction over the conduct.” *United States v. Bellaizac-Hurtado*, 700 F. 3d 1245, 1259 (11th Cir. 2012)(Barkett, J., concurring).

undertaken absent proof that there is a connection between the criminal conduct and the United States sufficient to justify the United States' pursuit of its interests." *United States v. Caicedo*, 47 F. 3d 370, 372 (9th Cir. 1995). Accordingly, international law provides for limited instances in which nations may prosecute the crimes of foreign nationals committed abroad. *Id.* at 941. These include the protective principle, the territorial principle, the effects principle, the nationality principle, and the universality principle. *United States v. Ibarquen-Mosquera*, 634 F. 3d 1370, 1378-79 (11th Cir. 2011); *United States v. Bin Laden*, 92 F. Supp. 2d 189, 195 (S.D.N.Y. 2000); *Hasan*, 747 F. Supp. at 606-07; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402-03. Because *Charming Betsy* counsels against interpreting federal statutes to contravene international law, this Commission must conclude that prosecuting Mr. Al-Nashiri for the alleged attack on the *MV Limburg* is inconsistent with the law of nations and the charges at issue should be dismissed. *See Ali*, 718 F. 3d at 935.

International law provides no basis for the assertion of jurisdiction by this Commission over the alleged attack on the *MV Limburg*. Bulgaria could arguably assert jurisdiction based upon the nationality of the crewman who was found dead. As a French-flagged vessel, France could also assert jurisdiction. Yemen has jurisdiction under the territorial principle and arguably under the effects principle. In fact, Yemen has already asserted its jurisdiction over this incident and tried those allegedly responsible. Both Malaysia and Iran may arguably also have jurisdiction, although the assertion of jurisdiction under either the effects principle or protective principle by these nations would be reasonably tenuous. But the United States does not have jurisdiction under any principle.

“The United States cannot be the world’s policeman. If we continue to extend our natural borders of our national jurisdiction, we can expect others to do the same to us.” *United States v. Angulo-Hernandez*, 565 F. 3d 2, 20 (1st Cir. 2009) (Torruella, J., concurring in part). Simply put, international law does not provide the United States with war-crimes jurisdiction to try Saudi citizens for allegedly attacking Bulgarian nationals, French oil tankers, or Iranian oil.

7. ~~(b)(7)(C)~~ **Oral Argument:** The defense requests oral argument on this motion.
8. ~~(b)(7)(C)~~ **Witnesses:** None.
9. ~~(b)(7)(C)~~ **Conference with Opposing Counsel:** The defense has conferred with the government and it objects to this motion.
10. ~~(b)(7)(C)~~ **List of Attachments:** None

/s/ Brian Mizer
BRIAN L. MIZER
CDR, JAGC, USN
Assistant Detailed Defense Counsel

/s/ Allison Danels
ALLISON C. DANELS, Maj, USAF
Assistant Detailed Defense Counsel

/s/ Richard Kammen
RICHARD KAMMEN
DOD Appointed Learned Counsel

/s/ Daphne L. Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

CERTIFICATE OF SERVICE

~~(S)~~ I certify that on 26 August 2013, I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

/s/ Daphne L. Jackson
DAPHNE L. JACKSON, Capt, USAF
Assistant Detailed Defense Counsel

CERTIFICATE OF SERVICE

I certify that on 18 September 2013, I electronically filed AE 168B with the Clerk of Court and served the aforementioned on all counsel of record via electronic mail.

/s/ Daphne L. Jackson

DAPHNE L. JACKSON, Capt, USAF

Assistant Detailed Defense Counsel