MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	AE 351E RULING **Defense Motion** To Dismiss Charge IV, Specification 2; Charge V, Overt Act 26; and Charges VII – IX Pursuant to *RJR Nabisco V. European Community* **30 October 2020**

1. **Procedural Background**.

a. On 11 August 2014, the Commission (Spath, J.) granted defense motions to dismiss charges related to the *MV Limburg* for lack of jurisdiction, dismissing Specification 2 of Charge IV, and Charges VII, VIII, and IX for lack of jurisdiction.[1] AE 168G; AE 241C. The dismissal of the affected charges and specifications was based on the Government's failure to offer evidence in support of their jurisdictional claims during the hearing on the motions in issue.

b. On 9 June 2016, the U.S. Court of Military Commission Review (CMCR) overturned the Commission's ruling, reinstating the dismissed charges. *United States v. Al-Nashiri*, 191 F.Supp.3d 1308, 1328 (U.S.C.M.C.R. 2016).

c. On 8 July 2016, the Defense filed the instant motion, moving the Commission to dismiss all charges related to the attack on the *MV Limburg* as an impermissible extraterritorial application of the 2009 Military Commissions Act (MCA). The Government responded in AE 351A on 22 July 2016. The Defense replied on 28 July 2016 in AE 351B. The Commission

[1] Although the charges related to the attack on the *MV Limburg* were numbered IX-XI on the original charge sheet, subsequent pen-and-ink changes to the referred charges dated 28 September 2011 have resulted in the re-numbering of these charges to VII-IX. Referred Charges at 12 (Sept. 28, 2011).

heard oral argument on this motion on 8 September 2016 during a motions hearing session at U.S. Naval Station Guantanamo Bay, Cuba.[2] On 23 September 2016, the Commission (Spath, J.) denied the defense motion to dismiss, concluding that the MCA does apply extraterritorially. AE 351D.

d. On 16 April 2019, the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit) vacated "all orders issued by Judge Spath on or after November 19, 2015 . . . ." *In re Al-Nashiri*, 921 F.3d 224, 241 (D.C. Cir 2019). In AE 400, this Commission directed the parties to identify vacated orders and rulings that required reconsideration, and in AE 400M, the Defense identified AE 351 as a motion requiring a ruling by this Commission. Accordingly, the Commission hereby reconsiders *ab initio* the subject motion.

2. **Law**.

a. "An indictment fails to state an offense if the specific facts alleged in it 'fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.'" *United States v. Vitillo*, 490 F.3d 314, 320 (3d Cir. 2007) (quoting *United States v. Panarella*, 277 F.3d 678, 685 (3d Cir. 2002)). When an accused is charged with an offense, each specification is sufficient only if it alleges every element of the offense, "either expressly or by necessary implication," so as to give the accused notice of the charge against which he must defend. *United States v. Turner*, 79 M.J. 401, 403 (C.A.A.F. 2020) (quoting *United States v. Dear*, 40 M.J. 196, 197 (C.M.A. 1994) (internal quotation marks omitted)); *see United States v. Fosler*, 70 M.J. 225, 230-32 (C.A.A.F. 2011); *United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010).

b. The Supreme Court has recognized "a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *RJR Nabisco v.*

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[2] Unofficial/Unauthenticated Transcript of the Motions Hearing dated 8 September 2016, at pp. 6446–6477.

European Community, 136 S. Ct. 2090, 2100 (2016). In *Nabisco*, the Court acknowledged the "canon of statutory construction known as the presumption against extraterritoriality," explaining that "absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *Id*. The Court further explained, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." *Id*. In analyzing the question of whether a statute applies extraterritorially, the Court asks "whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id*. at 2101. "While the presumption can be overcome only by a clear indication of extraterritorial effect, an express statement of extraterritoriality is not essential. Assuredly context can be consulted as well." *Id*. at 2102 (quoting *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 253–54 (2010)). Context may even be dispositive. *Id*.

c. In *Morrison*, the Supreme Court determined the question of a statute's extraterritorial reach was not a jurisdictional question but rather a merits question concerning what conduct the statute reaches or prohibits. Extraterritoriality, therefore, does not "refer[] to a tribunal's power to hear a case." *Id*. at 354 (internal quotation marks omitted) (citing *Union Pacific R. Co. v. Locomotive Engineers*, 558 U.S. 67, 81 (2009); *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006); *United States v. Cotton*, 535 U.S. 625, 630 (2002)).

3. **Conclusions of Law**.

a. Noting the general presumption that federal laws do not apply extraterritorially, the Defense contends that "[n]othing in the 2009 [Military Commissions] Act affords a 'clear, affirmative indication that it applies extraterritorially.'"[3] AE 351 at 7. From that premise, the

[3] Elsewhere in their motion, Defense Counsel concedes that the MCA applies extraterritorially in at least some limited circumstances, such as to the offense of cruel or inhuman treatment, which by its own terms applies "regardless of nationality or physical location." *See* AE 351 at 9; 10 U.S.C. §950t(12). During oral argument on the motion, Defense Counsel also explained the lack of any challenge to the charges related to the bombing of the *USS Cole* as an impermissible extraterritorial application of the MCA, noting that because the *USS Cole* was an

Defense argues that the charges and specifications related to the *MV Limburg* fail to state an offense and should be dismissed. In making this argument, the defense motion suggests that the Supreme Court established a "plain-statement rule" in *Morrison*,[4] implying that only a plain and unambiguous statement that Congress intends a statute to apply extraterritorially will overcome the presumption against extraterritorial application. The Defense conceded though that Congress need not use the magic words "this law applies abroad" in order to create legislation with extraterritorial application. AE 351B at 13. The Commission does not read the Supreme Court's holdings in *Morrison* and *Nabisco* as narrowly as the Defense might prefer. Instead, as suggested in *Morrison*, the Commission will not only read the MCA for any plain statement of extraterritorial application, but will also examine the context of the statute for any clear indication that Congress intended the statute to apply extraterritorially.

b. The MCA's stated purpose is to "establish[] procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission." 10 U.S.C. § 948b(a). The MCA explicitly refers to and incorporates the concept of the "law of war" throughout the text of the statute.[5] The MCA also includes multiple references to "hostilities,"[6] defined as "any conflict subject to the laws of war." Although the MCA doesn't explicitly define the "law of war," for context, the statute makes repeated reference to the Geneva Conventions,[7] which most assuredly establish recognized international law regarding the conduct of war. Indeed, the law of war "derives from the rules and precepts of the law of nations; it is the body of international law governing armed

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American warship and Americans were killed in the attack, the attack essentially qualified as a domestic crime even though it occurred overseas. Defense Counsel distinguishes the charges related to the *MV Limburg* bombing, however, because in the instance of the *MV Limburg*, "there is no United States connection." Tr. at pp. 6453–54.

[4] AE 351 at 8.

[5] *See, e.g.*, 10 U.S.C. §§ 948d, 950p(d).

[6] *See, e.g.*, 10 U.S.C. §§ 948a(9), 950p(c).

[7] *See, e.g.*, 10 U.S.C. §§ 948a(4), 948b(e), 950p(a)(2)–(3), and 950t(12).

conflict." *Hamdan v. Rumsfeld*, 548 U.S. 557, 641 (2006) (*Hamdan I*) (Kennedy, J., concurring). In defining offenses made punishable under the MCA, the statute also uses terms such as "combat," "war-fighting," "opposing force," and "military objective,"[8] terms that as a matter of common usage and sense tend to relate, from the perspective of the United States, to hostilities that historically, and almost exclusively, occur overseas.

c. Further evidence of Congressional intent that the MCA apply to violations of the law of war that occur outside of the territory of the United States can be found in the applicability of the MCA strictly to *alien* unprivileged enemy belligerents, who have engaged in or have purposefully and materially supported "hostilities against the United States *or its coalition partners*." 10 U.S.C. § 948a(7) (emphasis added). The plain language of the statute makes clear that it is intended to apply to war crimes committed by foreign nationals that have engaged in conflict with certain foreign countries. Any cursory review of United States history would reveal that conflicts in which the United States is engaged that are subject to the laws of war almost always involve extraterritorial acts. Similarly, hostilities against coalition partners can only be expected to occur outside of the United States as coalition partners are highly unlikely to engage in hostilities within the borders of the United States. The MCA does not expressly limit "hostilities" to acts occurring within the United States, and cannot reasonably be interpreted to intend such a limitation. As noted by the Supreme Court in *Nabisco*:

> Short of an explicit declaration, it is hard to imagine how Congress could have more clearly indicated that it intended [the statute] to have (some) extraterritorial effect. This unique structure makes [the statute] the rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality. We therefore conclude that [the statute] applies to some foreign [] activity.

Nabisco, 136 S. Ct. 2090, 2102–03.

[8] *See, e.g.*, 10 U.S.C. § 950p(a).

d. Based on the language used throughout the MCA, including repeated references to international law, aliens, and hostilities against coalition partners, it is counterintuitive in the extreme to draw any conclusion other than that Congress intended the MCA to apply to certain war crimes that occurred outside the territory of the United States. Upon consideration of the context of the language of the MCA, the Commission finds a clear, affirmative indication within the statute that Congress intended the MCA to apply extraterritorially to alien unprivileged enemy belligerents who commit violations of the law of war in the context of hostilities against the United States or its coalition partners, whether or not those law of war violations occur within the territory of the United States.

e. The Defense emphasizes that the *MV Limburg* was a French ship with a Bulgarian crew sailing from Yemen, carrying Iranian oil, bound for Malaysia and, therefore, "nothing about the *MV Limburg* bombing touched and concerned the United States at all, let alone with sufficient force to make the bombing the practical equivalent of an attack on U.S. Territory." AE 351 at 13. The Defense, therefore, reasons that even though the MCA may apply to the attack on the *USS Cole*, since the charged acts related to the *MV Limburg* don't directly impact the United States, they must not be chargeable under the MCA. Having found that the MCA applies extraterritorially to law of war violations committed by alien unprivileged enemy belligerents in the context of and associated with hostilities, the Commission finds that the offenses alleged in the specifications and charges related to the *MV Limburg* fall within the scope of the MCA as a matter of statutory interpretation. Therefore, the Commission finds that the *MV Limburg* charges do not fail to state offenses due to any lack of extraterritorial reach by the MCA.

f. In the context of the Defense claim that the charges and specifications in issue fail to state an offense, the other relevant questions are whether the charges in question place the Accused on notice of the nature of the allegations and whether the charges allege each of the

elements of the offenses either expressly or by necessary implication. The Defense does not suggest that the charges fail in either respect. The Commission answers those questions in the affirmative. The five charges challenged in this motion, relating to the *MV Limburg*, share two common elements: 1) that the Accused, an alien unprivileged enemy belligerent; 2) acted "in the context of and associated with hostilities." In order to convict the Accused of the charges in question, the Government will bear the burden at trial of proving that the Accused was a member of al Qaeda at the time of the attack or that he engaged in or supported hostilities against the United States or its coalition partners, and that the attack on the *MV Limburg* occurred in the context of or associated with hostilities, i.e., a conflict subject to the laws of war.

g. It is inappropriate to determine in this pretrial motion to dismiss for failure to state an offense whether the Government will be able to prove the elements of the charged offenses related to the *MV Limburg* at trial. The CMCR, in *Al-Nashiri*, has previously held that whether a charged offense is committed "in the context of and associated with hostilities" is to be reserved for resolution until after the government has presented all of the evidence on the merits. *Al-Nashiri*, 191 F. Supp. 3d at 1320, 1327–28. The nexus of the charged offenses to the scope of hostilities against the United States is not appropriate for disposition in a pretrial motion for dismissal.[9] Because "this pretrial motion raises factual questions that are interwoven with the issues on the merits, resolution of those factual questions must be deferred until trial." *Id*. at

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[9] *Al-Nashiri*, 191 F. Supp. 3d at 1324, n.22 (*see also United States v. Perez*, 575 F.3d 164, 166–67 (2d Cir. 2009) ("Unless the government has made what can fairly be described as a full proffer of the evidence it intends to present at trial . . . the sufficiency of the evidence is not appropriately addressed on a pretrial motion to dismiss an indictment." (alteration in original) (quoting *United States v. Alfonso*, 143 F.3d 772, 776–77 (2d Cir. 1998))); *United States v. Naegele*, 367 B.R. 1, 14 (D.D.C. 2007) ("Only in 'unusual circumstance[s]' is pretrial dismissal of the indictment possible on sufficiency-of-the-evidence grounds, and that is 'where there are material facts that are undisputed and only an issue of law is presented.'" (alteration in original) (quoting *United States v. Yakou*, 428 F.3d 241, 247 (D.C. Cir. 2005))).

1328; *see United States v. Poulin*, 588 F.Supp.2d 58, 61 (D. Me. 2008) (quoting *United States v. Russell*, 919 F.2d 795, 797 (1st Cir. 1990)).

h. The *MV Limburg* allegations set forth in Charge IV, Specification 2, and Charges VII-IX are sufficient to place the Accused on notice of what he must defend against, allege each element of the offenses either expressly or by necessary implication, and the offenses in question don't fall beyond the scope of the MCA as a matter of statutory interpretation. Accordingly, the charges do not fail to state an offense.

4. **Ruling**. The defense motion to dismiss set forth in AE 351 is **DENIED**.

So **ORDERED** this 30th day of October, 2020.

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LANNY J. ACOSTA, JR.
COL, JA, USA
Military Judge