MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI	**AE 287A** **Government Response** To Defense Motion To Dismiss Charge I For Tu Quoque Because The United States Has A Practice Of Using Concealed Explosive Boats 15 July 2014

1. Timeliness

The government timely files this response pursuant to Military Commissions Trial Judiciary Rule of Court 3.7.d(1).

2. Relief Sought

The government respectfully requests that the Commission deny the defense motion.[1]

3. Overview

Tu quoque has been universally rejected as a defense to individual criminal liability, both in post-World War II war-crimes trials and in modern international criminal tribunals. Simply, "the *tu quoque* defence has no place in contemporary international humanitarian law," or in this military commission. *Prosecutor v. Kupreškić*, Case No. IT-95-16-T, Judgement, ¶ 511 (Int'l Crim. Trib. for the Former Yugoslavia Jan. 14, 2000). Accordingly, the Commission should deny the defense motion.

What is more, the defense admits these charges are "arguably [] war crime[s] under international law," but it argues the factual allegations do not support offenses under international law. AE 287 at 3. Thus, the *tu quoque* motions essentially are motions to dismiss

[1] The defense submitted six separate motions concerning *tu quoque*. AE 287; AE 288; AE 289; AE 290; AE 291; AE 292. Though each motion deals with a different charge or specification, the defense raises the identical argument in each motion.

for failure to state offenses. The gravamen of the defense argument appears to be its claim that "[i]t is *not* unlawful, however, to mount an attack without advertising one's hostile intent. An individual does not commit a war crime by carrying out attacking [sic] without bearing a distinguishing emblem or carrying arms openly." AE 287 at 4. Yet the government's allegations of killing or injuring by resort to perfidy do not rest on the attackers' status as unprivileged belligerents, but rather allege the feigning of civilian status—"the feigning of civilian, non-combatant status" is a classic form of perfidy. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 37(1), Dec. 7, 1978, 1125 U.N.T.S. 3 ("Additional Protocol I"). Whether the suicide bombers feigned a civilian status and hid their small boat amongst a crowd of other small boats "are questions of fact and must be resolved by the fact-finder." AE 174C at 2 (where the Commission explained "[t]he additional matters . . . which were raised in the pleadings [for failure to state an offense] and discussed during oral argument, are questions of fact and must be resolved by the fact-finder."). The government properly alleged offenses in compliance with the legal requirements, and, therefore, the Commission should deny the defense motion.

4. Burden of Proof

The defense incorrectly asserts that the burden is on the government "since this motion relates to the subject matter jurisdiction of the Commission." AE 287 at 2 (citing R.M.C. 905(c)). First, Rule of Military Commission ("R.M.C.") 905(c)(2)(B) places the burden on the government in a "motion to dismiss for lack of jurisdiction," not simply in any motion that the defense asserts may affect jurisdiction. Second, the defense motion does not actually challenge the jurisdiction of the Commission; rather, it seeks to strike a charge under the rubric of *tu quoque*. The defense attempt to shift the burden to the government is not appropriate.

5. Facts

Abd Al Rahim Hussayn Muhammad Al Nashiri ("the accused") is charged with multiple offenses under the Military Commissions Act ("M.C.A.") of 2009, 10 U.S.C. §§ 948a *et seq.*,

relating to his participation in the attacks on USS COLE (DDG 67) on 12 October 2000 and MV *Limburg* on 6 October 2002, and the attempted attack on USS THE SULLIVANS (DDG 68) on 3 January 2000. These attacks resulted in the deaths of 18 people, injury to dozens of others, and significant property damage.

The accused is charged with Using Treachery or Perfidy, in violation of 10 U.S.C. § 950t(17) (Charge I); Murder in Violation of the Law of War, in violation of 10 U.S.C. § 950t(15) (Charge II); Attempted Murder in Violation of the Law of War, in violation of 10 U.S.C. § 950t(28) (Charge III); Terrorism by engaging in acts that evinced a wanton disregard for human life, in violation of 10 U.S.C. § 950t(24) (Charge IV); Conspiracy to commit terrorism and murder in violation of the law of war, in violation of 10 U.S.C. § 950t(29) (Charge V); Intentionally Causing Serious Bodily Injury, in violation of 10 U.S.C. § 950t(13) (Charge VI); Attacking Civilians, in violation of 10 U.S.C. § 950t(2) (Charge VII); Attacking Civilian Objects, in violation of 10 U.S.C. § 950t(3) (Charge VIII); and Hijacking or Hazarding a Vessel, in violation of 10 U.S.C. § 950t(23) (Charge IX). Of the offenses, Charges I, II, IV, V, VI, VII, and IX carry a maximum penalty of death.

In toto, the charges relevant to the *tu quoque* motions allege that two men (*i.e.*, suicide bombers) dressed in civilian clothing (Charges I, II, and III—Specification 2), launched and operated a civilian boat alongside USS COLE (DDG 67) (Charges I, II, III—Specification 2, and VI), and waved at the crewmembers (Charges I and II) before detonating the civilian boat laden with hidden explosives (Charges I, II, III—Specification 2, IV, and VI). Charge III—Specification 1 also alleges "two suicide bombers dressed in civilian clothes launched an explosives laden boat, with the intent to perfidiously approach USS THE SULLIVANS (DDG 68), [and] detonate[d] the explosives while alongside USS THE SULLIVANS (DDG 68) . . . ."

6. Law and Argument[2]

I. The *Tu Quoque* Defense "Has No Place in Contemporary International Humanitarian Law," or in This Military Commission, and Should Be Rejected

The defense asserts that "the doctrine of *tu quoque* prevents the United States from punishing such conduct as a violation of customary international law." AE 287 at 10 (citing the trial of Admiral Dönitz at the International Military Tribunal at Nuremberg). A defendant who raises the purported *tu quoque* defense is attempting to justify his culpable actions by claiming the logical fallacy that "two wrongs make a right":

> The Latin phrase *tu quoque* means "thou also" or "you too." 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 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.

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).

Tu quoque fails as a defense because, to the extent it is even an applicable doctrine, it is one of inter-State relations and not one applicable to individual criminal responsibility. As one of the cases cited inaptly by the defense explains, "[t]he rule of '*tu quoque*' merely means that *no State* may accuse *another State* of violations of international law and exercise criminal

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[2] The defense continues to assert—as it now does in nearly all of its pleadings—that denying the motion will violate various rights of the accused. *See* AE 287 at 2. The defense, however, persists in omitting any explanation of how those rights are implicated in the present case. Absent any explanation as to how those rights are implicated in this request and under these facts, the Commission should reject this boilerplate language. *See Harding v. Illinois*, 196 U.S. 78, 87 (1904) (dismissing writ of error because no federal question was raised properly in the state court where the Illinois Supreme Court concluded that "no authorities were cited nor argument advanced in support of the assertion that [a] statute was unconstitutional" and thus the "point, if it could otherwise be considered, was deemed to be waived"); *United States v. Heijnen*, 215 F. App'x 725, 726 (10th Cir. 2007) ("We nevertheless reject these arguments because they are unsupported by legal argument or authority or by any citations to the extensive record of the proceedings. . . . [A]ppellant's issues are not supported by any developed legal argument or authority, and we need not consider them.").

jurisdiction over the latter's citizens in respect of such violations if it is itself guilty of similar violations *against the other State or its allies*." (emphasis added). *War Crimes (Preventive Murder) (Germany) Case*, 32 I.L.R. 563, 564 (1960). As a noted scholar explains:

> As a preliminary [matter], it must be realized that *tu quoque* is a doctrine of equity, and that it is not a doctrine of criminal law. The fact that one individual has committed an offense and, perhaps, has not been prosecuted for it, does not constitute a defense when another individual is prosecuted for an offense of that same category.

Howard S. Levie, *Terrorism in War - The Law of War Crimes* 521 (1993). Thus, the doctrine of *tu quoque* generally has no application between a State and an individual, such as in criminal proceedings, and especially here, where the defendant did not act on behalf of a State, and the alleged violations that the defendant seeks to raise would not have been committed by the United States against another State.

Tu quoque has been universally rejected as a defense to individual criminal liability, both in post-World War II war-crimes trials and in modern international criminal tribunals. As noted by the International Criminal Tribunal for the Former Yugoslavia ("ICTY"):

> It should first of all be pointed out that although *tu quoque* was raised as a defence in war crimes trials following the Second World War, it was universally rejected. The US Military Tribunal in the *High Command* trial, for instance, categorically stated that under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused. Indeed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.

Kupreškić, Judgement, ¶ 516. *See also United States v. von Leeb* (High Command Case), 11 *Trials of War Criminals Before the Nuernberg Military Tribunals* 462, 482 (1950) (same); *United States v. von Weizsaecker* (Ministries Case), 14 *Trials of War Criminals Before the Nuernberg Military Tribunals* 308, 322 (1950) (noting that "if we assume, *arguendo*, that Russia's [aggressive] action was wholly untenable and its guilt as deep as that of the Third Reich, nevertheless, this cannot in law avail the defendants or lessen the guilt of those of the Third Reich who were themselves responsible"); *United States v. Ohlendorf* (Einsatzgruppen Case), 4 *Trials of War Criminals Before the Nuernberg Military Tribunals* 1, 466 (1950)

(rejecting the *tu quoque* argument); Levie, *Terrorism in War*, at 524 (same); John R.W.D. Jones & Steven Powles, *International Criminal Practice* 455 (2003) (The defence of *tu quoque*, i.e., that the other Party has committed similar atrocities, was rejected as a defence at Nuremberg. It is also not a defence at the ICTY, where it has been implicitly raised."); E. van Sliedregt, *The Criminal Responsibility of Individuals for Violations of International Humanitarian Law* 295 (2003) ("It seems that the *erga omnes* character of international humanitarian law norms makes the defence of *tu quoque* defence [sic] inapplicable in the field of war crimes law. The defence is met by growing opposition and seems an outdated and controversial plea. It seems unlikely that the [International Criminal Court] would apply the defence under Articles 31(3) and 21(1) of its Statute.").

The defense is incorrect in citing the *Dönitz* case in support of *tu quoque*, as Admiral Dönitz's lawyer did not argue this purported defense, and the International Military Tribunal never used the phrase in its decision.[3] *See, e.g.*, Kevin Jon Heller, *Book Review: The Oxford Companion to International Criminal Justice*, 104 Am. J. Int'l L. 154, 157 (2010) (noting that the German lawyer representing Admiral Dönitz at the Nuremburg trial "successfully challenged the existence of a customary rule prohibiting unrestricted submarine warfare; he did not argue *tu quoque*."); Sean Watts, *Combatant Status and Computer Network Attack*, 50 Va. J. Int'l L. 391,

[3] Likewise, the defense citation to the Preventive Murder case is inapposite, incomplete, and at best offers mixed, anachronistic support both against and for the purported *tu quoque* defense. *See generally War Crimes (Preventive Murder) (Germany) Case*, 32 I.L.R. 563, 564-65 (1960) (holding "[t]he liability of the accused to conviction and punishment is not excluded by any general rule of international law . . . such as the rule of reciprocity . . . (the rule of '*tu quoque*'). No such justification is generally recognized in international law, and in particular no such justification is recognized as between the State which exercises powers of criminal prosecution and its own citizens. The rule of '*tu quoque*' merely means that no State may accuse another State of violations of international law and exercise criminal jurisdiction over the latter's citizens in respect of such violations if it is itself guilty of similar violations against the other State or its allies. The right and duty of a State to hold its own citizens responsible, in accordance with its municipal criminal law, for violations of international law is not affected by this rule. . . . It follows that the plea of '*tu quoque*' is unfounded, and it is unnecessary to inquire whether the accused was in error in believing that some rule of international law . . . permitted the killings.").

445-46 (2010) (noting "counsel for D[ö]nitz quoted directly from the Nimitz interrogatory, emphasizing submarines' limited capacity for rescue. Furthermore, he argued that the tactics of the Allies made the procedures of the Proces-Verbal militarily impossible."). *See generally* 1 *Trial of the Major War Criminals Before the International Military Tribunal* 310-15 (1947) (discussing the Dönitz case).

As the only modern international criminal tribunal to address this purported defense, the ICTY has also unequivocally rejected *tu quoque*:

> The Trial Chamber wishes to stress, in this regard, the irrelevance of reciprocity, particularly in relation to obligations found within international humanitarian law which have an absolute and non-derogable character. It thus follows that the *tu quoque* defence has no place in contemporary international humanitarian law. The defining characteristic of modern international humanitarian law is instead the obligation to uphold key tenets of this body of law regardless of the conduct of enemy combatants.

Kupreškić, Judgement, ¶ 511. *See also Prosecutor v. Martić*, Case No. IT-95-11-A, Appellate Judgement, ¶ 111 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 8, 2008) ("It is well established in the jurisprudence of the Tribunal that arguments based on reciprocity, including the *tu quoque* argument, are no defence to serious violations of international humanitarian law."). In fact, the ICTY expressly instructs its litigants as to the invalidity of the purported *tu quoque* defense in its pre-trial procedural guidelines. *See, e.g.*, *Prosecutor v. Hadžić*, Case No. IT-04-75-PT, Annex to Order on Guidelines for Procedure for Conduct of Trial, ¶ 27 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 4, 2012) ("The Tribunal does not recognise *tu quoque* as a valid defence.").

Since *tu quoque* is doctrine of equity and not a defense under international criminal law, and since it has been universally rejected as a defense, both in post-World War II war-crimes trials and in modern international criminal tribunals, the defense motion should be denied. Simply, "the *tu quoque* defence has no place in contemporary international humanitarian law," or in this military commission.[4] *Kupreškić*, Judgement, ¶ 511.

[4] The purported *tu quoque* defense was raised as a defense motion in another military commission (Khadr) convened under President Bush's Military Commission Order #1, but had

II. Perfidy, Terrorism, and the Related Charges Constitute Clear Violations of the Law of War

The defense admits these charges are "arguably [] war crime[s] under international law." AE 287 at 3. As such, the defense has conceded that these charges constitute "arguably" clear law-of-war violations over which this Commission has subject-matter jurisdiction. Obviously, "[i]t remains the obligation of the Prosecution to establish the factual assertions of the charge[s] and [their] specification[s] beyond a reasonable doubt at trial on the merits." AE 169E at 4 (where the Commission found that even where it has subject-matter jurisdiction over the offenses, the government still must prove its case at trial). The defense, however, disputes whether the alleged acts "satisfy the international law elements" of the various charges. AE 287 at 3. The *tu quoque* motions, therefore, are properly viewed as motions to dismiss the charges for failure to state offenses.

The defense filed a similar motion to dismiss the charges relating to the MV *Limburg* (Charge IV—Specification 2, and Charges VII-IX) for failure to state offenses under international law, claiming "enemy oil tankers are lawful military targets," and the alleged attackers were "lawful combatants." AE 174 at 1-7. *See also* AE 174C at 1. This Commission explained that R.M.C. 307(c)(3) merely requires "[a] specification [to be] a plain, concise, and definite statement of the essential facts constituting the offense charged. A specification is sufficient if it alleges every element of the charged offense expressly or by necessary implication." AE 174C at 1-2 (citing R.M.C. 307(c)(3)). The Commission also found in reviewing the identical rule for courts-martial:

> the Court of Appeals for the Armed Forces (C.A.A.F.) announced the standard for stating an offense by writing, "[T]he standard for determining whether a specification states an offense is whether the specification alleges 'every element'

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not yet been decided when the Appointing Authority stayed all then-pending military commissions on June 10, 2006. Following the Supreme Court's decision in *Hamdan I* on June 29, 2006, and the subsequent passage of the 2006 Military Commissions Act, Khadr pled guilty at his subsequent military commission, apparently without re-raising any purported *tu quoque* defense. *See generally United States v. Khadr*, RE151 (Defense Motion 44 ("D44") dated 28 April 2006); RE178 (Prosecution Response to D44 dated 9 May 2006); RE 197 (Defense Reply to Government Response to D44 dated 18 May 2006).

> of the offense either expressly or by implication, so as to give the accused notice and protect him against double jeopardy."

Id. at 2 (citing *United States v. Sutton,* 68 M.J. 455, 457 (C.A.A.F. 2010)). The Commission denied the defense motion, stating "the Prosecution has satisfied the requirements of R.M.C. 307(c)(3) and has met the aforementioned standard announced by C.A.A.F. Specification 2 of Charge IV and Charges VII-IX properly state an offense in compliance with the legal requirements." *Id.* The defense and government spent considerable effort briefing and arguing the nuances of international law relevant to the prior defense motion. *See generally* AE 174; AE 174A; AE 174B; Unofficial/Unauthenticated Transcript at 2686-92 (Feb. 19, 2014). The Commission found "[t]he additional matters concerning the MV Limburg's and the Accused's legal status at the time of the alleged attack, which were raised in the pleadings and discussed during oral argument, are questions of fact and must be resolved by the fact-finder." AE 174C at 2.

In the present set of motions, the gravamen of the defense argument appears to be its claim that "[i]t is *not* unlawful, however, to mount an attack without advertising one's hostile intent. An individual does not commit a war crime by carrying out attacking [sic] without bearing a distinguishing emblem or carrying arms openly." AE 287 at 4. The defense argument obfuscates the issue. "[T]he *feigning* of civilian, non-combatant status" is a form of intentional deception that runs directly counter to the principle of distinguishing between combatants (who are subject to attack) and civilians not taking a direct part in hostilities (who are not subject to attack); as such, it is a classic form of perfidy. Additional Protocol I, art. 37(1) (emphasis added). *Accord U.S. Dep't of the Army, Field Manual 27-10, The Law of Land Warfare* ¶ 50 (July 1956); *U.S. Navy*, *NWP* 1-14M, *The Commander's Handbook on the Law of Naval Operations* ¶ 12.1.2 (July 2007) ("*Commander's Handbook*"); *Commander's Handbook* ¶ 12.7 (noting that "attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes. It is also prohibited to kill, injure, or capture an adversary by feigning civilian or noncombatant status."); *International Lawyers and Naval Experts Convened by the International Institute of Humanitarian Law, San Remo Manual on*

International Law Applicable to Armed Conflicts at Sea ¶ 111(a) (Louise Doswald-Beck ed. 1995) ("San Remo Manual") ("Perfidious acts include the launching of an attack while feigning: (a) exempt, civilian, neutral or protected United Nations status . . . .").

Although certain forms of deception, such as camouflage, are permissible ruses, pretending to be a civilian in order to carry out attacks is clearly prohibited. *See also Commentary on the Additional Protocols*, at 438 ¶ 1507 (providing that "[a] combatant who takes part in an attack, or in a military operation preparatory to an attack, can use camouflage and make himself virtually invisible against a natural or man-made background, but he may not feign a civilian status and hide amongst a crowd.").[5]

The charges relevant to the *tu quoque* motions allege two men (*i.e.*, suicide bombers) dressed in civilian clothing: (1) launched an explosives laden boat intending to perfidiously approach USS THE SULLIVANS (DDG 68) and detonate the explosives while alongside it; and (2) launched and operated a civilian boat alongside USS COLE (DDG 67) and waved at the crewmembers before detonating the civilian boat laden with hidden explosives. Whether the two suicide bombers carried their arms openly during the time they were visible to the crews of the two Navy ships, or whether the suicide bombers feigned a civilian status and hid their small boat amongst a crowd of other small boats "are questions of fact and must be resolved by the fact-finder." AE 174C at 2.

The government properly satisfied the requirements of R.M.C. 307(c)(3) and the standard for stating an offense announced by C.A.A.F. in *Sutton*. The government specified "a plain, concise, and definite statement of the essential facts constituting the offense charged . . .

[5] The defense cites to the use of retrofitted merchant "Q-ships" during World War II as evidence of permissible "maritime guerilla operations." AE 287 at 5. However, the roundtable of naval experts at San Remo "was of the view that the former British practice of Q-ships is no longer acceptable." San Remo Manual, ¶ 111.2. *Accord Commander's Handbook*, ¶ 12.3.1 (noting that "[u]nder the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colors. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is forbidden.").

alleg[ing] every element of the charged offense expressly or by necessary implication." R.M.C. 307(c)(3); AE 174C at 1-2. The accused, therefore, is on notice of the charged offenses and protected against double jeopardy. *Sutton*, 68 M.J. at 457; AE 174C at 2.

7. Conclusion

The post-World War II and modern international criminal tribunals have universally rejected *tu quoque* as a defense because it is an equitable doctrine of international relations and not one of criminal law. "[T]he *tu quoque* defence has no place in contemporary international humanitarian law," or in this military commission. *Kupreškić*, Judgement, ¶ 511. For that reason, the Commission should deny the defense motion.

8. Oral Argument

The defense requested oral argument. The Commission can decide this matter without oral argument. *See* Military Commissions Trial Judiciary Rule of Court 3.9(a). If the Commission grants the defense an opportunity to present oral argument, however, the government requests an opportunity to do the same.

9. Witnesses and Evidence

The government does not intend to rely on witnesses or evidence in support of this response.

10. Additional Information

The government has no additional information.

11. Attachments

A. Certificate of Service, dated 15 July 2014.

Respectfully submitted,

_____//s//_____
Mikeal M. Clayton
Trial Counsel

Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 15th day of July 2014, I filed **AE 287A, Government Response** To Defense Motion To Dismiss Charge I For Tu Quoque Because The United States Has A Practice of Using Concealed Explosive Boats, with the Office of Military Commissions Trial Judiciary and served a copy on counsel of record.

//s//
Mikeal M. Clayton
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