

**MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

<p>UNITED STATES OF AMERICA</p> <p>v.</p> <p>ABD AL RAHIM HUSSAYN MUHAMMAD AL NASHIRI</p>	<p>AE 168G / AE 241C</p> <p>ORDER</p> <p>DEFENSE MOTION TO DISMISS CHARGES VII-IX FOR LACK OF JURISDICTION UNDER INTERNATIONAL LAW¹</p> <p>11 August 2014</p>
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1. The Accused is charged with multiple offenses in violation of the Military Commissions Act of 2009(2009 M.C.A.), 10 U.S.C. §§ 948 *et seq.*, Pub. L. 111-84, 123 Stat. 2574 (Oct. 28, 2009). He was arraigned on 9 November 2011.

2. Procedural History. Defense moved for the dismissal of all charges related to the MV Limburg, specifically Specification 2 of Charge IV and Charges VII – IX, due to a lack of subject matter jurisdiction under international law. (AE 168 (Classified), AE 168A (Unclassified) and AE 168G (Supplemental Filing (filed after oral argument))). The Prosecution asserted the “Commission has jurisdiction over the offenses related to the attack on MV Limburg under both the [2009] M.C.A. and international law.” (AE 168C at 1.) The Prosecution focused on the protective principle of jurisdiction under international law as the basis for jurisdiction. Defense did not file a reply, and the Prosecution did not respond to the Defense’s supplemental filing. Oral argument occurred on 24 February 2014.² During oral argument, the Defense’s comments focused on how 10 U.S.C. §

¹ AE 168, DEFENSE MOTION TO DISMISS CHARGES IX - XI FOR LACK OF JURISDICTION UNDER INTERNATIONAL LAW, as originally filed on 26 August 2013, incorrectly identified the charges involving the MV Limburg as Charges IX – XI, which became Charges VII – IX at referral on 28 September 2011. Defense corrected this in AE 168G, Supplement to Defense Motion at pg 1. See also Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 February 2014, from 9:11 A.M. to 10:33 A.M. at 3074 where the Prosecution identified the error.

² See Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 February 2014, from 9:11 A.M. to 10:33 A.M. at 3068 to 3101.

948a(7)(A) and an application of Article 21, Uniform Code of Military Justice and international law did not provide a basis for the Commission to assert jurisdiction over the offenses involving the MV Limburg. The Prosecution failed to establish France was a coalition partner and the United States had an interest to vindicate or protect in a prosecution based on the alleged attack of the MV Limburg.

The Prosecution argued jurisdiction vested under the protective principle of international law, 10 U.S.C. § 948a(7)(A), and raised 10 U.S.C. § 948a(7)(C) as an alternative basis of jurisdiction for the first time. The parties were granted permission to file additional pleadings on the Prosecution's assertion 10 U.S.C. § 948a(7)(C) provided a basis for jurisdiction, and the Defense filed AE 168G.

3. The Defense filed AE 241 and requested dismissal of the same charges and specifications as the Prosecution had not established that the Accused "was a member of al Qaeda at the time of the alleged offense under this chapter." (AE 241 at 1). The Prosecution responded and continued to assert "the Commission's exercise of jurisdiction over the Accused with respect to the charges at issue is lawful under both domestic and international law. States may lawfully try enemy belligerents before military commissions for violations of the law of war committed in the context of hostilities against them." (AE 241A at 1.) Oral argument on AE 241 occurred on 24 April 2014.³ During oral argument, the Defense pointed out the lack of evidence to support the Prosecution's assertions. The Prosecution on several instances averred it would provide evidence to the panel during the merits portion of the trial to establish jurisdiction beyond a reasonable doubt.

4. The Prosecution bears the burden of persuasion by a preponderance of the evidence when the Defense seeks dismissal of charges due to a lack of jurisdiction. (Rule for Military Commission (R.M.C.) 905(c)(2)(B).) The Prosecution acknowledged this burden in its pleadings. (*See* AE 168C at 2 and AE 241A at 2.) This would normally suggest the necessity to request and conduct an evidentiary hearing as part of the interlocutory motion. The Prosecution did not request such a

³ *See* Unofficial/Unauthenticated Transcript of the Al Nashiri (2) Motions Hearing Dated 24 April 2014, from 2:59 P.M. to 4:54 P.M. at 3874 to 3905.

hearing despite the topic being discussed throughout both oral arguments by counsel and the Military Judge.⁴ It is not the responsibility of the Commission to sua sponte require the parties to conduct such a hearing.

5. In its pleadings and during its oral argument, the Prosecution proffered, without offering any evidence in support of the proffer, the existence of the following facts to support its assertion of jurisdiction:

a. an attack on a civilian vessel (MV Limburg) occurred (*See* AE 168C at pg 2, AE 241A at pg 2, and Unofficial Transcript pg 3076);

b. the attack was conducted by cells of al Qaeda fighters (*See* Unofficial Transcript pg 3076);

c. the attack occurred in maritime lanes in Southwest Asia / in a Yemeni Port (*See* AE 168C at pg 2 and Unofficial Transcript pp 3076, 3085, and 3887);

d. the U.S. and world economies were disrupted (*See* Unofficial Transcript pp 3077 and 3891);

e. the price of oil rose for all countries because insurance rates rose (*See* Unofficial Transcript pp 3077, 3891, and 3893);

f. since 2001, France was in Afghanistan fighting along with the U.S. against al Qaeda as a member of North Atlantic Treaty Organization (NATO) (*See* Unofficial Transcript pg 3079);

g. NATO Members invoked Article 5 of the NATO Treaty to conduct operations in Afghanistan (*See* Unofficial Transcript pg 3079);

h. MV Limburg was a French flagged vessel (*See* AE 168C at pg 2, AE 241A at pg 2, and Unofficial Transcript pg 3080);

i. "hostilities," as the term is defined in 10 U.S.C. § 948a(9), against the United States existed (*See* Unofficial Transcript pg 3081);

⁴ See Unofficial Transcript at pages 3070, 3071, 3076, 3096, 3878, 3882, 3883, 3887, 3888, 3889, 3890, 3897, 3899, and 3903.

j. the MV Limburg was destined for Malaysia (*See* AE 168C at pg 2, AE 241A at pg 2, and Unofficial Transcript pg 3085);

k. the crew was composed of non-U.S. persons (*See* Unofficial Transcript pg 3085);

l. the oil in the MV Limburg was Iranian (*See* Unofficial Transcript pg 3085);

m. the Accused was a member of al Qaeda (*See* Unofficial Transcript pg 3885);

n. in 2002, when the attack occurred, one-quarter of all imported U.S. oil came from the Middle East (*See* Unofficial Transcript pg 3887);

o. U.S. interests extended to ensuring safe refueling ports for U.S. Navy vessels (destroyers) in the region (*See* Unofficial Transcript pg 3892);

p. U.S. financial, security, and governmental operations were all directly affected by the bombing of the MV Limburg (*See* Unofficial Transcript pg 3896);

q. MV Limburg was carrying crude oil (*See* AE 168C at pg 3 and AE 241A at pg 3); and,

r. tens of thousands of barrels of crude oil were lost due to the explosion and resulting damage to the hull of the MV Limburg (*See* AE 168C at pg 3 and AE 241A at pg 3).

6. The Defense, in its pleadings and during its oral arguments, acknowledged the following:

a. the MV Limburg was a French flagged vessel (*See* Unofficial Transcript pp 3069, 3072, and 3875);

b. the MV Limburg was attacked (*See* Unofficial Transcript pp 3069 and 3875);

c. the MV Limburg was carrying Iranian oil (*See* Unofficial Transcript pp 3069, 3072, and 3875);

d. the MV Limburg's destination was Malaysia (*See* Unofficial Transcript pp 3069, 3072, and 3875); and,

e. France was fighting in Afghanistan in 2002 (Unofficial Transcript pg 3095).⁵

⁵ This is the only statement of fact by the Prosecution which Defense Counsel specifically agreed was correct.

7. The Defense, to contest the Prosecution assertion of a rise in oil prices, proffered world oil prices were not adversely impacted by the attack on the MV Limburg based on a report from the Energy Information Administration.⁶ (AE 168G at pg 3.)

8. The Commission need not reach any conclusions of law based on both parties' legal arguments raised in their written filings and oral arguments. While the facts argued by the Prosecution may be easily susceptible of proof, the Prosecution failed to request an evidentiary hearing and offer any documentary or testimonial evidence into the record to factually support their assertion of jurisdiction as to the charges and specification involving the MV Limburg. The Prosecution has thus failed to meet its burden of persuasion in this interlocutory matter. (*See* R.M.C. 905c(2)(B).)

Accordingly, AE 168 and AE 241 are **GRANTED**.

So **ORDERED** this 11th day of August, 2014.

//s//
VANCE H. SPATH, Colonel, USAF
Military Judge
Military Commissions Trial Judiciary

⁶ The Defense stated the report was available at <http://www.cia.gov/dnav/pet/hist/LeafHandler.ashx?n=PET&s=RWTC&f=D>. (AE 168G at pg 3.)