United States, Jurisprudence Related to the Bombing of the U.S.S. Cole

[***INTRODUCTORY TEXT:*** *This case study presents two court opinions relating to the bombing of the U.S.S. Cole. In* Flanagan v. Islamic Republic of Iran, et al.*, the federal district court upheld a default judgment against Sudan for the extrajudicial killings of American sailors on board the U.S.S Cole on the basis of the former's support for al Qaeda. Meanwhile, the appellate court in* In re Al-Nashiri *held that the mastermind of the bombings could be tried by military commission.]*

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Background Note: This note is intended to provide domestic legal context to allow the reader to better extract the IHL principles found in this case. This note does not provide US legal advice.

US law can be unofficially grouped into two broad categories: civil (tort, contracts, commercial, family, administrative, estate law, etc.) and criminal. Depending on the relevant law, the nature of the parties, and the location of the parties, a person may bring a lawsuit in a state district court or federal district court. In consideration of the principle of sovereignty under international law, foreign States are generally immune from civil suits in US courts. One limited exception is the terrorism exception found in the Foreign Sovereign Immunities Act ("FSIA"). Under FSIA, a State is not immune when "money damages are sought […] for […] extrajudicial killing" when the State is designated by the US as a sponsor of terrorism. (28 USC § 1605A (2017)). In *Flanigan v. Islamic Republic of Iran, et al.*, families of the victims of the U.S.S. Cole bombing sued the governments of Iran, Sudan, Syria, as well as other entities, for monetary damages as a result of the

"extrajudicial killings" of their family members on board the U.S.S. Cole.

When an entity is sued in a US federal district court, it has a specified number of days to respond to the complaint. If a defendant fails to respond, the party enters default, and the court may enter a default judgment—and may award monetary damages—against the defaulting party. A default judgment may not be set aside but for very strict, non-substantive reasons. In *Flanigan*, both Iran and Sudan failed to respond to the complaint. A default judgment, consisting of $18.75 million USD in compensatory damages and $56.25 million USD in punitive damages, was entered against them. In this case, Sudan moved to set aside the default judgment. Although the court agreed to vacate the punitive damage award, the court refused to set aside the default judgment. This case study will solely focus on the issue of how the bombing of the U.S.S. Cole amounted to an extrajudicial killing and the IHL implications thereof.

In re Al-Nashiri provides an interesting comparison to the legal conclusions found in *Flanigan*. Al-Nashiri, a Guantanamo Bay detainee, petitioned for a writ of habeas corpus and an injunction stopping the military commission trial against him regarding the crimes he committed in the U.S.S. Cole bombings. About two months after the decision of the district court in *Flanigan,* the appellate court denied the petition because Al-Nashiri was a combatant at the time of the bombing, and it is possible that the bombing took place in the context of hostilities. This case study will focus solely on this analysis and Al-Nashiri's treatment during pre-trial detention.]

A. *FLANIGAN V. ISLAMIC REPUBLIC OF IRAN*, MEMORANDUM OPINION GRANTING IN PART AND DENYING IN PART THE REPUBLIC OF SUDAN'S MOTION TO SET ASIDE THE DEFAULT JUDGMENT

[**Source:** United States District Court, District of Columbia, *Flanagan v. Islamic Republic of Iran, [et al.]*, 190 F.Supp.3d 138 (D.D.C. 2016), Civil Action No.: 10-1643 (RC), 3 June 2016: available at https://www.courtlistener.com/opinion/3209191/flanagan-v-islamic-republic-of-iran/ (footnotes partially omitted; all citations omitted)]

[…]

I. INTRODUCTION

[1] Plaintiffs in this case are the family members of Electronic Warfare Technician First Class Kevin Shawn Rux, who was killed along with sixteen other American sailors in the 2000 terrorist bombing of the U.S.S. Cole in Yemen, carried out by Al-Qaeda.[…]

[…]

II. FACTUAL BACKGROUND

[...]

B. Factual & Procedural Background

[2] […] Plaintiffs alleged that each of the Defendants, including Sudan and its agencies and instrumentalities, [Footnote 2: For ease of reference, the Court will refer to the Sudanese defendants collectively as "Sudan."] provided material support to Al-Qaeda, "including but not limited to providing, financing, lodging, training, and safehouses" as a result of which Al-Qaeda "was able to plan and execute its attack against the U.S.S. Cole." […]

[…]

III. ANALYSIS

[…]

D. Sudan's Proffered Defenses

[…]

1. Extrajudicial Killing

[3] Sudan first argues that the Court lacks subject-matter jurisdiction over Plaintiffs' claims because the bombing of the U.S.S. Cole did not constitute an extrajudicial killing, as defined in 28 U.S.C. § 1605A. […] The Court is not convinced.

[4] […] The FSIA […] defines "extrajudicial killing" by cross-referencing the definition contained in the Torture Victim Protection Act ("TVPA"). […] And the TVPA, in turn, defines an "extrajudicial killing" as:

[A] deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. Such term, however, does not include any such killing that, under international law, is lawfully carried out under the authority of a foreign nation.

[…]

[5] Sudan claims that both the language and the context of the TVPA indicate that, when Congress defined "extrajudicial killing," it "intended to adopt the international law meaning of the term," which is synonymous with a "summary execution." […] As a result, Sudan claims that there is no basis "for the term 'extrajudicial killing' to include a general act of terrorism." […]

[6] The Court acknowledges that various portions of the TVPA's legislative history indicate that Congress sought to closely align the TVPA's definition of "extrajudicial killing" with the prevailing meaning of "summary execution" under international law. For example, a House Report on the legislation notes that the TVPA "defines 'torture' and 'extrajudicial killing' in accordance with international standards," and that the "concept of 'extrajudicial killings' is derived from article 3 common to the four Geneva Conventions of 1949." […] Similarly, a Senate Report states that the TVPA "incorporates into U.S. law the definition of extrajudicial killing found in customary international law," and that the "definition conforms with [the definition] found in the Geneva Convention." […] Indeed, the TVPA's definition closely tracks the definition found in the Geneva Convention. Compare TVPA § 3(a) (defining an extrajudicial killing as "a deliberated killing not authorized by a previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples"), with Geneva Convention Relative to the Treatment of Prisoners of War, art. 3[…] (prohibiting "the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples").

[7] As explained momentarily, Sudan does not cogently explain what features of a bombing like that of the U.S.S. Cole would render the event anything other than a deliberated killing, unauthorized by the judgment of a regularly constituted court affording indispensable judicial guarantees. […]

[…]

[8] Accordingly, the Court concludes that […] definition is met here. The bombings were "killing[s]," and the coordination and planning required to carry them out indicate that they were "deliberated." […] The bombings were not authorized by any court judgment and Sudan does not suggest that they were permissible under international law.

[9] More pertinently, Sudan does little to explain how the bombing of the U.S.S. Cole fails to meet the definition of an extrajudicial killing—under either the statutory definition or international law. Nowhere in its memorandum in support of its motion or in its reply does Sudan explain what it is about the deliberate bombing of a Navy destroyer, divorced from regularly constituted judicial proceedings in the most indisputable terms, that puts the attack outside the scope of an "extrajudicial killing" or "summary execution." Sudan claims that the TVPA is intended to refer to "summary execution," but that is where its analysis on this point ends. […] Simply "offering a synonym does not advance the analysis," […] however, and one will search Sudan's papers in vain for a more developed argument. […]

[10] It may be that Sudan intends to hint that a summary execution can only be committed by a foreign state, and not a private group. […] As the court concluded in *Owens*, "Congress clearly wanted to permit liability both when states themselves perpetrate the predicate acts and also when they help others do so," and the

"most obvious actors that Congress would worry might receive material support ... are non-state terrorist organizations." […]

[…]

B. IN RE AL-NASHIRI, OPINION

[**Source:** United States Court of Appeals, District of Columbia Circuit, In re Al-Nashiri, 835 F.3d 110 (D.C. Cir. 2016), Nos. 15-1023 15-5020, 30 August 2016: available at http://www.leagle.com/decision/In%20FCO%2020160830184/IN%20RE%20MUHAMMED%20AL-NASHIRI (footnotes omitted)]

[1] Abd Al-Rahim Hussein Muhammed Al-Nashiri is the alleged mastermind of the bombings of the U.S.S. Cole and the French supertanker the M/V Limburg, as well as the attempted bombing of the U.S.S. The Sullivans. Together, the completed attacks killed 18 crew members and injured dozens more. The government charged Al-Nashiri with nine offenses for his role in the attacks and convened a military commission to try him. His trial, and any subsequent appeals, will be governed by the Military Commissions Act, in which Congress strengthened the procedural protections and review mechanisms for military commissions in response to the Supreme Court's guidance in *Hamdan v. Rumsfeld* […] Al-Nashiri now seeks to avoid the structure Congress has created. He petitions for a writ of mandamus to dissolve the military commission convened to try him and appeals the district court's denial of his motion to preliminarily enjoin that trial. We deny the petition for mandamus relief and affirm the district court.

I. A.

[2] At this pretrial stage, we recount the details of Al-Nashiri's alleged offenses based on the information provided in the government's charges. Al-Nashiri, a Saudi national, is a member of al Qaeda who orchestrated the attempted bombing of The Sullivans in January 2000 and the successful bombings of the Cole in October 2000 and the Limburg in October 2002.

[3] Al-Nashiri met with Osama bin Laden and other senior members of al Qaeda in 1997 or 1998 to plan a "boats operation" that would attack ships in the Arabian Peninsula. The government argues that while bin Laden was planning the "boats operation," he was also coordinating the "planes operation" that would unfold on September 11, 2001. At bin Laden's direction, Al-Nashiri and his alleged co-conspirator, Walid bin Attash, traveled to Yemen around 1998 to prepare for the boats operation. Al-Nashiri scouted the region and monitored ship traffic. He and his co-conspirators ultimately focused on Aden Harbor and bought and stored explosives to carry out an attack there. In 1999, after bin Attash was arrested, bin Laden instructed Al-Nashiri to take control of the operation. Al-Nashiri and his co-conspirators recruited others to the cause, bought a boat, and obtained false identification documents.

[4] Under Al-Nashiri's direction, his co-conspirators steered an explosive-filled boat toward The Sullivans in January 2000 while the warship was refueling. But the boat carrying the explosives foundered in Yemen's Aden Harbor, thwarting the plan. Al-Nashiri and his coconspirators recovered the boat and confirmed that the explosives could be used in future attacks. Sometime after the failed attack, Al-Nashiri returned to Afghanistan to meet with bin Laden and other high-ranking members of al Qaeda and to receive explosives training from an al Qaeda expert.

[5] By the summer of 2000, Al-Nashiri had returned to Yemen to carry out preparations for a second attack in Aden Harbor. He and his co-conspirators rented a house from which they could surveil the harbor, repaired and tested the attack boat, filled it with explosives, and arranged for the attack to be videotaped. Sometime around September 2000, Al-Nashiri reported to bin Attash—who by then had been released from jail and was in Afghanistan—that the operation was ready and that he had chosen suicide bombers to carry it out. Before the attack, Al-Nashiri returned to Afghanistan at bin Laden's direction and told him the bombing was imminent.

[6] Adhering to Al-Nashiri's instructions, in October 2000 the suicide bombers launched the boat—again filled with explosives—and piloted it toward the Cole, which was refueling in Aden Harbor. The bombers gave friendly gestures to crew members and steered their boat alongside the Cole, where they detonated the explosives. The blast killed 17 crew members and injured at least 37, and left a hole in the Cole's side measuring about 30 feet in diameter.

[7] After the attack, Al-Nashiri began planning another bombing. He and his co-conspirators acquired another boat and explosives, with Al-Nashiri directing the transfer of money to fund the attack. In October 2002, suicide bombers under Al-Nashiri's direction drew their explosive-filled boat alongside the French supertanker the Limburg near the port of Al Mukallah, Yemen. The explosion blasted a hole in the ship's hull, killing one crew member and injuring 12. Some 90,000 barrels of oil also spilled from the tanker into the Gulf of Aden.

[8] Local authorities arrested Al-Nashiri in Dubai in 2002 and turned him over to U.S. custody. He was transferred to the Guantanamo Bay Naval Base in 2006. A year later, a Combatant Status Review Tribunal determined that Al-Nashiri was detainable as an "enemy combatant" under the Authorization for Use of Military Force that Congress had passed and the President had signed in response to the attacks of September 11, 2001. […] The AUMF permits the President to use "all necessary and appropriate force" against the "nations, organizations, or persons" he determines were responsible for the 9/11 attacks. […] Al-Nashiri filed a petition for a writ of habeas corpus in the United States District Court for the District of Columbia in 2008, challenging various aspects of his detention at Guantanamo. Three years later, with Al-Nashiri's habeas petition still pending, the Defense Department convened a military commission to try him for offenses including terrorism, murder in violation of the law of war, and attacking civilians. […] The government is seeking the death penalty.

[…]

II

[…]

[9] […] We do not understand Al-Nashiri to challenge his status as an alien unprivileged enemy belligerent who is subject to detention and to trial by military commission for certain types of conduct. Instead, he argues that the nature of his alleged offenses is such that the military lacks the authority to try them. […]

[…]

III

[…]

[10] According to Al-Nashiri, it is "clear and indisputable" that his conduct did not take place in the context of hostilities, and therefore that he is entitled to mandamus relief. He contends that hostilities exist only when the political branches say so in a "contemporaneous public act"; the existence of hostilities cannot be determined after the fact. And in his view, no contemporaneous public act established that hostilities existed either before September 11, 2001, or in Yemen, where his alleged offenses took place.

[11] In fact, Al-Nashiri asserts, public acts at the time of his offenses suggested that America was at peace. He points to the President's public statement, in response to the Cole bombing, that the nation was not at war. And while the President reported to Congress under the War Powers Resolution that he had introduced forces "equipped for combat" into Yemen after the Cole attack, he did not report that he had introduced forces "into hostilities." […] Further, the Federal Bureau of Investigation led the investigation of the Cole bombing, treating it as a crime scene rather than a combat zone. In Al-Nashiri's view, these facts suggest that the President did not believe "hostilities" existed around the time of the Cole bombing.

[12] The government responds that the existence of hostilities is established by looking not merely to the contemporaneous acts of the political branches, but to a totality of the circumstances, including al Qaeda's conduct. Implicit in this argument is the notion that the existence of hostilities can be assessed after the fact, at trial. Applying this totality-of-the-circumstances standard, the government argues that the Cole attack was part of al Qaeda's larger strategy to wage war against the United States, which culminated in the attacks of September 11. It notes that al Qaeda publicly declared jihad against the United States in 1996 and attacked the U.S. embassies in Kenya and Tanzania in 1998, and that after these bombings, the President ordered missile strikes on al Qaeda training camps in Afghanistan and a chemical weapons facility in Sudan, and invoked the right to self-defense under the United Nations Charter. The government also points to the MCA

[Military Commissions Act], which authorizes military commission jurisdiction for conduct occurring "before, on, or after" September 11, 2001. […] To the government, this language suggests that Congress believed hostilities existed before September 11, even if no public act was taken until the passage of the AUMF on September 14, 2001.

[13] The disagreement between the parties thus boil down to two central questions: Should the existence of hostilities be determined based on the totality of the circumstances, or only on the understanding of the political branches? And may it be based on a retrospective analysis, or only on what decisionmakers believed at the time of the events? Al-Nashiri and amici believe the judgments of the political branches at the time are what matters; the government takes a broader view.

[…]

[14] The debate in *Hamdan* indicates that whether hostilities against al Qaeda existed at the time of Al-Nashiri's alleged offenses, and whether Al-Nashiri's conduct in Yemen took place in the context of those hostilities, are open questions. And open questions are "the antithesis of the 'clear and indisputable' right needed for mandamus relief." […]

[…]

IV

[15] We deny Al-Nashiri's petition for a writ of mandamus and affirm the district court's denial of his motion for a preliminary injunction.

Tatel, *Circuit Judge*, dissenting:

[16] Since July 2011, Abd Al-Rahim Hussein Muhammed Al-Nashiri has repeatedly sought to challenge the government's authority to try him in a military commission. In his view, none of the offenses with which he is charged occurred in the context of an armed conflict and thus none is triable outside of a civilian court. In one of his latest attempts to raise the issue, Al-Nashiri petitioned the district court for a writ of habeas corpus. That court ultimately concluded that it was required to stay its hand under *Schlesinger v. Councilman* […].

[…]

[17] Here, it appears that extraordinary and unusual circumstances may well outweigh whatever equity and inter-branch comity principles might otherwise justify *Councilman*-like abstention. In petitioning for pretrial review of the military commission's authority to try him, Al-Nashiri alleges that the government subjected him to years of brutal detention and interrogation tactics that left him in a compromised physical and psychological state and that the harms he has already suffered will be exacerbated—perhaps permanently—

by the government's prosecution of him in a military commission. If there is merit to these allegations, the harms he will suffer are truly extraordinary and are a far cry from the ordinary burdens—even serious ones—that individuals endure in the course of defending against criminal prosecutions.

[18] According to the unclassified version of Al-Nashiri's brief, local authorities in the United Arab Emirates seized him in October 2002 and transferred him to United States custody. […] The CIA then detained him at secret locations, commonly referred to as black sites, as part of its "newly-formed Rendition, Detention, and Interrogation ('RDI') Program." […] Al-Nashiri asserts that this program employed extreme interrogation tactics with the hopes of inducing "learned helplessness" among the detainees. […] According to Al-Nashiri, the CIA's RDI program sought to induce "learned helplessness" in the detainees so that they "might become passive and depressed in response to adverse or uncontrollable events, and ... thus cooperate and provide information." […]

[19] Describing his treatment at the hands of the CIA from 2002 to 2006, Al-Nashiri, in the unclassified version of his brief, which I quote at length, asserts the following:

The first records of Al-Nashiri['s] treatment [redacted]. He was not allowed to sleep, was regularly beaten, and hung by his hands. After a month, he was transferred to CIA custody and taken to a location codenamed COBALT. In transit to COBALT, ice was put down his shirt. This appears to have been done as part of a broader policy of using transportation between black sites to induce anxiety and helplessness.

Virtually no documentation of Al-Nashiri's time at COBALT exists. Certain facts can be ascertained from then-prevailing standard operating procedures. The chief of interrogations described COBALT as "good for interrogations because it is the closest thing he has seen to a dungeon, facilitating the displacement of detainee expectations." COBALT operated in total darkness and the guard staff wore headlamps. [Redacted]. Detainees were subjected to loud continuous noise, isolation, and dietary manipulation.

According to one CIA interrogator, detainees at COBALT "[']literally looked like [dogs] that had been kenneled.' When the doors to their cells were opened, 'they cowered.' " At COBALT, [redacted]. Detainees were fed on an alternating schedule of one meal on one day and two meals the next day. They were kept naked, shackled to the wall, and given buckets for their waste. On one occasion, Al-Nashiri was forced to keep his hands on the wall and not given food for three days. To induce sleep deprivation, detainees were shackled to a bar on the ceiling, forcing them to stand with their arms above their heads. [Redacted].

[Redacted] use of improvised interrogation methods, such as water dousing, wherein a detainee was doused with cold water and rolled into a carpet, which would then be soaked with water in order to induce suffocation.

[Redacted].

[Redacted] Al-Nashiri was kept continually naked and the temperature was kept, in his words, "cold as ice cream." [Redacted].

The documentation of conditions at [redacted] lacks specificity. Most summaries of interrogation[s] say simply [redacted]. There is no question, however, that Al-Nashiri was "waterboarded" at GREEN. This entailed being tied to a slanted table, with his feet elevated. A rag was then placed over his forehead and eyes, and water poured into his mouth and nose, inducing choking and water aspiration. The rag was then lowered, suffocating him with water still in his throat and sinuses. Eventually, the rag was lifted, allowing him to "take 3–4 breaths" before the process was repeated.

[Redacted]

....

After interrogators questioned Al-Nashiri's intelligence value, CIA Headquarters sent an untrained, unqualified, uncertified, and unapproved officer to be Al-Nashiri's new interrogator at BLUE. [Redacted]. Al-Nashiri was kept continually hooded, shackled, and naked. He was regularly strung up on the wall overnight. Al-Nashiri was regularly forced into "stress positions" prompting a Physician's Assistant to express concern that Al-Nashiri's arms might be dislocated.

While prone, this [redacted] interrogator menaced Al- Nashiri with a handgun. The interrogator racked the handgun "once or twice" close to Al-Nashiri's head. [Redacted].

The [redacted] interrogator also threatened to "get your mother in here," in an Arabic dialect implying he was from a country where it was common to rape family members in front detainees [sic]. [Redacted]. These threats were coupled with "forced bathing" with a wire brush to abrade the skin, [redacted]. There is also evidence Al-Nashiri was, in fact, forcibly sodomized, possibly under the pretext of a cavity search that was done with "excessive force." […]

[20] In his unclassified brief, Al-Nashiri further claims that at one point

[t]he CIA's Chief of Interrogations, a person whose presence had previously caused Al-Nashiri to tremble in fear, threatened to resign if further torture was ordered. He wrote that torturing Al-Nashiri is "a train wreak [sic] waiting to happen and I intend to get the hell off the train before it happens." He then wrote a cable to be "entered for the record" that "we have serious reservations with the continued use of enhanced techniques with [Al-Nashiri] and its long term impact on him. [Al-Nashiri] has been held for three months in very difficult conditions, both physically and mentally.... [Al-Nashiri] has been mainly truthful and is not withholding significant information. To continue to use enhanced technique[s] without clear indications that he [is] withholding important info is excessive.... Also both C/CTC/RG and HVT interrogator who departed [BLUE] in

[REDACTED] January, believe continued enhanced methods may push [al-Nashiri] over the edge psychologically." Headquarters ordered Al-Nashiri to be tortured further.

[…]

[21] According to Al-Nashiri, several years after he was detained as part of the RDI program, the government requested that a competency board evaluate him. […] They concluded that he suffers from posttraumatic stress disorder (PTSD) and major depressive disorder. […]

[22] Al-Nashiri claims that these conditions are "the result—intended result—of the government's deliberate, years long campaign to coerce [him] into a state of 'learned helplessness.' " […] He further claims that a military trial will greatly aggravate these conditions, with potentially permanent consequences for his mental and physical health. In support, he offers the declaration of his DoD-appointed expert, Dr. Crosby. Based on her examinations of Al-Nashiri, Dr. Crosby believes that he "suffers from complex posttraumatic stress disorder as a result of extreme physical, psychological, and sexual torture inflicted upon him by the United States." […] She concludes that the CIA "succeeded in inducing 'learned helplessness' " and that Al-Nashiri is "most likely irreversibly damaged by torture." […] Indeed, she writes that in her "many years of experience treating torture victims from around the world," Al-Nashiri "presents as one of the most severely traumatized individuals [she] ha[s] ever seen." […]

[23] After recounting aspects of Al-Nashiri's treatment and its current impact on his physical and psychological well-being, Dr. Crosby states that "[a]lthough, even in the best of circumstances, the horrific and calculated nature of his torture would be expected to have long lasting effects, there are multiple factors that are unique to Guantánamo and the military proceedings against [Al-Nashiri] that are further exacerbating his symptoms and suffering." […] She notes that because Guantanamo was one of the black sites at which he was held, he is regularly "confronted with reminders ... of his time in CIA custody." […] In her opinion, "[s]eeing these reminders particularly when shackled as he often is while moved to and from meetings with counsel and to court, triggers traumatic stress and causes him intense anxiety, dissociation, and painful flashbacks to his experience of torture." […] Noting that "[a] key strategy of the CIA's RDI program was to keep the detention facility's policies and procedures unpredictable in order to induce helplessness," Dr. Crosby opines that ongoing instability at Guantanamo "profoundly exacerbates ... Al-Nashiri's complex PTSD" because he has "no way of differentiating this from the government's prior deliberate efforts to destabilize his personality." […]

[24] Dr. Crosby further believes that, "[a]t present, the military trial process is a principal driver of this instability" and Al-Nashiri's condition. […] She states, for example, that "the ad hoc character of the proceedings," in which the government seeks to impose death, causes Al-Nashiri "profound anxiety," […] and that the "lack of continuity of [his] defense team" due to military personnel rules undermines his ability to build trusting relationships with his attorneys[.]

[25] While recognizing that a capital trial in any tribunal would be stressful, Dr. Crosby states that her understanding of "the more predictable procedures of federal confinement and trials causes [her] to believe that the contemplated military trial is stressful on a different order of magnitude and, given ... Al-Nashiri's situation and fragile psychological state induced by torture, exponentially more harmful." […] She has "serious doubts" about his ability to "remain physically and mentally capable of handling the physical and emotional stress of the military trial process," and she "fear[s]" that, if forced to undergo a military trial, Al-Nashiri "will eventually decompensate" with "permanently disabling effect[s] on his personality and his capacity to cooperate meaningfully with his attorneys." […]

[26] In its responsive brief, the government contests neither Al-Nashiri's allegations regarding his past treatment nor the potential consequences of a capital trial in a military commission. Instead, the government insists that those allegations are irrelevant […] But as noted above, *Councilman* held only that the ordinary burdens of defending against criminal prosecutions, however serious, are insufficient to outweigh such considerations. If there is merit to Al-Nashiri's allegations regarding his treatment and to Dr. Crosby's assessment of his current condition and the consequences of proceeding with a military trial, then Al-Nashiri is threatened with far more than the harms "incidental to every criminal proceeding brought lawfully and in good faith." […] Indeed, the alleged burdens he faces are not only unusual, but extraordinary. He contends that because the executive branch, the very authority that now seeks to try him, subjected him to years of brutal detention and interrogation tactics—"torture" in the words of his DoD-appointed expert—he suffers from psychological disorders that will be aggravated by a capital trial in a military commission. Surely, such circumstances—if true—would outweigh the equity and inter-branch comity principles that might otherwise call for abstention. […]

[…]

Discussion

I. Classification of Situation and Applicable Law

1. *(Document A, paras [1]-[2]; Document B, paras [1]-[8], [10]-[14])*

a. What are the two situations to which IHL applies? (GC I-IV, Arts. 2 and 3) b. What is the material scope of both situations? (GC I-IV, Arts. 2 and 3) c. In either situation, what qualifies an act of violence as part of an armed conflict? (GC I-IV, Arts. 2 and 3) d. In either situation, can public statements of the parties determine the classification of an act of violence? If so, how? (GC I-IV, Arts. 2 and 3) e. (*Document B, para. [12])* Is the application of IHL "established by looking not merely to the contemporaneous acts of the political branches, but to a totality of the circumstances, including [the parties'] conduct"? (GC I-IV, Arts. 2 and 3) f. Is the applicability of IHL a question of law or fact? (GC I-IV, Arts. 2 and 3) g. Are the acts of violence of al Qaeda sufficient evidence of any situation of armed conflict? (GC I-IV, Arts. 2 and 3) h. If so, is the bombing of the U.S.S. Cole part of this armed conflict? (GC I-IV, Arts. 2 and 3) i. When did this (alleged) armed conflict begin? (GC I-IV, Arts. 2 and 3)

2. *(Background Note; Document A, paras [1]-[2])*

a. According to the Court in *Flanagan*, who are the parties to the bombing of the U.S.S. Cole, and what are

the relationships between the parties? b. Could the relationship between Sudan and al Qaeda, as described by the court, change the classification of the conflict? If so, how? (GC I-IV, Art. 2; GC III, Art. 4; CIHL, Rule 4, 149; ICJ, Nicaragua v. United States, paras 80 – 122; ICTY, The Prosecutor v. Tadić, paras 87 – 145; ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 396 - 407) c. Do the facts presented establish that Sudan was a party to the armed conflict? Why or why not? (GC I-IV, Art. 2; GC III, Art. 4; CIHL, Rule 4, 149; ICJ, Nicaragua v. United States, paras 80 – 122; ICTY, The Prosecutor v. Tadić, paras 87 – 145; ICJ, Bosnia and Herzegovina v. Serbia and Montenegro, paras 396 - 407) d. How would you classify the conflict? (GC I-IV, Arts. 2 and 3)

3. *(Document A, paras [1]-[2]; Document B, paras [1]-[8])*

a. Does the bombing of the U.S.S. Cole qualify as an act of naval warfare? (GC II, Art. 4; San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994, Art. 10) b. What laws apply if the conflict is an IAC? (GC I-IV, Art. 2; GC II, Art. 4; San Remo Manual, Arts. 1, 10) c. Do laws of naval warfare apply in NIACs? Why or why not and how? What laws apply if the situation is a NIAC? (GC II, Art. 3; San Remo Manual, Arts. 1, 10) d. What laws apply in this situation? (GC II, Art. 3; San Remo Manual, Arts. 1, 10)

II. Treatment of Persons

4. *(Document A, para [1]; Document B, paras [1]-[9])*

a. Who do the plaintiffs in Flanagan et al. represent? How do you classify those victims, and are those victims protected from attack? (GC II, Art. 3; CIHL, Rules 1, 3, 4) b. How does the court classify Al-Nashiri? How do you classify Al-Nashiri? (GC I-IV, Art. 3; GC III, Art. 4; GC IV, Art. 4; CIHL, Rules 3, 5 and 6)

5. (Document A, paras [2]-[10])

a. If they had been committed in a NIAC, would the bombings of U.S.S. Cole and of the French supertanker Limburg have violated IHL? What is the difference between the two attacks? (San Remo Manual, Art. 111) b. If the bombing of U.S.S. Cole did not violate IHL, may Al-Nashiri nevertheless be prosecuted for this attack? c. Under Common Art 3, what is the prohibition against extrajudicial killing? Who does the prohibition protect? In what situation does it apply? Must a victim of an extrajudicial killing be in the power of the perpetrator? (GC I-IV, Art. 3) d. Is any killing lawful under IHL? If so, under what circumstances? (GC I-IV, Art. 3; CIHL, Rule 1) e. Under what circumstances can a non-state armed group commit a summary execution? Under IHL, are all killings by non-state armed groups summary executions? (GC I-IV, Art. 3; CIHL, Rule 1) f. Is Congress' definition of "extrajudicial killing" coterminous with IHL's definition of "summary execution"? Do you agree with the Court's analysis of the definition? Why or why not? (GC I-IV, Art. 3) g. Under IHL, can the prohibition of summary executions apply to the victims of the bombing? Why or why not? Were the victims summarily executed? (GC I-IV, Art. 3; CIHL, Rule 1) h. If so, could Sudan be responsible for any summary executions committed because of this bombing under IHL? (GC I-IV, Art. 3; CIHL, Rules 1, 149)

6. *(Document B, paras [9]-[14])*

a. Under what circumstances is it lawful for a military tribunal to try a belligerent in a NIAC? (GC I-IV, Art. 3, CIHL, Rule 100) b. Does this change if the belligerent is an "unlawful combatant"? (GC I-IV, Art. 3, CIHL, Rule 100) c. Under IHL, is it lawful to try Al-Nashiri by military commission? Does your answer change depending on whether the conflict is international or non-international in character? (GC I-IV, Art. 3, GC III, Arts 84 and 102; CIHL, Rule 100)

7. *(Document B, paras [16]-[26])*

a. How must a belligerent be treated during detention in a NIAC? (GC I-IV, Art. 3; CIHL, Rules 87, 90) b. Does this change if the belligerent is an "unlawful combatant"? (GC I-IV, Art. 3; CIHL, Rules 87, 90) c. Was

Al-Nashiri treated lawfully and, if so, why or why not? (GC I-IV, Art. 3; CIHL, Rule 87, 90) d. Can Al-Nashiri's treatment in detention affect the conditions of his trial under IHL? If so, how? (GC I-IV, Art. 3; CIHL, Rule 87, 90, 100)

III. Conduct of Hostilities

8. *(Document A, paras [1]-[2]; Document B, paras [1]-[8])*

a. Was al Qaeda, as a belligerent, required to identify itself when it bombed the U.S.S. Cole? If so, how would those requirements be met? (GC II, Art. 3; San Remo Manual, Rules 109-111) b. Is it lawful to bomb an enemy ship at port? When and why? (San Remo Manual, Rules 10-12, 14-15) c. What other requirements was al Qaeda obliged to follow under the laws of naval warfare? Under IHL of the conduct of hostilities generally? (San Remo Manual, Rules 38-45, 46) d. Were any of these requirements violated in this case, and how?