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

| **UNITED STATES OF AMERICA**<br><br>**v.**<br><br>**KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI** | **AE 251J**<br><br>**RULING**<br><br>**Defense Motion to Dismiss** Charges III and V as Barred by the Statute of Limitations.<br><br>**7 April 2017** |
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1. **Procedural History**.

a. On 22 November 2013, Counsel for Mr. Ali (a.k.a. Mr. al Baluchi) moved the Commission to dismiss Charges III and V due to their being time-barred.[1] Both are single-specification charges—the first of Attacking Civilian Objects under 10 U.S.C. §950t(3), the latter of Destruction of Property under 10 U.S.C. §950t(16). The Government responded on 6 December 2013,[2] and Mr. Ali's Counsel replied on 13 December 2013.[3]

b. Counsel for Mr. Ali argued that (1) at the time the conduct alleged in Charges III and V occurred, applicable statutes[4] established a five-year limitations period; (2) under that limitations period, the offenses had become time-barred prior to enactment of the Military Commissions Act of 2006 (M.C.A. 2006); and (3) revival of these offenses through retroactive application of the statutory

[1] AE 251 (AAA), Defense Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, filed 22 November 2013. The Rules of Court (R.C.) in effect at the time did not presume joinder of non-signatory Accused. R.C. 3.5.g-h (24 Apr. 2014). However, the R.C. were subsequently amended to presume such joinder in the absence of any motion to the contrary—which remains the rule today. R.C. 3-5.i (1 Sep 2016, incl. Chg. 1 dated 2 Mar 2017). No Accused has sought non-joinder in this motion. All Accused indicated intent to join during oral argument. *See* footnote 11, *infra*. Accordingly, the Commission finds it appropriate to apply the presumption, and will consider all non-signatory Accused to have joined Mr. Ali's motion.
[2] AE 251A, Government Response to Defense Motion To Dismiss Charges III and V as Barred by the Statute of Limitations, filed 6 December 2013.
[3] AE 251B (AAA), Defense Reply to Government Response to Defense Motion To Dismiss Charges III and V as Barred by the Statute of Limitations, filed 13 December 2013
[4] Specifically, 18 U.S.C. § 3282 (2001) and Article 43 of the Uniform Code of Military Justice (U.C.M.J.), codified at 10 U.S.C. § 843 (2001).

provision permitting their trial "at any time without limitation"[5] would offend the *Ex Post Facto* Clause of the Constitution.[6] The Government, in turn, responded that the statutes of limitation cited by Mr. Ali were inapposite; and that the offenses were subject to a customary international law (CIL) norm permitting their trial at any time, without limitation.[7] In reply, Counsel for Mr. Ali averred that (1) the statutes of limitation he relied on were the only ones extant during the relevant time period, and therefore were controlling; (2) CIL could not dictate a result contrary to these domestic laws; and (3) the Government had failed to sufficiently establish the CIL principle on which they relied.[8]

c. Counsel for Mr. Ali requested oral argument.[9] The parties argued before the Commission on 25 July 2016.[10] Counsel for Mr. Ali reiterated the arguments made in his filings, and also averred that the "catchall" five-year statute of limitations regarding non-capital offenses at court-martial (found in U.C.M.J. Article 43) applied to the subject offenses based on the Supreme Court's holding in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).[11] The Government argued that (1) the M.C.A. provision permitting trial of offenses before military commissions "at any time without limitation"[12] was controlling; (2) no relevant statute of limitations applied to these offenses prior to the M.C.A. 2006's enactment; (3) CIL permitted their trial without regard to time; and (4) the offenses were, therefore, not revived by retroactive application of the M.C.A., because they had never become time-barred in the first place.[13]

[5] M.C.A. 2006, P.L. 109-366, 120 Stat. 2600, sec. 950v (b) (17 Oct. 2006). The Military Commissions Act of 2009 (M.C.A. 2009) contained identical language. National Defense Authorization Act for Fiscal Year 2010, P.L. 111-84, 123 Stat. 2190, Title XVIII, sec. 1802 (28 Oct. 2009). This language is currently codified at 10 U.S.C. § 950t.
[6] *See* AE 251.
[7] *See* AE 251A.
[8] *See* AE 251B.
[9] AE 251, para. 7. The Government did not request oral argument. AE 251A, para. 8.
[10] Unofficial/Unauthenticated Transcript of the *U.S. Khalid Shaikh Mohammad, et al.* Motions Hearing Dated 25 July 2016 from 2:06 P.M. to 4:12 P.M. at pp. 12884-12904.
[11] *Id*. at 12885-12889, 12895-12898. The other Accused verbally joined in Mr. Ali's argument. *Id*. at 12889-90, 12898. Counsel for Mr. bin 'Attash also cited to certain actions of the U.S. Government that they averred were inconsistent with the position taken by the Prosecution. *Id*. at 12898-12904.
[12] 10 U.S.C. § 950t.
[13] *Id*. at 12890-12895.

d. On 11 January 2017, the Commission directed briefing on the following specified issue: "Whether the *Ex Post Facto* prohibition of Article I, section 9, clause 3 of the Constitution applies to this military commission proceeding such that it would prohibit revival of a time-barred offense."[14] Mr. Ali submitted his brief on the specified issue on 8 February 2017.[15] The Government responded on 22 February 2017.[16] Mr. Ali replied on 1 March 2017.[17] Neither party requested further oral argument.[18]

e. In his specified brief, Mr. Ali argued the *Ex Post Facto* Clause did apply to prohibit revival of a time-barred offense.[19] The Government conceded the applicability of the Clause,[20] but argued the motion should be denied regardless as no statute of limitations applied to the subject offenses prior to the M.C.A. 2006's passage.[21] In reply, Mr. Ali acknowledged the Government's concession, and again argued that *Hamdan* required application of the U.C.M.J. Article 43 five-year statute of limitations.[22]

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[14] AE 251D, ORDER: Defense Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, para. 1, dated 11 January 2017. (Note that the designation "AE 251C" was assigned to an in-court submission received by the Commission from counsel for Mr. bin 'Attash during oral argument on this matter. AE 251C; Transcript at 12903.)

[15] AE 251F (AAA), Mr. al Baluchi's Brief on Application of the Ex Post Facto Clause as Directed by AE251D Order, Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, filed 8 February 2017. (Note that, for administrative reasons, the "E" designation was not used in the AE 251 series.) In accordance with his approved request, Mr. Ali filed AE 251F after the date directed in AE 251D. AE 251-1 (MFL)(AAA), Mr. al Baluchi's Motion For Extension Of Time to File Response to AE 251D Order, filed 19 January 2017; AE 251-2 (RUL)(AAA), RULING: Mr. al Baluchi's Motion For Extension of Time To File Response to AE 251D Order, dated 24 January 2017.

[16] AE 251G (GOV), Government Response To Mr. Ali's Brief on Application of the Ex Post Facto Clause as Directed by AE 251D Order, Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, filed 22 February 2017.

[17] AE 251H (AAA), Mr. al Baluchi's Reply to Government Response to Brief on Application of the Ex Post Facto Clause as Directed by AE 251D Order, Motion to Dismiss Charges III and V as Barred by the Statute of Limitations, filed 1 March 2017.

[18] Mr. Ali's additional filing made no reference to any need or desire for additional argument. *See* AE 251F. The Government requested only the opportunity to respond if Mr. Ali were afforded the opportunity to argue. AE 251G, para. 8.

[19] *See* AE 251F.

[20] AE 251G, p. 2 (answering the question of overall applicability of the Clause to this military commission proceeding with a "Yes." *Id.*).

[21] *See* AE 251G.

[22] *See* AE 251H.

f. On 8 March 2017, the Commission received an amicus brief.[23] The amicus argued the *Ex Post Facto* Clause applies to these military commission proceedings.[24]

2. **Findings of Fact**.

a. The date of the offenses alleged in the Specifications of Charges III and V is 11 September 2001.

b. On 12 September 2006, five (5) years elapsed since the date of those offenses.

c. The M.C.A. 2006 was signed into law by the President on 17 October 2006.[25]

d. The initial sworn charges and specifications regarding each accused were received by the Convening Authority[26] on 15 April 2008.[27]

e. The Government offered neither argument nor evidence as to potential tolling, extension, and/or suspension of any statute of limitations applicable to Charges III and V.[28]

3. **Law**.

a. **Jurisdiction**. This Commission has been established to try alien unprivileged enemy belligerents for violations of offenses triable by military commission. 10 U.S.C. § 948b. Its personal jurisdiction is limited to individuals subject to the Military Commissions Act of 2009 (M.C.A. 2009). 10 U.S.C. § 948d.

b. **Burden of Persuasion**.

(1) Ordinarily, as movant, Mr. Ali would bear the burden to persuade the Commission by a preponderance of the evidence regarding any factual issues predicate to the relief

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[23] AE 251I (AMI), Amicus Brief Filed By The Human Rights Clinic, Inter-American University of Puerto Rico, School of Law, filed 8 March 2017.
[24] *See* AE 251I.
[25] *See* M.C.A. 2006.
[26] *See* footnote 74, *infra*, and accompanying text regarding the relevance of this date.
[27] *See* individual April 2008 charge sheets pertaining to each Accused named in the present case. Note that this first set of charges brought in April 2008 was ultimately dismissed without prejudice on 21 January 2010. *See* Direction of the Convening Authority Concerning *U.S. v. Khalid Sheikh Mohammed, et al.* (11 January 2010). Charges were brought again on 31 May 2011, forming the basis for the present case. Charge Sheet, *U.S. v. Khalid Sheikh Mohammed, et al.* (referred 4 April 2012). However, by the time of the January 2010 dismissal, the M.C.A. expressly provided the charges were subject to trial "at any time without limitation." 10 U.S.C. § 950t.
[28] *See* footnote 76, *infra*, and accompanying text.

he seeks. R.M.C. 905(c)(1)-(2). However, when the statute of limitations is raised as a defense, the Government bears the burden of demonstrating the affected offenses are not, in fact, time-barred. *See*, *e.g.*, *Musacchio v. United States*, ___ U.S. ___, 2016 U.S. LEXIS 972 (2016) ("When a defendant presses a limitations defense, the Government then bears the burden of establishing compliance with the statute of limitations by presenting evidence that the crime was committed within the limitations period or by establishing an exception to the limitations period." *Id*. at ___, *19). The Rules for Courts-Martial (R.C.M.), on which the R.M.C. are based, expressly so provide. R.C.M. 905(c)(2)(B). The R.M.C. do not expressly address statute of limitations motions. *See* R.M.C. 905-907. Per the M.C.A., offenses tried by these commissions ordinarily are subject to no statute of limitations. 10 U.S.C. § 950t.

(2) Here, however, Mr. Ali argues that the Constitution mandates application of a statute of limitations to these offenses, 10 U.S.C. § 950t notwithstanding. Under these circumstances, given the ordinary burden of proof allocation for such motions, the Commission finds it appropriate: (a) that Mr. Ali bear the initial burden of establishing a *prima facie* showing that the offenses at issue are, in fact, subject to an expired statute of limitations; and (b) if Mr. Ali does so, that the burden then shift to the Government to establish that the offenses are not, in fact, time-barred.

c. **The *Ex Post Facto* Clause and Statutes of Limitation**.

(1) The Commission notes that the applicability of most provisions of the Constitution to these proceedings remains ill-defined.[29] With regard to the *Ex Post Facto* Clause

[29] *See*, *e.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008) (expressly and narrowly holding that the Suspension Clause of the Constitution applies to detainees held at Guantanamo Bay); *Bahlul v. United States*, 767 F.3d 1, 31-33 (D.C. Cir. 2014), *rehearing granted*, 2015 U.S. App. LEXIS 16967 (D.C. Cir. 2015) (Henderson, J., concurring) (discussing generally the continued lack of clarity regarding application of other constitutional rights to Guantánamo detainees after *Boumediene*). There is significant precedent indicating that certain Fifth Amendment rights, at least, do not apply to the Guantánamo detainees. *See Bahlul*, 767 F.3d at 33 (Henderson, J., concurring) ("[I]t remains the law of this circuit that, after *Boumediene*, aliens detained at Guantánamo may not invoke the protections of the *Due Process Clause of the Fifth Amendment*." *Id*., citing *Kiyemba v. Obama*, 555 F.3d 1022 (D.C. Cir. 2009), vacated and remanded, 559 U.S. 131 (2010), reinstated in relevant part, 605 F.3d 1046 (D.C. Cir. 2010), *cert. denied*, 562 U.S. 1302 (2010); *see also Rasul v. Myers*, 563 F.3d 527 (D.C. Cir 2009), *cert. denied*, 558 U.S. 1091 (2009) (noting in context of 42 U.S.C. § 1983 suit the narrowness of *Boumediene* holding and substantial pre-*Boumediene*

specifically, no superior ruling definitively resolves its application to these Commissions.[30] In this instance, however, the Government has conceded the Clause's general applicability (though not its specific effect).[31] The Commission accepts the Government's concession and will analyze and resolve this matter accordingly.

(2) The Constitution's *ex post facto* prohibitions[32] "protect[] liberty by preventing governments from enacting statutes with [certain] manifestly unjust and oppressive retroactive effects."[33] In *Calder v. Bull*, Justice Chase described four categories of law thus prohibited:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.[34]

In *Stogner v. California*, the Court (citing *Calder*) held that a state statute purporting to extend a criminal limitations period for child sex abuse crimes violated the Clause, when applied to revive offenses that were already long time-barred[35] when the statute was enacted.

> The law at issue here created a new criminal limitations period that extends the time in which prosecution is allowed. It authorized criminal prosecutions that the passage of time had previously barred. Moreover, it was enacted after prior limitations periods

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precedent militating against extension of Fifth Amendment due process rights to Guantánamo detainees. *Id*. at 529 (citing, *inter alia, Johnson v. Eisentrager*, 339 U.S. 763 (1950))).

[30] In *Bahlul*, based on a Government concession, an *en banc* D.C. Circuit assumed the Clause applied—but stressed that "[i]n so doing, we are not to be understood as remotely intimating in any degree an opinion on the question." *Bahlul*, 767 F.3d at 18 (quotation marks omitted) (citing *Petite v. United States*, 361 U.S. 529 (1960)). The *Bahlul* judges reached differing conclusions as to the wisdom of the concession, with five of the seven indicating they would have found the Clause applicable. *Id.* at 63 (Kavanaugh, J., concurring in the judgment in part and dissenting in part).

[31] *See* AE 251F, AE 251G.

[32] U.S. Const., art. I, sec. 9, cl. 3; art. I, sec. 10, cl. 1. Note that the former clause applies to the Federal government, whereas the latter applies only to the states (and, while plainly not controlling, is cited here for clarity and completeness). Unless otherwise specified, "*Ex Post Facto* Clause" will hereinafter refer to art. I, sec. 9, cl. 3.

[33] *Stogner v. California*, 539 U.S. 607, 611 (2003) (citing *Calder v. Bull*, 3 U.S. (Dall.) 386 (1798)) (italics and internal quotation marks omitted).

[34] *Stogner*, 539 U.S. at 612 (quoting *Calder*, 3 U.S. (Dall.) at 390-91(Chase, J.)).

[35] The statute of limitations for these offenses had been three years. *Stogner*, 539 U.S. at 610. The new statute permitted prosecution of such offenses without regard to time, if certain conditions were met. *Id*. at 609-10. Stogner was indicted in 1998 for child sex abuse spanning from 1955 to 1973; the new statute thus expanded his criminal exposure by more than 22 years. *Id*.

> for Stogner's alleged offenses had expired. Do these features of the law, taken together, produce the kind of retroactivity that the Constitution forbids? We conclude that they do.

*Stogner*, 539 U.S. at 610. The Court found the statute, when applied in this manner, fell within the second (and potentially also the fourth) category of *ex post facto*-prohibited laws identified by Justice Chase in *Calder*. *Id*. at 613-16.

d. **Civilian Federal Criminal Statutes of Limitation**. The offenses at issue in this motion are not capital.[36] The parties refer to a number of Title 18, U.S. Code provisions defining and/or relating to statutes of limitation associated with similar noncapital offenses, including 18 U.S.C. §§ 32, 34, 844, 2441, 3282, and 3286. None of these statutes is directly controlling on military commissions, which are a separate and distinct justice system from the Article III courts. *See United States v. McElhaney*, 54 M.J. 120, 124 (C.A.A.F. 2000). However, they are summarized below because they provide informative context for other issues here.

(1) 18 U.S.C. § 3282. This statute states that a "catchall" statute of limitations of five years applies to noncapital federal crimes, "[e]xcept as otherwise expressly provided by law."[37]

(2) 18 U.S.C. § 2441. This statute criminalizes "war crimes,"[38] defined by the statute to include certain specified serious violations of Common Article 3 (CA3) of the Geneva Conventions.[39] Under the statute, a person committing such an offense is subject to capital punishment.[40] As defined by the statute, these CA3 violations include a number of serious crimes against persons (*e.g.*, murder, maiming), but do not appear to include any property crimes.[41]

(3) 18 U.S.C. §§ 32, 34, and 3286. 18 U.S.C. § 32 criminalizes certain acts involving hindrance, endangerment and/or destruction of aircraft and related equipment, facilities and/or

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[36] Manual for Military Commissions, Pt. IV, paras. 5(3).d, 5(16).d.
[37] 18 U.S.C. § 3282(a). Title 18 expressly makes capital offenses subject to no statute of limitations. 18 U.S.C. § 3281 ("An indictment for any offense punishable by death may be found at any time without limitation." *Id*.).
[38] The statute is limited to offenses committed by or against U.S. citizens or service members. 18 U.S.C. § 2441(b).
[39] 18 U.S.C. § 2441(a), (c)(3). The Supreme Court has categorized the conflict between the United States and al Qaeda as a non-international armed conflict falling subject to CA3. *See Hamdan*, 548 U.S. at 629-32.
[40] 18 U.S.C. § 2441(a).
[41] 18 U.S.C. § 2441(d)(1)(A)-(I).

personnel. If such act results in the death of any person, 18 U.S.C. § 34 renders it a capital offense. 18 U.S.C. § 3286 extends the statute of limitations for noncapital 18 U.S.C. § 32 violations to eight years.[42]

e. **Article 43, U.C.M.J.** The parties also refer to Article 43 of the U.C.M.J., which establishes statutes of limitation applicable to courts-martial. 10 U.S.C. § 843. Non-capital offenses under the U.C.M.J. are generally subject to a five-year statute of limitations. 10 U.S.C. § 843(b)(1).

f. ***Hamdan v. Rumsfeld***.

(1) Mr. Ali's argument relies heavily on *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), a decision in which the Supreme Court invalidated the orders that originally implemented the post-September 11 military commissions.[43]

(2) Prior to enactment of the M.C.A. 2006, the primary authority for the post-September 11 military commissions had been a 13 November 2001 "Presidential Military Order" (PMO)[44] and a series of Department of Defense (DoD) implementing "Military Commissions Orders" (MCOs) and "Military Commissions Instructions (MCIs)."[45] Chiefly at issue in *Hamdan* was MCO#1, which established basic procedure for military commissions at the time.[46] The *Hamdan* petitioner detainee sought a writ of habeas corpus and a writ of mandamus on the basis that, *inter alia*, the military commission procedures established by MCO#1 "violate[d] the most basic tenets of military and international law."[47]

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[42] Specifically, 18 U.S.C. § 3286(a) states that, "[n]otwithstanding section 3282" (*i.e.*, the five-year catchall for noncapital federal offenses described above), an eight-year statute applies to "any noncapital offense involving a violation of any provision listed in" a specified subsection of 18 U.S.C. § 2332b. That subsection lists, *inter alia*, 18 U.S.C. § 32. 18 U.S.C. § 2332b(g)(5)(B)(i).
[43] *Hamdan*, 548 U.S. at 635, 655. In a particularly fractured opinion, Justice Kennedy declined to join in certain portions of the majority *Hamdan* opinion (specifically, "Parts V and VI-D-iv,") giving those sections support of a plurality only. *Id*. at 655 (Kennedy, J., concurring). Unless otherwise indicated, all *Hamdan* citations herein are to those portions of the opinion supported by a majority of the Justices.
[44] *Id.* at 568, 622 (citing PMO, 66 Fed. Reg. 57833 (16 Nov. 2001)).
[45] *Hamdan*, 548 U.S. at fn 30, 613 (referencing implementing MCO and MCI).
[46] *Hamdan,* 548 U.S. at 613 (citing Dep't of Defense, Military Commission Order No. 1 (31 Aug 2005)).
[47] *Hamdan*, 548 U.S. at 567.

(3) The Court first recognized that, whatever his unilateral Constitutional ability to establish military commissions, the President already enjoyed qualified statutory authority to do so under Article 21, U.C.M.J (originally, Article of War 15).[48] That Article, at the time *Hamdan* was written, read as follows:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.[49]

The Court found that, with this language, "Congress . . . preserved what power, under the Constitution and the common law of war, the President had had before 1916 to convene military commissions" subject to "the express condition that the President and those under his command comply with the law of war."[50] The Court determined that Article 21 and other statutes[51] gave the President the authority "to convene military commissions in circumstances where justified under the Constitution and laws, including the law of war."[52]

(4) Next followed a plurality discussion regarding the jurisdictional viability of a conspiracy charge against the petitioner—which was largely not germane to the questions posed here.[53] One relevant matter was a reference to Colonel William Winthrop's formulation of the traditional temporal limits of military commission jurisdiction: "[T]he offense charged must have

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[48] *Id*. at 592-93.
[49] *Id*. at 641 (Breyer, J., concurring) (quoting Art. 21, U.C.M.J, codified at 10 U.S.C. § 821). Article of War 15 was first enacted in 1916. Act of 29 Aug. 1916, P.L. 64-242, 39 Stat. 619, 653. After *Hamdan*, the M.C.A. 2006 subsequently added to the end of Article 21 the following language: "This section does not apply to a military commission established under [the Military Commissions Act]." M.C.A. 2006, § 4(a)(2). Neither party argues that this statutory change had any material retroactive effect that is germane here, and the Commission finds none.
[50] *Hamdan*, 548 U.S. at 593 (citing *Ex Parte Quirin*, 317 U.S. 1 (1942)).
[51] In addition to U.C.M.J. Article 21, the Court considered Congress's 2000 Authorization for Use of Military Force (AUMF), 115 Stat. 224, note following 50 U.S.C. § 1541 (2000 ed., Supp. III), and the Detainee Treatment Act of 2005 (DTA), Pub. L. 109-148, 119 Stat. 2739—but determined that neither had any profound effect, positive or negative, on the President's Article 21authority to convene military commissions. *Hamdan*, 548 U.S. at 593-95 (noting that the AUMF did not "expand or alter the authorization set forth in Article 21," and that the DTA "cannot be read to authorize [military] commission[s]." *Id*.).
[52] *Id*. at 594-95.
[53] *Id*. at 595-613 (plurality opinion).

been committed within the period of the war"—that is, "[n]o jurisdiction exists [for a commission] to try offenses committed either before or after the war."[54] The plurality further noted that "the[se] jurisdictional limitations . . . were incorporated in Article of War 15 and, later, Article 21 of the UCMJ."[55]

(5) The Court then evaluated the procedural adequacy of MCO#1 as compared to both the U.C.M.J. and international law, and found it wanting.

> The UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the rules and precepts of the law of nations—including, *inter alia*, the four Geneva Conventions signed in 1949. The procedures that the Government has decreed will govern Hamdan's trial by commission violate these laws.[56]

The Court emphasized a long-standing principle of procedural uniformity between military commissions and courts-martial.

> In part because the difference between military commissions and courts-martial originally was a difference of jurisdiction alone, and in part to protect against abuse and ensure evenhandedness under the pressures of war, the procedures governing trials by military commission historically have been the same as those governing courts-martial. Accounts of commentators from Winthrop through General Crowder—who drafted Article of War 15 and whose views have been deemed "authoritative" by this Court—confirm as much. As recently as the Korean and Vietnam wars, during which use of military commissions was contemplated but never made, the principle of procedural parity was espoused as a background assumption.[57]

The Court further observed that this "uniformity principle" was not absolute—it "does not preclude all departures from the procedures dictated for use by courts martial," but does require that "any departure must be tailored to the exigency that necessitates it."[58] The Court found these principles to be reflected in U.C.M.J. Article 36, which at the time read:

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[54] *Id*. at 597-98 (plurality opinion) (quotation marks and cites omitted)(quoting Col. William Winthrop, *Military Law and Precedents* 837 (rev. 2d ed. 1920)).
[55] *Hamdan*, 548 U.S. at 598 (plurality decision) (italics omitted).
[56] *Id*. at 613 (quotation marks and cites omitted).
[57] *Id*. at 617 (quotation marks and cites omitted).
[58] *Id*. at 620.

> (a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [*i.e.*, the U.C.M.J.] triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
>
> (b) All rules and regulations made under this article shall be uniform insofar as practicable.[59]

The Court interpreted Article 36 as imposing two restrictions:

> Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be contrary to or inconsistent with the UCMJ—however practical it may seem. Second, the rules adopted must be uniform insofar as practicable. That is, *the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable*.[60]

Hamdan argued that certain provisions of MCO#1 were invalid due to their inconsistency with the U.C.M.J.[61] The Government countered that the Court should consider only those nine out of 158 U.C.M.J. articles that expressly addressed military commissions; that requiring procedural parity with the U.C.M.J. would undercut the utility of commissions; and that the presidential finding of impracticability of applying U.S. district court procedure recited in the November 2001 PMO was also sufficient to justify any procedural variances from the U.C.M.J.[62] Based on its interpretation of Article 36, U.C.M.J., the Court rejected these arguments.

> Hamdan has the better of this argument. Without reaching the question whether any provision of [MCO#1] is strictly contrary to or inconsistent with other provisions of

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[59] Manual for Courts-Martial, United States, app. 2, § 836 (2005, incl. 14 Oct. 2005 amendments). Note that, after *Hamdan* was decided, the M.C.A. 2006 amended Article 36, expressly excepting commissions established under the M.C.A. from the Article's application. M.C.A. 2006 § 4(a)(3). Neither party argues, and the Commission does not find, that this amendment had any retroactive effect germane to the disposition of the instant motion.

[60] *Hamdan*, 548 U.S. at 620 (emphasis added).

[61] *Id*. at 621.

[62] *Id*. at 621-22. The PMO contained an express Presidential finding that

> [g]iven the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order . . . consistent with [Article 36, U.C.M.J.] . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

PMO, §1(f).

> the UCMJ, we conclude that the practicability determination the President has made is insufficient to justify variances from the procedures governing courts-martial. Subsection (b) of Article 36[, UCMJ] was added after World War II, and requires a different showing of impracticability from the one required by subsection (a). Subsection (a) requires that the rules the President promulgates for courts-martial . . . and military commissions alike conform to those that govern procedures in Article III courts, so far as he considers practicable. Subsection (b), by contrast, demands that the rules applied in courts-martial . . . and military commissions . . . be uniform insofar as practicable. *Under the latter provision, then, the rules set forth in the Manual for Courts-Martial must apply to military commissions unless impracticable*.[63]

The Court went on to note that the Presidential finding in the PMO regarding U.S. district court procedure did not address the impracticability of applying the U.C.M.J.; and that, in any event, "[n]othing in the record before us demonstrates that it would be impracticable to apply court-martial rules."[64] The prerequisites for variance not having been met, "the rules applicable in courts-martial must apply."[65]

(6) The Court went on to compare MCO#1 to relevant international law standards, and found MCO#1 also inadequate based on its inconsistency with portions of the Geneva Conventions.[66] The *Hamdan* Court made clear, however, that inconsistency with the U.C.M.J. had been a separate, independent basis—apart from international law—for quashing MCO#1. "Article [36, U.C.M.J.] not having been complied with here, the rules specified for Hamdan's trial are illegal."[67]

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[63] *Hamdan*, 548 U.S. at 622 (quotations marks, cites and italics contained in original omitted; emphasis of last sentence added). It is also notable that, in responding to the dissent, the majority stated a belief that Article 36 evidenced Congressional intent "to codify the long-standing practice of procedural parity between courts-martial and other military tribunals." *Id*. at fn 50.

[64] *Id*. at 624. Justice Kennedy, in a portion of his concurrence joined in by three other Justices, further discussed the impracticability standard, noting that subsection (b) of Article 36, U.C.M.J "requires us to compare the military-commission procedures with those for courts-martial and determine, to the extent there are deviations, whether greater uniformity would be practicable." *Id*. at 640 (Kennedy, J., concurring in part). He noted the language of Article 36 suggests the President receives a lower degree of deference when departing from court-martial—as opposed to federal district court—procedure, and that departures from court-martial procedure "cannot . . . be based on mere convenience or expedience." *Id*.

[65] *Id*.

[66] *Id*. at 625-635 (partial plurality opinion).

[67] *Id*. at 625. The Commission notes that, while neither the PMO nor MCO#1 contained any statute of limitations provisions, other implementing DoD policy stated that law of war violations tried by commission were "not subject to any statute of limitations." U.S. Dep't of Defense, Military Commissions Instruction #2 (MCI#2), ¶ 4.C (30 April

g. **CIL Imprescriptibility[68] Principle Regarding War Crimes**. The Government relies heavily on an asserted CIL norm against application of statutes of limitation to war crimes. There appears to be little doubt that such an international norm had crystallized in some form by at least 1998, with the adoption of the Rome Statute of the International Criminal Court (ICC).[69] However, CIL principles generally have limited binding domestic effect. While ambiguous domestic statutes are ordinarily construed so as to harmonize with CIL whenever possible,[70] CIL ordinarily cannot

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2003). No higher binding domestic legal authority appears to have so stated, prior to the M.C.A. 2006. The *Hamdan* Court, while apparently aware of MCI#2 (*see Hamdan*, 548 U.S. at fn 30 (citing MCI#2 in passing)), did not substantively address MCI#2 or its limitations language. However—even assuming any charges in *Hamdan* were noncapital—5 years had not then passed since the alleged offenses. Accordingly, the *Hamdan* Court was not presented with the precise issue we address here.

[68] "Imprescriptibility" is a term originating within civil law systems, which refers to the inapplicability of time limits to prosecution of an offense – *i.e.*, an "imprescriptible" offense is one that cannot ordinarily become time-barred. Kok, Ruth A., *Statutory Limitations in International Criminal Law* 14 (2007); Jan Arno Hessbrugge, *Justice Delayed, Not Denied: Statutory Limitations and Human Rights Crimes*, 43 Geo. J. Int'l L. 335, 338 (2012). While recognizing its origin outside of Anglo-Saxon common law, since imprescriptibility is "an often-used term for the non-applicability of statutory limitations to international crimes" (Kok, 14), the Commission will employ it herein for convenience.

[69] *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (hereinafter, Rome Statute); Kok, pp. 338-39 (following exhaustive analysis, identifying passage of the Rome Statute as "the decisive moment" regarding clear establishment of international norm regarding imprescriptibility of certain international crimes, including serious war crimes); *see also* Hessbrugge, 351-54 (noting that, as of 1989, "only 19 of the then 157 UN Member States had adopted [imprescriptibility] legislation [regarding] core international crimes" such as war crimes, and that the 1998 Rome Statute "provided the decisive impetus" for change in this regard. *Id*. at 352-53). The Rome Statute, to which 139 of 193 U.N. member nations are signatories, gives the ICC jurisdiction over serious law of war violations in the context of CA3 conflicts (such as the conflict with al Qaeda), and expressly applies no statute of limitations to them. Rome Statute, art's 5.1(c), 8.2(c)-(f), 29; *Hamdan*, 548 U.S. at 629-32 (finding the conflict between the U.S. and al Qaeda a non-international armed conflict subject to CA3); U.N. Treaty Collection Website Report, Rome Statute of the International Criminal Court, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XVIII-10&chapter=18&clang=_en (last retrieved 7 Apr 2017) (hereinafter, UNTC ICC Status Report) (showing number of Rome Statute signatories as of 7 April 2017). The Rome Statute's definition of CA3 war crimes subject to its jurisdiction includes certain specified property crimes, such as "[d]estroying . . . the property of an adversary" when such destruction is not "imperatively demanded by the necessities of the conflict." Rome Statute, art. 8.2(e)(xii). While there are indications the imprescriptibility principle may have crystallized earlier (*see* Kok, pp. 303-23), identification of the Rome Statute as a clear marker is sufficient for the analysis here. In any event, it appears the principle was not clearly established as late as 1968—when widely disparate international reaction to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, 754 U.N.T.S. 73 (11 Nov 1970) (hereinafter, 1968 Convention), clearly indicated a lack of meaningful consensus on the issue. *See* Robert H. Miller, *The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity*, 65 Am. J. Int'l L. 476 (1971) (contemporaneous analysis of the development and adoption of the Convention, noting that "[d]uring the [U.N.] debates on the convention . . . opinions were sharply divided on the non-applicability of statutory limitations to war crimes as a universal principle." *Id*. at 481). When the Convention was initially presented for adoption, fewer than half of the then-126 U.N. Member States voted for it. *Id*. at 477.

[70] "Where fairly possible, a United States statute is to be construed so as not to conflict with international law or with an international agreement of the United States." Restatement (Third) of the Foreign Relations Law of the U.S.

override domestic statutory language.[71] A domestic statute can be superseded or amended through U.S. ratification of a treaty occurring later in time.[72] The United States has not, to the Commission's knowledge, formally acceded to or implemented any treaty or international instrument purporting to disallow application of statutes of limitation to all war crimes.[73]

4. **Analysis**.

a. **Whether the Offenses at Issue Would Be Time-Barred if a Five-Year Statute of Limitations Applied to Them Prior to Passage of the M.C.A. 2006**.

(1) Mr. Ali argues that a five-year statute of limitations applied to noncapital military commission offenses prior to passage of the M.C.A. 2006; that the subject offenses thus became time-barred prior to the M.C.A. 2006's enactment; and that the M.C.A. cannot now be retroactively applied so as to revive them. As an initial matter, Mr. Ali's petition self-evidently fails if a five-year statute would not, in fact, have run with regard to these offenses before the M.C.A.'s passage. The facts presented here, however, support his contention in this regard. The offenses were committed on 11 September 2001. Accordingly, absent supervening factors, a five-year statute of limitations would

§ 114. *See also Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804) ("[A]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Id*. at 118).

[71] *See U.S. v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." *Id*. at 1091); *see also Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (in denial of petition for *en banc* rehearing, three circuit judges in separate opinions discussing significant limitations on domestic application of CIL (*Id*. at 1-9 (Brown, J., concurring in denial), 9-53 (Kavanaugh, J., concurring in denial), 53-56 (statement of Williams, J.)).

[72] *See* Restatement (Third) of the Foreign Relations Law of the U.S. § 111(3)-(4).

[73] The United States is not a signatory to the 1968 Convention. *See* corresponding U.N. Treaty Collection Website Report, https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-6&chapter=4&clang=_en (last retrieved 7 Apr 2017). Neither is the United States a party to the Rome Statute (even assuming the principles underlying formulation of the ICC's jurisdiction could somehow have any direct impact on application of domestic statutes of limitation). *See* UNTC ICC Status Report, *supra*. The four Geneva Conventions (GCs), to which the U.S. is a party, require those bound to "enact any legislation necessary to provide effective penal sanctions for . . . grave breaches"—but are silent on the specific issue of statutes of limitation. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GC I), 6 U.S.T. 3114; T.I.A.S. 3362; 75 U.N.T.S. 31, Art. 49 (12 Aug 1949) (note that while there are four GCs, for the sake of brevity only GC I is cited here; the relevant language in the other three GCs is substantially similar to that in GC I). With regard to domestic implementation, 18 U.S.C. § 2441 criminalizes grave CA3 breaches without limitation as to time, but does not define such breaches to include pure property offenses—which remain subject to the catchall five-year statute in 18 U.S.C. § 2332. *See* footnotes 38-41, *supra*, and accompanying text. The Government has drawn the Commission's attention to no other relevant international instruments to which the United States is a party, and the Commission is aware of none.

have run on 12 September 2006. The M.C.A. 2006 was passed on 17 October 2006. Initial sworn charges and specifications regarding each accused were received by the Convening Authority[74] on 15 April 2008.[75] The Government has not effectively raised any issue regarding potential tolling, extension and/or suspension of any statute of limitations applicable to the subject offenses prior to 15 April 2008.[76] Accordingly, the facts before the Commission indicate that, under a five-year statute, these offenses would have become time-barred before the M.C.A. 2006 was passed.

(2) The Government has conceded applicability of the *Ex Post Facto* Clause, and has not contested the general applicability of *Stogner* to prohibit revival of time-barred offenses. Rather, the Government avers that *Stogner* does not merit the relief Mr. Ali seeks here, as it claims these offenses did not become time-barred prior to the M.C.A. 2006's enactment.

(3) Accordingly, this matter turns on the question of what statute of limitations—if any—applied from the time the offenses alleged in Charges III and V were committed through the

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[74] As the M.C.A. does not contemplate application of any statute of limitations to offenses before it, neither the Act nor its implementing regulation specify a mechanism to trigger tolling. However, the R.M.C. are patterned after the R.C.M. and the M.C.A. specifically states that court-martial precedent and procedure may be looked to for interpretive guidance where commissions-specific authorities are silent. 10 U.S.C. § 948b(c) (noting that while standards for courts-martial are not binding on military commissions, they may be considered as "instructive" interpretive guidance where appropriate). At court-martial, the statute of limitations tolls when preferred charges are received by the officer exercising summary-court martial convening authority over the accused. 10 U.S.C § 843(b)(1). The most analogous act under the R.M.C. is receipt of charges by the Convening Authority for disposition. *See* Regulation for Trial by Military Commission, paras. 2-3.a; 3-3; 4-3 (2011); R.M.C., Ch. IV. Accordingly, for purposes of the present matter, the Commission determines this to be the relevant date.

[75] That is, a total of 6 years, 7 months, and 4 days after the offenses alleged in Charges III and V.

[76] Only in its final filing regarding this matter does the Government make some passing reference to tolling. Arguing regarding application of 18 U.S.C. § 3286—a statute the Commission has determined to be inapposite here (*see* para 3.d, *supra*)—the Government states:

> Assuming for argument's sake that a Title 18 statute would determine this matter, and *leaving aside any bases for tolling a statute of limitations during times the Accused were fugitives from justice*, the statute of limitations under 18 U.S.C. § 3286 could not have expired before . . . the Accused were originally charged in a military commission.

AE 251G, p. 11 (footnotes omitted)(emphasis added). In an accompanying footnote, the Government makes the bare assertion that "[t]olling is appropriate under both the UCMJ and Title 18," with an accompanying "see" citation to 10 U.S.C. § 843(c)-(d) and 18 U.S.C. § 3290. No supporting facts are supplied. The Commission declines to find that this cryptic, bare, eleventh-hour assertion, made in a footnote and unsupported by any clear proffer of fact, effectively raises this issue. Rather, the Commission takes the Government at its word that it "leav[es] aside any bases for tolling." *See U.S. v. Blazier*, 68 M.J. 439, 443 (C.A.A.F. 2010) (citing *Greenlaw v. United States*, 554 U.S. 237 (2008)); *U.S. v. Bonilla-Mungia*, 422 F.3d 316, fn 1 (5th Cir. 2005).

passage of the M.C.A. 2006. If the offenses thereby became time-barred prior to the M.C.A. 2006's passage, then, under *Stogner*, they must be dismissed.

b. **Article 43, U.C.M.J and *Hamdan*.**

(1) Mr. Ali places great weight on *Hamdan*. He claims *Hamdan* mandated application of Article 43, U.C.M.J. to military commissions prior to passage of the M.C.A. 2006. Fairly read, *Hamdan* stands for the proposition that, by its enactment in 1920 of what would become Article 36, U.C.M.J.,[77] Congress mandated parity of "[p]retrial, trial, and post-trial *procedures*"[78] between "courts-martial, military commissions and other military tribunals;"[79] and, as a result—in the absence of effective action establishing a departure from such procedures—"the rules [of] courts-martial must apply."[80] Article 43, U.C.M.J. appears to establish statutes of limitation as a matter of court-martial procedure,[81] and no party has argued that Article 43 is anything other than procedural in nature. Accordingly, per the interpretation of Article 36 advanced in *Hamdan*, the sole action taken by the Government to establish differing procedures for military commissions pre-M.C.A. 2006 (*i.e.*, MCO#1) was ineffective; and, in the absence of such action, "the rules [of] courts-martial must apply."[82] The statutes of limitation applicable to courts-martial are established by Article 43, U.C.M.J.—which directs a five-year limitations period for non-capital offenses.

(2) Nowhere in its filings regarding this matter does the Government distinguish, discuss, or even refer to, *Hamdan*. Rather, it relies almost entirely on its reading of the CIL imprescriptibility norm. However, a CIL principle cannot override Articles 36 and/or 43 of the

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[77] Article 36 was originally enacted as Article of War 38 in 1920. 41 Stat. 759, 794.
[78] 10 U.S.C. § 836(a) (emphasis added). The Commission notes that, as originally written in 1920, Article of War 38 only specified "procedure." 41 Stat. 759, 794. The clarifying language specifying "[p]retrial, trial, and post-trial procedure" was added in 1979. Act of Nov. 9, 1979, Pub. L. No. 96-107, 93 Stat. 803, 811, § 801(b). Neither the fact nor the timing of that amendment, however, dictates any differing result here.
[79] 10 U.S.C. § 836(a).
[80] *Hamdan*, 548 U.S. at 624.
[81] Article 43 appears in Subchapter VII of the U.C.M.J., which is titled "Trial Procedure." *See* 10 U.S.C. §§ 836-854. The U.C.M.J. Articles considered by the *Hamdan* court in its evaluation of MCO#1's consistency included other provisions from this subchapter (*e.g.*, 10 U.S.C. § 839). *Hamdan*, 548 U.S. at 621.
[82] *Hamdan*, 548 U.S. at 624.

U.C.M.J.—which, in light of *Hamdan*, constitute relevant, binding domestic statutes.[83] Ordinarily, international law can only override a domestic statute in the form of a ratified, implemented (or self-executing) treaty occurring later in time.[84] The Government has cited no such authority, and the Commission is aware of none.

(3) Even if CIL is in some way applicable, the Supreme Court in *Hamdan* looked to both court-martial procedure and international law as independently sufficient bases for defining procedural limits on military commissions. As a matter of both common sense and fundamental interpretive principles, if separate authorities purport to impose differing standards, the narrower (*i.e.*, a five-year limitations period, as opposed to an unbounded one) will generally control.[85]

(4) Beyond its CIL discussion, the Government advances several other arguments that Article 36, U.C.M.J. is not controlling here. Specifically, the Government: (1) argues that Article 43, U.C.M.J. cannot reach military commission proceedings, as by its express terms it applies only to courts-martial;[86] (2) relies on Article 21, U.C.M.J.'s "preserv[ation of] the jurisdiction of military commissions;"[87] (3) cites to certain language from *In re Yamashita*, 327 U.S. 1 (1946), regarding the

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[83] *See* footnote 71, *supra*. The Commission takes notice of the interpretive principle directing that ambiguous domestic statutes be construed consistently with international law whenever possible (often referred to as the "*Charming Betsy* canon," after the Supreme Court decision that established it). *See* footnote 70, *supra*. However, the Government has not invoked that principle here. Even if it had, the operative language of U.C.M.J. Articles 36 and 43 is fairly clear in this application—particularly in light of *Hamdan*. Where statutory language is unambiguous, the canon has no application. *See Yunis*, 924 F.2d at 1091 (courts are "'obligated to give effect to an unambiguous exercise by Congress of its jurisdiction . . . even if such an exercise would exceed the limitations imposed by international law." *Id*.). Regardless, the CIL norm relied on by the Government, as implemented both domestically and by the international community, appears to recognize that not all law of war violations are *per se* imprescriptible. Both the Rome Statute and the 1968 Convention apply the imprescriptibility principle only to a select category of offenses. Rome Statute, art's. 5(c); 8.2(c), (e); 29; 1968 Convention, art. I(a). Domestically, 18 U.S.C. § 2441 renders certain severe war crimes capital (to include "grave breaches" of CA3 as defined by the statute), while leaving others subject to the catchall five-year limitations period in 18 U.S.C. § 3282. Notably, the charges at issue in this motion would not qualify as capital CA3 "grave breaches" as defined in that statute. 18 U.S.C. § 2441(c)(3), (d). Accordingly, even assuming *Charming Betsy* to be applicable, a construction of the U.C.M.J. as applying a five-year statute of limitations to certain noncapital war crimes before military commissions does not appear materially inconsistent with the law of nations in this regard.

[84] Restatement (Third) of the Foreign Relations Law of the U.S. § 111(3)-(4).

[85] *See*, *e.g.*, *United States v. Estate of Romani*, 523 U.S. 517, 532 (1998) (later, more specific statute governs).

[86] Transcript at 12891; AE 251A, pp. 3-4; AE 251G, p. 7.

[87] AE 251G, p. 7.

temporal scope of military commission authority;[88] and (4) references a footnote penned by Col. William Winthrop indicating that statutes of limitation are "inapposite" to military commissions.[89] However, none of these is persuasive.

i. The Government claims Article 43 cannot affect military commission proceedings, as by its express terms it applies only to courts-martial.[90] In *Hamdan*, the Government presented this precise argument with regard to the U.C.M.J.'s applicability, and the Supreme Court brushed it aside.[91] The *Hamdan* Court made clear that, absent an effectively-justified variance, *court martial procedure* controls military commissions. The fact that Article 43 by its terms is expressly a facet of *court martial procedure* therefore in fact bolsters—rather than undermines—the justification for its applicability to commissions pre-M.C.A. 2006.

ii. At first blush, Article 21, U.C.M.J. and the cited language from *Yamashita* appear potentially more helpful to the Government's position. Article 21 of the U.C.M.J. states in pertinent part that "[t]he provisions of [the U.C.M.J.] conferring *jurisdiction* upon courts-martial do not deprive military commissions . . . of concurrent *jurisdiction* with respect to *offenders or offenses* that by statute or by the law of war may be tried by military commissions."[92] The Government also quotes the following language from *Yamashita*:

> The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the *authority sanctioned by Congress* to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed. . . .
>
> We cannot say that there is no *authority to convene* a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances, the practical

[88] AE 251A, p. 6; AE 251G, p. 6.
[89] AE 251G, p. 8.
[90] Transcript at 12891; AE 251A, pp. 3-4; AE 251G, p. 7.
[91] *Hamdan*, 548 U.S. at 622.
[92] 10 U.S.C. § 821 (emphasis added).

> administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.
>
> No writer on international law appears to have regarded *the power of military tribunals*, otherwise *competent to try* violations of the law of war, as terminating before the formal state of war has ended.

*In re Yamashita*, 327 U.S. at 11-12 (internal citations omitted) (emphasis added). However, full consideration indicates these authorities are inapposite to the issue here. These references to "concurrent jurisdiction," "offenders and offenses [who] may be tried," the "authority to convene" tribunals, and so forth appear focused on the temporal scope of military commission *jurisdiction*—rather than any specific *procedure* such as statutes of limitation.[93] The issue here is one of identifying procedural controls applicable to commissions pre-M.C.A. 2006, not of defining the scope of jurisdictional authority to convene a commission before or after a conflict. The jurisdictional authority to convene a military commission at any time during the existence of a conflict does not necessarily foreclose the ability to establish procedural controls limiting the exercise that authority—to include statutes of limitation. As interpreted by *Hamdan*, the procedural parity codified in Article 36 of the U.C.M.J. (the inception of which postdates Article 21)[94] does just that.

iii. The Winthrop footnote cited by the Government appears to at least strongly imply that statutes of limitation were ordinarily considered inapplicable to military commissions at the time of that writing.[95] However, giving due regard to Col. Winthrop's authority

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[93] Statutes of limitation are ordinarily not jurisdictional in nature. *See Musacchio v. United States*, __ U.S. __, 2016 U.S. LEXIS 972 (2016) (in examining the five-year catchall limitations period of 18 U.S.C. § 3282(a), noting that "statutes of limitations and other filing deadlines ordinarily are not jurisdictional," and finding that "[a]lthough §3282(a) uses mandatory language, it does not expressly refer to subject-matter jurisdiction or speak in jurisdictional terms," and that it therefore "[did] not . . . provide a clear indication that Congress wanted [it] treated as having jurisdictional attributes." *Id*. at __, *15-16).

[94] Article 21, U.C.M.J. (originally Article of War 15) was first enacted in 1916, whereas Article 36, U.C.M.J (originally Article of War 38) first appeared in 1920. 39 Stat. 619, 653; 41 Stat. 759, 794.

[95] In the cited language, Winthrop notes that military commissions ordinarily entertain any special pleas offered, but adds a qualifying footnote: "Provided [such pleas] are legally apposite. Thus a plea of the statute of limitations would *not* be, under the terms of Art. 103." Winthrop 842, fn 27. Article of War 103 was the predecessor to

as the repeatedly-recognized "Blackstone of military law,"[96] the Commission notes that a single footnote, even from his well-regarded treatise, is a slender reed. Other contemporaneous sources indicate statutes of limitation were, at times, historically applied in U.S. military commissions.[97] Furthermore, Col. Winthrop wrote his treatise antecedent to the passage of Article of War 38—which would become U.C.M.J. Article 36.[98] Therefore, whatever Col. Winthrop's position on this question, it cannot have taken Article 36 and its pronouncement of procedural parity—which was central to *Hamdan*—into account.

5. **Conclusion**.

a. In light of the foregoing, the Commission is persuaded that, prior to passage of the M.C.A. 2006, absent effective action by the Government establishing differing procedure in accordance with Article 36 of the U.C.M.J. (as construed by the *Hamdan* Court), court-martial procedure was applicable to military commissions—to include Article 43, U.C.M.J. The CIL principle cited by the Government, however well-established, cannot override the U.C.M.J.—a domestic statute. The Government has cited no authority sufficient to contravene Articles 36 and 43 of the U.C.M.J. in this regard.

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U.C.M.J. Article 43, and established a two-year catchall statute of limitations. Manual for Courts-Martial, United States 92 (1898).

[96] *Burns v. Wilson*, 346 U.S. 844, 849, fn 1 (1953); *Reid v. Covert*, 354 U.S. 1, 19, fn 38 (1957) (plurality opinion); *Hamdan*, 548 U.S. at 596 (plurality opinion) (citing *Reid*).

[97] *See*, *e.g.*, Capt. Charles R. Howland, *Digest of Opinions of the Judge Advocates General of the Army* (1917), which noted:

> In view of the analogy prevailing . . . between these bodies and courts-martial, [it has been] held that military commissions would properly be sworn like general courts-martial; that the right of challenging their members should be afforded to the accused; that two-thirds of their members should concur in death sentences; *and that the two years' limitation would properly be applied to prosecutions before them*.

*Id*. at 1070 (emphasis added). *See also* Major-General George B. Davis, *Treatise on the Military Law of the United States Together With the Practice and Procedure of Courts-Martial and Other Military Tribunals* 313 (3d ed., revised 1915) (stating same).

[98] Article 36, U.C.M.J. was originally enacted as Article of War 38 in 1920. 41 Stat. 759, 794. While the 1920 edition of Col. Winthrop's treatise is often cited, it is a reprint of an edition published in 1898. Winthrop, pp. 2-3, 5-7. Winthrop passed away in 1899. Joshua E. Kastenberg, *The Blackstone of Military Law: Col. William Winthrop* 318 (2009).

b. The Commission notes the provisions of the M.C.A. 2006 and 2009 purporting to permit trial of these offenses without limitation as to time were plainly intended by Congress to be applied retroactively.[99] The *Ex Post Facto* Clause, as applied by the *Stogner* Court, prohibits revival of time-barred offenses by retroactive application of changes to statutes of limitation. The Government has conceded applicability of the Clause here. The offenses at issue, applying Article 43, U.C.M.J., would have become time-barred prior to passage of the M.C.A. 2006. Well-established precedent cautions against disposing of issues on Constitutional grounds, if doing so can reasonably be avoided.[100] The Constitutional issue here, however, is squarely presented, and accordingly must be resolved.[101]

c. The Commission acknowledges the great deference it owes the concerted will of the Executive and Legislative branches, as expressed in the M.C.A. 2006 and 2009 and their implementing regulations. In the context of reviewing combined Executive and Legislative action, the Supreme Court has said that "[a]n [action] executed by the President pursuant to an Act of Congress [is] supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it," and further noted that

> [w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate. . . . If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power.[102]

The Constitution's *ex post facto* protections are just such an express, overriding Constitutional check on the Government's power. The Commission further acknowledges that the political branches, in

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[99] *See Bahlul*, 767 F.3d 1, 12-13 ("Although we presume that statutes apply only prospectively absent clear congressional intent to the contrary, that presumption is overcome by the clear language of the 2006 MCA." *Id*. (internal quotation marks omitted).)
[100] *See id. at* 15-17 (discussing constitutional avoidance canon).
[101] *See id.* at 16-17 ("Because the Congress's intent to authorize retroactive prosecution of the charged offenses is clear, we must address [the] *ex post facto* argument." *Id*. at 17).
[102] *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952).

drafting and enacting the M.C.A. 2006, doubtless did their own good-faith Constitutional analysis, and—based on their own independent judgment and due diligence—were satisfied the *Ex Post Facto* Clause would not be offended by retroactive application of 10 USC § 950t.[103] In light of the Supreme Court's analyses in *Calder*, *Stogner,* and *Hamdan*, with regard to these particular offenses and under these specific circumstances, the Commission does not agree.

6. **Ruling**. Mr. Ali's Motion to Dismiss Charges III and V as Barred by the Statute of Limitations is **GRANTED**. Charges III and V are **DISMISSED WITH PREJUDICE** as to all Accused in this case.

So **ORDERED** this 7th day of April, 2017.

*//s//*
JAMES L. POHL
COL, JA, USA
Military Judge

[103] *See Bahlul*, 767 F.3d 1, 15-16 (noting the presumption that members of the other branches of Government understand and faithfully attempt to carry out their oaths to uphold the Constitution in performing their functions).