MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA v. **KHALID SHAYKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	AE 502(MAH) **Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities** Filed: 7 April 2017

1. Timeliness: This motion is timely filed under R.M.C. 905(b)(2), which provides that jurisdictional defects in the charges and specifications may be raised at any time during the pendency of the proceedings.

2. Relief Sought: The Defense seeks dismissal of this case for lack of personal jurisdiction under the Military Commissions Act of 2009 (MCA), because Mr. al Hawsawi and his co-accused are not "unprivileged enemy belligerents" over whom this Commission would have personal jurisdiction.

3. Overview: The Military Commissions Act of 2009 explicitly gives commissions jurisdiction to try "alien unprivileged enemy belligerents." But "alien unprivileged enemy belligerents" are defined in such a way that they cannot exist outside of "hostilities," i.e., "armed conflict" as that term is used in international law. Furthermore, under the U.S. Constitution and the Law of War, they *could* not be defined to exist outside of an armed conflict, even if Congress wished to do so. That is because the law of war is shaped and defined by customary international law.

Therefore, the non-existence of an armed conflict is fatal not only to subject matter jurisdiction (as the Defense has argued in AE 488(MAH), Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction due to the Absence of Hostilities (3 February 2017)) but to personal jurisdiction as well.

4. Burden and Standard of Proof: The Prosecution has the burden to show that the Commission has jurisdiction. R.M.C. 905(c)(2)(B).

5. Facts:

This motion relies on the same facts presented in AE 488, Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction due to the Absence of Hostilities (filed 3 February 2017), at 2-9 and therefore incorporates those facts here by reference.

6. Law and Argument:

A. The Absence of Hostilities Deprives this Commission of Personal Jurisdiction

The "jurisdiction" section of the Military Commissions Act of 2009 provides that "A military commission under this chapter shall have jurisdiction to try persons subject to this chapter for any offense made punishable by this chapter . . ." 10 U.S.C. § 948d. The section labelled "persons subject to this chapter" states that "Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter." 10 U.S.C. § 948c. Under the statute,

> The term 'unprivileged enemy belligerent' means an individual (other than a privileged belligerent) who—
>
> (A) has engaged in hostilities against the United States or its coalition partners;
>
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or

> (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

10 U.S.C. § 948a(7).

"Hostilities" are defined as "any conflict subject to the law of war," 10 U.S.C. § 948a(9), i.e., an "armed conflict" as that term is used in international law. Thus, subsections (A) and (B) of this definition explicitly require the existence of "hostilities" for a defendant to be subject to the personal jurisdiction of this Commission.[1] Section 950b(c) further requires that "[a]n offense specified in [subchapter VIII] is triable by military commission under this chapter *only if* the

[1] An exchange on the record on 24 March 2017 suggested that the Commission is inclined to see the question of hostilities as a pure question of law. *United States v. Khalid Shaikh Mohammad, et al.*, Tr. 15526. However, it is actually a mixed question of law and fact.

In federal litigation, jurisdiction may present a purely legal question, but it can also present a question that requires pretrial fact finding. See *Bulova Watch Co., Inc., v. K. Hattori, Co., Ltd.*, 508 F. Supp. 1322, 1328 (E.D.N.Y. 1981) (noting that judicial notice may be used broadly in determining issues of jurisdiction, because "[t]he judgments involved in determining questions of jurisdiction such as the one before us involve mixed questions of law and fact"). Thus, in a case based on diversity of jurisdiction for example, a federal court may have to resolve a dispute about the state citizenship of one or more parties, or the amount in controversy, in a way that requires pretrial factfinding. *See Sheehan v. Gustafson*, 967 F.2d 1214, 1215 (8th Cir. 1992) ("A district court's conclusion as to citizenship for purposes of federal diversity jurisdiction is a mixed question of law and fact (albeit primarily fact)"); *Hudson Pak Establishment v. Shelter for Homeless, Inc.*, No. 05-2212-CV, 224 Fed. Appx. 26, 29 (2d Cir. Mar. 24, 2007) (collecting cases); see also *United States v. Williams*, 14 M.J. 428, 429 (C.M.A. 1983) (holding that extent of "special and maritime jurisdiction of the United States" presented a mixed question of law and fact, and requiring judicial DuBay hearing to determine the same). Jurisdictional discovery may be allowed to establish jurisdictional facts when necessary. *See GTE New Media Services, Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351-52 (D.C. Cir. 2000).

Here, the Defense's challenge to jurisdiction is necessarily based on "the customs and usages of civilized nations," and to find evidence of these, the Supreme Court has relied on "the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat." *The Paquete Habana*, 175 U.S. 677, 700 (1900), quoted in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004). The "customs and usages of civilized nations" are obviously questions of fact, as they involve the actual behavior of governments around the world. Such behavior cannot be ascertained from any single legal source, but must be sought through evidence—including, but not limited to, the learned opinions of jurists and commentators.

The U.S. District Court for the District of Columbia has recently recognized that a question of customary international law—specifically, whether a given U.S. action violated such law—was a "quintessential mixed question of law and fact." *Ali Jaber v. United States*, 155 F. Supp. 3d 70, 80 (D.D.C. 2016) (appeal pending). As that court stated, such questions "require the application of a broad legal standard to particular facts." *Id., citing Barbour v. Browner*, 181 F.3d 1342, 1345 (D.C. Cir. 1999). This perfectly describes the situation before the Commission in this motion. The *Tadic* standard, see AE 488(MAH), at 10, broadly describes the factors that distinguish an armed conflict from a "terrorist" action, as those terms are used in the Law of War. But that standard must be applied to particular facts—including the behavior of states and international tribunals in analogous situations—to answer the jurisdictional questions presented in this motion.

offense is committed in the context of and associated with hostilities." (emphasis added). 10 U.S.C. § 950b(c).

Every charge against Mr. al Hawsawi is an offense specified in subchapter VIII. Thus, under the Military Commissions Act itself, Mr. al Hawsawi cannot be an "unprivileged enemy belligerent" under any part of this definition *unless hostilities existed at the time of his alleged conduct.*

In AE 488, Mr. al Hawsawi showed how his alleged actions did not take place in the context of "hostilities," i.e. an armed conflict. *See* AE 488, Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction Due to the Absence of Hostilities (3 February 2017);[2] *see also* att. B. Because no hostilities existed, under the Military Commissions Act as passed by Congress, Mr. al Hawsawi cannot be an unprivileged enemy belligerent subject to the jurisdiction of this Commission.

Furthermore, not only does Congress' definition of "unprivileged enemy belligerent" disallow that status outside of armed conflict, but also under the law of war, Congress could not have expanded that status outside of armed conflict, even had it wished to do so. In *Ex Parte Quirin*, the Government's preferred authority on the law of unprivileged belligerents, the Supreme Court found that

> By universal agreement and practice *the law of war* draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants . . . The spy who secretly and without uniform passes the military lines of a belligerent *in time of war*, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the

[2] The Defense incorporates here the arguments made in AE 488, regarding the absence of hostilities at the time of the acts alleged against Mr. al Hawsawi.

> status of prisoners of war, but to be offenders *against the law of war*. . .

317 U.S. 1, 30-31 (1942) (emphasis added). In other words, the entire concept of an "unlawful combatant" or "unprivileged belligerent" lies within the Law of War, and has no validity outside of armed conflict. As shown in AE 488, the Government cannot demonstrate the existence of the armed conflict it claims between itself and al Qaeda either before or on 11 September 2001, or at the time of any act it has alleged against Mr. al Hawsawi. And because it cannot demonstrate an armed conflict, it cannot demonstrate that Mr. al Hawsawi is an "unprivileged belligerent"—or any other kind of belligerent, for that matter.

This Commission therefore lacks personal as well as subject matter jurisdiction to try Mr. al Hawsawi. The case should be dismissed.

7. Witnesses: None

8. Conference with Opposing Counsel: The Prosecution opposes this motion.

9. Attachments:

A. Certificate of Service;

B. Extract from Leslie C. Green, *The Contemporary Law of Armed Conflict* (2d ed. 2000)

//s//
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A

CERTIFICATE OF SERVICE

I certify that on the 7th day of April 2017, I electronically filed **AE502(MAH) Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities** with the Clerk of the Court and served the foregoing on all counsel of record by e-mail.

//s//
WALTER B. RUIZ
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The contemporary law of armed conflict

second edition

L. C. Green

extent certain non-international conflicts have come under the aegis of international law since 1977 with the adoption of Article 1 (4) of Protocol I and Protocol II[11] additional to the 1949 Geneva Conventions, while Article 3 common to those Conventions already sought to impose minimal humanitarian considerations even in such conflicts. However, acts of violence committed by private individuals or groups which are regarded as acts of terrorism,[12] brigandage, or riots which are of a purely sporadic character[13] are outside the scope of such regulation and remain subject to national law or specific treaties relating to the suppression or punishment of terrorism.[14] Such acts occurring during an international armed conflict may amount to war crimes or grave breaches of the Geneva Conventions or Protocol I[15] and render those responsible liable to trial under the law of armed conflict.[16]

Since the adoption of the Charter of the United Nations it has sometimes been contended that armed conflict contrary to the provisions of the Charter cannot be lawful and that since military operations conducted under the auspices of the United Nations constitute enforcement or policing undertakings they cannot be considered as war in the technical sense. In practice, in both these situations the laws of armed conflict will apply and will do so on an equal basis as between both sides.[17] Moreover, since the purpose of the law of armed conflict is to a great extent directed to the preservation of the principles of humanitarianism, even the forces of a state alleged to be waging an illegal war will be protected by and required to observe that law.[18] This principle of equality as between the parties is spelled out in Article 1 common to the Geneva Conventions which are to be respected 'in all circumstances', while common Article 2 declared that they are to apply 'to any ... armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them'. As if to remove any possible doubt, the preamble of Protocol I proclaims that the Conventions and Protocol 'must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict'. It is clear, therefore, that for the parties to these instruments

[11] Schindler and Toman, 621, 628, 689.

[12] See, e.g., *Pan American World Airways Inc.* v. *Aetna Casualty and Surety Co.* (1974), 505 F. 2d 99; see also Green, 'Terrorism and armed conflict: the plea and the verdict', 19 Israel Y.B.H.R. (1989), 131.

[13] Pr. II, Art. 1(2).

[14] See, e.g., the Conventions re offences against aircraft, Tokyo, 1963, 704 U.N.T.S. 219, The Hague, 1970, 860 *ibid.*, 105, Montreal, 1971, 974 *ibid.*, 177; re internationally protected persons, 1973, 1035 *ibid.*, 167; re hostage-taking, 1979, 18 I.L.M. 1422.

[15] Schindler and Toman, 621.

[16] See below, ch. 18.

[17] See below, ch. 20.

[18] See, e.g., Lauterpacht, 'Rules of warfare in an unlawful war', in Lipsky, *Law and Politics in the World Community*, 89; US Dept. of the Air Force, Pamphlet A.F.P., 110–34, *Commander's Handbook on the Law of Armed Conflict*, para. 1-4(b).