MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. **KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI**	**AE 617G(MAH) / 620F(MAH)** **Mr. al Hawsawi's Response to AE 617D / 620C, Regarding Hostilities as an Element of the Charges** **Filed: 19 April 2019**

1. **Timeliness**: This response is timely filed in accordance with AE 617D/620C, entered 4 April 2019, p. 5.

2. **Evidentiary Note**: M.C.R.E. 201A(b) permits the Military Judge to consider "testimony of lay and expert witnesses, whether or not submitted by a party or admissible under these rules," in deciding matters regarding the international Law of War. Therefore, in support of his arguments, Mr. al Hawsawi is submitting previous testimony by a Law of War expert in this case (Att. B),[1] an affidavit from another Law of War expert (Att. C),[2] and an extract from a leading Law of War treatise that was current on 9/11 (Att. D).[3]

[1] Att. B (Testimony of Professor Sean Watts) (*United States v. Khalid Shaikh Mohammad, et al.*, Tr. 17984-18034 [7 December 2017]). Professor Watts' qualifications are covered from pages 17984-94, and he was recognized as a Law of War expert without objection by the Government. His *curriculum vitae* has been submitted as AE 502Z, Defense Response to AE 502V, Trial Conduct Order, filed 29 September 2017, att. C (UNDER SEAL). The Defense encourages the Commission to consider Prof. Watts' impressive qualifications in giving weight to his testimony.
[2] Att. C (Affidavit of Professor Marco Sassóli). Professor Watts testified that Professor Sassóli is recognized as a "renowned expert" in the Law of War, and that few people in the field are as influential as he is. Att. B, p. 18024; *see also* Att. C, ¶¶ 3-10 & p. 12-13 (background and publications list for Professor Sassóli).
[3] Att. D (Extract from Leslie C. Green, *The Contemporary Law of Armed Conflict* (2d ed. 2000)).

3. **Answers to the Military Judge's Questions:**

A. Whether proof of existence of hostilities (as opposed to nexus to hostilities)[4] is a component of the common substantive element established by 10 U.S.C. § 950p(c).

1. Answer.

Yes, guilt of a war crime requires proof of hostilities, not just a "nexus" to hostilities. Furthermore, under the Law of War, the "nexus" requires the alleged war crimes to occur *during* hostilities; the panel must not be permitted to find a "war crime" for any action occurring before the beginning of any hostilities that are found. These requirements are imposed by the United States Constitution and the Law of War; the C.M.C.R.'s opinion in *United States v. Nashiri* does not address them.

2. This Commission exists only for the trial of war crimes under the Law of War. It is bound to follow the Law of War itself, and to instruct the panel members to do the same.

The Constitution confers "no part" of the judicial power of the United States on military commissions.[5] And "Congress and the President, like the courts, possess no power not derived from the Constitution."[6] Article III of the Constitution requires that "the trial of all crimes, except in cases of impeachment, shall be by jury"—which military commission trials are not.[7]

The Supreme Court recognizes a few, tightly circumscribed[8] exceptions that allow

Professor Watts testified that the late Professor Green was "also a giant" in the field of the Law of War, "highly regarded," and that [a later edition of] his textbook is still used.

[4] As part of this question, the Commission adds, "By 'nexus to,' the Commission means "in the context of and associated with," as stated in 10 U.S.C. § 950p(c)." AE 617D/620C, p. 4 n.18.

[5] *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006), *citing Ex Parte Milligan*, 71 U.S. 2, 76 (1866).

[6] *Ex Parte Quirin*, 317 U.S. 1, 25 (1942) (establishing this fact in the context of military commissions).

[7] *Reid v. Covert*, 354 U.S. 1, 37 (1957) ("Looming far above all other deficiencies of the military trial, of course, is the absence of trial by jury . . .).

[8] *Reid*, 354 U.S. at 29-31 (tracing the reluctance of the Framers and the Supreme Court to allow broad jurisdiction in the military courts, back to abuses of King George III, and citing instances where the Court refused to allow the expansion of military jurisdiction). "Free countries of the

military instead of jury trials.[9] The relevant exception here is for Law of War military commissions. In *Hamdan v. Rumsfeld*, a plurality of the Supreme Court laid out the Constitutional limits of such commissions:

> [T]he offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war **. . .** *Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only,"* and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."[10]

As "breaches of military orders" are not covered in the Military Commissions Act of 2009, this Commission can try only one kind of crime: violations of the Law of War.[11] The Law of War is

world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service." *Ex Parte Toth v. Quarles*, 350 U.S. 11, 22 (1955), *quoted in Lee v. Madigan*, 358 U.S. 228, 233 (1959).

[9] *Hamdan v. Rumsfeld*, 548 U.S. 557, 595-98 (2006) (plurality opinion); *see also Ex Parte Quirin*, 317 U.S. 1, 44 (1942) (noting that wartime saboteurs in the United States "were outside the constitutional guaranty of trial by jury, not because they were aliens but only because they had violated the law of war by committing offenses constitutionally triable by military tribunal").

[10] *Hamdan v. Rumsfeld*, 548 U.S. 557, 597-98 (2006) (plurality opinion), *citing* William Winthrop, *Military Law and Precedents* 836-39 (2d ed. 1920) (emphasis added).

[11] The terms "Law of War," "Law of Armed Conflict," and "International Humanitarian Law" are synonymous. Att. B, p. 17988. For an illustration of the principle that the Commission's jurisdiction is limited by the Law of War, *see Hamdan v. United States*, 696 F.3d 1238, 1248-49, 1252-53 (D.C. Cir. 2012) (establishing that only war crimes can be tried by commission, and vacating convictions for "material support for terrorism," because it was not a war crime), *overruled on other grounds Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014); *see also* AE 490, Defense Motion to Dismiss Charges I, VI, VII Due to Lack of Jurisdiction Based on *Ex Post Facto* Violation, filed 3 February 2017, p. 6-8 (asking the Commission to dismiss charges that were not recognized as war crimes on 9/11).

a type of international law[12] fixed by treaties and the customary practice of states,[13] and neither the United States nor this Commission can change it alone.[14] Thus, the limits of the Law of War are the limits of this Commission's power to convict, and any instructions issued by this Commission must comply with the Law of War.

For the Commission to convict anyone of anything beyond the limits set by the Law of War would be to expand its jurisdiction beyond the limits set by the United States Constitution. It would also violate Department of Defense policy that requires all DoD entities—including this

[12] Att. B, p. 17995. The Law of War is a species of international law. *Hamdan v. Rumsfeld*, 548 U.S. 557, 641 (2006) (Kennedy, J, concurring) ("[T]he 'law of war' . . . is the body of international law governing armed conflict"), *citing Ex Parte Quirin*, 317 U.S. 1, 28 (1942); *Application of Yamashita*, 327 U.S. 1, 7 (1946) (referring to "the Law of Nations, of which the Law of War is a part"); *Quirin*, 317 U.S. at 27-28, 29 ("this Court has recognized and applied the law of war as including *that part of the law of nations* which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals," and referring to the Law of War as "that branch of international law"). U.S. Department of Defense, Directive 2310.01E, *DoD Detainee Program* p. 14 (2014) (defining "law of war" as "[t]he part of *international law* that regulates the conduct of hostilities and the protection of victims of armed conflict in both international and non-international armed conflict and occupation, and that prescribes the rights and duties of neutral, non-belligerent, and belligerent states"); U.S. Department of Defense, Directive 2311.01E, *DoD Law of War Program* para. 3.1 (2006).

[13] International law consists of treaties, which by definition must have more than one party, and custom, which requires a uniform practice of states, not a unilateral declaration of one state. *See* American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2) (1987); Committee on the Formation of Customary (General) International Law, International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* 8 (2000); Att. B, p. 17998 (customary international law requires "general and consistent state practice, not by one state but by the community of states"); *The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rest[ ] upon the common consent of civilized communities. It is [in] force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."); *Kadic v. Karadzi*, 70 F.3d 232, 238–39 (2d Cir. 1995); *United States v. Schultz*, 4. C.M.R. 104, 114 (C.M.A. 1952) ("[T]he common law of war has its source in the principles, customs, and usages of civilized nations").

[14] *See* Att. B, p. 17995-96.

Commission—to comply fully with the Law of War at all times.[15] It would also be contrary to the Law of War itself, which requires *both* parties to a conflict to comply with its strictures.[16]

3. War crimes cannot exist outside armed conflict (i.e., "hostilities"). Therefore, no one can be convicted of a war crime without a finding that hostilities existed at the time of his allegedly criminal acts.

Under *Hamdan v. Rumsfeld*, a military commission cannot try or punish anyone for "offenses committed either before or after the war."[17] No commission following the Law of War could ever do that.[18] "International humanitarian law [i.e., the Law of War] governs the conduct of both internal and international armed conflicts . . . [F]or there to be a violation of this body of

[15] U.S. Department of Defense, Directive 2310.01E, *DoD Detainee Program*, para. 3a (2014) ("It is DoD policy that . . . [a]ll persons subject to this directive will comply with the law of war with respect to the treatment of all detainees."); *id.* para. 3b.(3) ("The criminal punishment of any detainee for any offense, including serious violations of the law of war, will only be conducted in accordance with a previous judgment pronounced by a regularly constituted court that affords all required judicial guarantees."); U.S. Department of Defense, Directive 2311.01E, *DoD Law of War Program*, para. 4a (2006) ("It is DoD policy that . . . [m]embers of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and in all other military operations.").

[16] *See* Att. C, ¶ 25 ("In my view, the qualification (or lack thereof) of Al Qaeda as a transnational armed group under IHL [i.e., the Law of War] highlights the difference between IHL applicable to armed conflicts and law enforcement and criminal law directed towards combating crime. The former has to apply to both sides equally and it has to be implemented with and by the parties, while criminal law has to be enforced by the state against the criminals.")

[17] *Hamdan*, 548 U.S. at 599 (plurality opinion). This prohibition is grounded in the "common [i.e., customary] law of war," *id.*, and in Article III to the Constitution, which requires jury trials outside of the narrowly circumscribed limits of military commissions. *See Lee v. Madigan*, 358 U.S. 228, 233 (1959).

[18] 1 *Trial of the Major War Criminals before the International Military Tribunal Nuremberg, 14 November 1945—1 October 1946*, at 254 (1947) [hereinafter, *Nuremberg–Major War Criminals*] (refusing to consider crimes against humanity, even "revolting" or "horrible" ones, as within the scope of its statute when committed before hostilities began on 1 September 1939); 1 *Nuremberg—Major War Criminals* at 262, 273 (refusing to consider members of the SS or Leadership Council as war criminals when they departed their organizations before hostilities began on 1 September 1939); 1 *Nuremberg—Major War Criminals*, at 218 (recognizing the Nuremberg Charter as reflecting the international Law of War as it stood at the time).

law, there *must be an armed conflict . . .* International humanitarian law applies *from the initiation of such conflicts. . .*"[19]

In the context of the Military Commissions Act of 2009, "hostilities" means the same thing as "armed conflict": a conflict governed by the Law of War.[20] And the Law of War applies only to actions taken *during* the armed conflict.[21] Thus, if any person is going to be convicted (let alone executed)[22] by findings of this Commission, one of those findings must be that an armed conflict existed *at the time* of his alleged crimes. If Congress has chosen to make "nexus to hostilities" an element of every war crime,[23] logically it intended to require a *complete* finding that hostilities existed and that the actions charged took place during them. A "nexus" that did not include these findings could never be enough under the Law of War.

4. Note on *United States v. Nashiri.*

The C.M.C.R.'s opinion in *United States v. Nashiri*[24] is insufficient to answer the Commission's questions. The C.M.C.R. considered only the statute in isolation; it did not

[19] *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ¶¶ 69-70 (Int'l Crim. Trib. for the Former Yugoslavia 1995), *available at* 1995 WL 17205280.
[20] *See* 10 U.S.C. § 948a(9); R.M.C. 103(a)(16).
[21] *Hamdan*, 548 U.S. at 599 (plurality opinion); *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ¶¶ 69-70 (Int'l Crim. Trib. for the Former Yugoslavia 1995), *available at* 1995 WL 17205280.
[22] The Eighth Amendment "calls for a greater degree of reliability when the death sentence is imposed," *Lockett v. Ohio*, 438 U.S. 586, 604 (1978), *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), and grants more stringent protections to prevent the conviction of an innocent person when his life is at stake. *Herrera v. Collins*, 506 U.S. 390, 398-99 (1993), *citing Beck v. Alabama*, 447 U.S. 625, 641-46 (1980). Thus, in a death penalty case, the importance of requiring *complete* proof of *every* element is enhanced. *See also United States v. Curtis*, 32 M.J. 252, 269 (C.M.A. 1992) (accepting the principles of *Lockett* and *Woodson* as applying in military court).
[23] *United States v. Nashiri*¸191 F.Supp.3d 1308, 1322 (C.M.C.R. 2016).
[24] *United States v. al-Nashiri*, 191 F.Supp.3d 1308 (C.M.C.R. 2016).

consider the restrictions imposed by the Constitution or the Law of War[25] and did not interpret the statute to avoid them.[26] Thus, its interpretation is not binding when a Constitutional or Law-of-War consideration is before the Commission.[27] Furthermore, in reversing the dismissal of Mr. al-Nashiri's commission, it was answering only one question: whether the statute required "hostilities" as a matter of subject matter jurisdiction, rather than as a substantive element of the crimes enumerated in the MCA.[28] Moreover, its discussion of the supposed "nexus" requirement is entirely *dicta*. Even if that discussion were part of the court's holding interpreting the statute, it could and should be superseded by any interpretation that takes the Constitution and the Law of War into account;[29] of course, as well, the statute must always yield to the superior authority, in this case both the Constitution and the Law of War.

[25] *Nashiri*, 191 F.Supp.3d at at 1315 ("In determining whether the nexus to hostilities is a jurisdictional grant, we use principles of statutory construction . . ."); *id.* at 1315-16 (resolving the issue of jurisdiction without reference to the Constitution or the Law of War).
[26] *See Office of Senator Mark Dayton v. Hanson*, 550 U.S. 511, 514 (2007), *citing Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (noting "established practice" that statutes should be interpreted to avoid constitutional difficulties); *The Charming Betsy*, 6 U.S. 64, 118 (1804), *cited in United States v. Ali*, 718 F.3d 929, 935 (D.C. Cir. 2013) (same holding for international law).
[27] "Constitutional rights are not defined by inferences from opinions which did not address the question at issue." *Texas v. Cobb*, 532 U.S. 162, 169 (2001), *citing Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974).
[28] *Nashiri*, 191 F.Supp.3d at 1311 (listing the "issue presented" as the Military Judge's pretrial decision to dismiss the charges for lack of subject matter jurisdiction).
[29] *See United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (reinterpreting federal drug statute to make certain provisions elements of the crimes rather than sentencing factors to be decided by the judge, to comport with the Constitutional requirements of *United States v. Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). The court specifically grounded its reinterpretation in the doctrine that statutes should be interpreted to save them from unconstitutionality. *Buckland*, 289 F.3d at 564, *citing, inter alia*, *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001); *see also, FEC v. Hall-Tyner Election Campaign Committee*, 678 F.2d 416, 422 n.15 (2d Cir. 1982) (noting that statutes "may be reinterpreted to avoid [a] direct constitutional infirmity").

B. Whether the Commission is bound to use the same member instruction used in *United States v. Hamdan* and *United States v. Bahlul*.

1. Answer.

To the contrary, the Commission must use an instruction based on the international Law of War, as it stood on 9/11. The *Hamdan* footnote instruction is contrary to the Law of War, and to the U.S. Constitution. Most seriously, it invites a panel of officers to extend the jurisdiction of military commissions beyond the limits set by the Constitution. Its absurd vagueness permits a factfinder to create "armed conflict" for purposes of a criminal prosecution out of any fact pattern at any time—indeed, it is not really a legal standard at all, just an open invitation for the factfinder to do as it pleases. It has never been adopted as part of the *holding* of any superior court; instead, it appears only in *dicta* in a footnote of the *Hamdan* decision, which has been overruled based on other issues.

2. Imposing the *Hamdan* footnote instruction would violate the Principle of Legality under the Law of War, and the *Ex Post Facto* Clause of the United States Constitution.

Under the Constitution, a Law of War military commission can try persons only for violations of the Law of War.[30] Neither Congress nor this Commission has the power to *expand* the jurisdiction of military commissions beyond the limited scope of this exception to Article III. "Hostilities," by definition, end where the Law of War ends,[31] and so does the commission's jurisdiction. Therefore, any judicial instruction on "hostilities" must comply with the Law of War, and must not permit the factfinder to exceed the scope of that law's application.

[30] *Hamdan v. Rumsfeld*, 548 U.S. 557, 598 (2006); *see also Ex Parte Quirin*, 317 U.S. 1, 44 (1942) (accused were subject to trial by military tribunal "because they had violated the Law of War," which made them "constitutionally triable" by such tribunals).
[31] *See* 10 U.S.C. § 948a(9); R.M.C. 103(a)(16).

International law in general, and the Law of War in particular, include the Principle of Legality: criminal laws may not be applied retroactively.[32] The U.S. Constitution includes the *Ex Post Facto* clause, which requires the same thing,[33] and which applies at court-martial[34] and thus in military commissions.[35] Thus, any Law of War findings against Mr. al Hawsawi must be based on the Law of War as it stood on 9/11, and not on any later standard.

A legally correct instruction, reflecting the Law of War as it stood on 9/11, would have to be based on the two-part standard articulated by the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Tadic.* This standard had become customary international law by the end of the twentieth century and so was current on 9/11:[36]

[32] Att. B, p. 17996-97; *Prosecutor v. Delalic*, Judgment, No. IT-96-21-T, 1998 WL 34310017, ¶ 408 (Int'l Crim. Trib. for the Former Yugoslavia 1998) ("To put the meaning of the principle of legality beyond doubt, two important corollaries must be accepted. The first of these is that penal statutes must be strictly construed, this being a general rule which has stood the test of time. Secondly, *they must not be given retroactive effect.*")(emphasis added); *see also, Prosecutor v. Hadzihasanovic, et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case IT-01-47-AR72, 2003 WL 23833764, ¶ 51 (Jul. 16, 2003) (recognizing the Principle of Legality "as a peremptory norm of international law, and thus of the human rights of the accused"). *Prosecutor v. Hadzihasanovic, et al.*, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, Case: IT-01-47-AR72, 2003 WL 23833764, ¶ 51 (Jul. 16, 2003) ("An expansive reading of criminal texts violates the principle of legality, widely recognized as a peremptory norm of international law, and thus of the human rights of the accused").

[33] U.S. Constitution, Art. 1 § 9 cl. 3 ("No Bill of Attainder or *ex post facto* Law shall be passed"); *see Calder v. Bull*, 3 U.S. 386, 390 (1798) (opinion of Chase, J.); *Collins v. Youngblood*, 497 U.S. 37, 39 (1990).

[34] *United States v. Gorski*, 47 M.J. 370, 373 (1997) (applying U.S. Constitution's prohibition on ex post facto laws to court-martial proceedings, citing *Calder v. Bull*).

[35] *Hamdan v. Rumsfeld*, 548 U.S. 557, 632-33 (2006) (Common Article 3 guarantees the accused at military commission the protections of a service member at court-martial, unless some "practical need" justifies deviation from court-martial practice).

[36] Att. B, p. 18008. The *Tadic* standard was further fleshed out in other ICTY cases, based on events in the late 1990s, which help to clarify what is required for both "organization" and "intensity." *Id.* p. 18008-09. *See also* Att. C, ¶ 16. "Sporadic" attacks—with weeks or months passing in between the acts of violence—do not meet the "intensity" criterion for armed conflict. Att. B, p. 18020-22. Attacks on unarmed civilians—as opposed to "clashes" between the non-state actor and the forces of the state actor—do not carry much weight in establishing "intensity"

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal [i.e., non-international] or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law [i.e., the Law of War].[37]

To meet the standard, a conflict must meet *both* the intensity *and* the "organization" requirements (with the latter focusing especially on the "organization" of the non-state actor),[38] and it is based on objective facts, not the pronouncements of the parties.[39] As shown by *Tadic*, a legally correct instruction would exclude "terrorist activities" as not being armed conflict, and so lying outside the Law of War and therefore also outside the authority of the Commission to punish.[40]

for armed conflict. Att. B, p. 18021-22. Transnational armed groups such as al Qaeda rarely meet the criteria for "organization" as would support a finding of armed conflict. Att C, ¶ 24.

[37] *Prosecutor v. Tadic*, Case No. IT-94-1-T-7, Judgment ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia 1997); Att. B, p. 18007; *Prosecutor v. Rutaganda*, Case No. ICTR-96-3, Judgment and Sentence ¶ 93, 1999 WL 33288416 (Int'l Crim. Trib. Rwanda 1999); *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgment ¶ 101, 2001 WL 34377584 (Int'l Crim. Trib. Rwanda 2001); *Prosecutor v. Musema*, Case No. ICTR-96-13, Judgment and Sentence ¶¶ 250-51, 2000 WL 33348765 (Int'l Crim. Trib. Rwanda 2000); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment ¶ 620, 1998 WL 1782077 (Int'l Crim. Trib. Rwanda 1998) (all applying the same standard).

[38] Att. B, p. 18007, 18024.

[39] Att. B, p. 18007-08; att. C, ¶ 23.

[40] *See also* Att. D (excluding "acts of violence committed by private individuals or groups which are regarded as acts of terrorism"); Att. B, p. 18003-04, 18021; att. C, ¶ 22; *Tadic*, Judgment ¶ 562; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts [Additional Protocol II], art. 1(2), June 8, 1977, 1125 U.N.T.S. 609 (provides that armed conflicts do not include "disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature."); U.S. Department of Defense Law of War Manual (2016), Section 3.4.2.2 (p. 83), *Distinguishing Armed Conflict From Internal Disturbances and Tensions* ("situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature do not amount to armed conflict.").

The *Hamdan* footnote, which the Government has tried to advance as a standard,[41] does not come close to complying with the Law of War as it stood on 9/11, or at any other time:

> In determining whether an armed conflict existed between the United States and al Qaeda and when it began, you should consider the length, duration, and intensity of hostilities between the parties, whether there was protracted armed violence between governmental authorities and organized armed groups, whether and when the United States decided to employ the combat capabilities of its armed forces to meet the al Qaeda threat, the number of persons killed or wounded on each side, the amount of property damage on each side, statements of the leaders of both sides indicating their perceptions regarding the existence of an armed conflict, including the presence or absence of a declaration to that effect, and any other facts or circumstances you consider relevant to determining the existence of armed conflict. The parties may argue the existence of other facts and circumstances from which you might reach your determination regarding this issue. In determining whether the acts of the accused took place in the context of and were associated with an armed conflict, you should consider whether the acts of the accused occurred during the period of an armed conflict as defined above, whether they were performed while the accused acted on behalf of or under the authority of a party to the armed conflict, and whether they constituted or were closely and substantially related to hostilities occurring during the armed conflict and other facts and circumstances you consider relevant to this issue.[42]

For an armed conflict to exist, the Law of War as it stood on 9/11 required *both* sufficient intensity of the conflict and sufficient organization of the non-state party.[43] The *Hamdan* footnote tells the members that they "should" consider these things (but need not do so), and does not require either one outright.

[41] *See, e.g.*, AE 617A, Government Response To Mr. Ali's Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, filed 24 January 2019, p. 1 (citing the applicability of this footnote as a "fact").
[42] *United States v. Hamdan*, 801 F.Supp.2d 1247, 1278, n.54 (C.M.C.R. 2011), *reversed and conviction vacated*, 696 F.3d 1238, 1253 (D.C. Cir. 2012), *overruled on other grounds*, *Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014).
[43] Att. B, p. 18007-08, 18024.

The Law of War *required* protracted armed violence between the non-state party and the security forces of the state party, or at least gave great weight to the duration of such violence, and did not base the existence of hostilities on the occurrence of attacks on civilians by armed persons.[44] The *Hamdan* footnote tells the members they "should" consider the existence of prolonged violence of this kind (but need not do so), and does not even mention the relative weight given attacks on civilians.

The Law of War also gave no weight to the pronouncements of government leaders; objective facts on the ground, not the rhetoric of political leaders, determined the existence of armed conflict.[45] The Law of War gave no weight at all to the statements, perceptions, or opinions of non-state armed groups, including "declarations of war" issued by private groups, as to the existence of armed conflict.[46] "Declarations of war" were not relevant, at least not to non-international armed conflicts.[47]

The *Hamdan* footnote, however, permits the statements and "perceptions" of "the leaders of both sides" to be considered, specifically to include "declarations of war." Worse, the *Hamdan* footnote repeatedly invites the members to consider "any other facts or circumstances [they] consider relevant to determining the existence of armed conflict," as well as "other facts and circumstances" argued by counsel. No such standard exists or existed in the Law of War.[48] Indeed, this language is the negation of all standards, and thus of law itself.

[44] Att. B, p. 18021-22. Professor Watts clarified that attacks on civilians were, of course, relevant to the existence of a war *crime* once armed conflict was established, but not to the establishment of armed conflict in the first place. *Id.* at 18022.
[45] Att. B, p. 18009-10, 18028.
[46] Att. B, 18009-10.
[47] Att. B, p. 18028, 18029-30.
[48] Att. B, p. 18010.

3. The *Hamdan* footnote invites military officers to extend the jurisdiction of military commissions beyond the limits set by the Constitution.

The Law of War—and the U.S. Constitution—*require* any act, if it is to be prosecuted as a war crime, to be committed *during* the armed conflict, not before or after it.[49] Contrary to the Constitution and the Law of War, the *Hamdan* instruction would tell the members that they "should" consider whether an act took place during the armed conflict. Such a directive would free them to convict of "war crimes" outside armed conflict, and so to extend the jurisdiction of a military commission beyond the limits set by the Constitution.

The U.S. Constitution forbids a Law of War Commission to try anything except actual war crimes.[50] But *Hamdan* would tell the members they "should" consider whether any charged acts "were performed while the accused acted on behalf of or under the authority of a party to the armed conflict, and whether they constituted or were closely and substantially related to hostilities occurring during the armed conflict." Under that standard, if the members wished, they could convict of "war crimes" that had nothing to do with the decisions of either party to the conflict, or even with the conflict itself.

[49] *Hamdan v. Rumsfeld*, 548 U.S. 557, 597-98 (2006) (plurality opinion), *citing* William Winthrop, *Military Law and Precedents* 836-39 (2d ed. 1920) (emphasis added) (for a military commission to have jurisdiction, "the offense charged 'must have been committed within the period of the war.' No jurisdiction exists to try offenses "committed either before or after the war."); *Prosecutor v. Tadic*, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia 1995), *available at* 1995 WL 17205280 ("[F]or there to be a violation of [the Law of War], there *must be an armed conflict* . . . International humanitarian law applies *from the initiation of such conflicts*. . .").

[50] *See Hamdan v. United States*, 696 F.3d 1238, 1248-49, 1252-53 (D.C. Cir. 2012) (establishing that only war crimes can be tried by commission, and vacating convictions for "material support for terrorism," because it was not a war crime), *overruled on other grounds, Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014).

Furthermore, *Hamdan* would permit the members to consider "any other facts or circumstances [they] consider relevant to determining the existence of armed conflict," "other facts and circumstances" argued by the parties, and "other facts and circumstances [they] consider relevant" to the context of the actions. The Supreme Court has always refused to defer to the judgment of military officials on the subject of military criminal jurisdiction.[51] The *Hamdan* instruction defers infinitely to a group of military officers sitting as a panel—they are required only to consider whatever they want to consider, to include any matters the attorneys wish to bring to their attention, and to have unfettered judgment in deciding their own jurisdiction.

4. Relying on the *Hamdan*s instruction to determine hostilities would violate the Due Process Clause of the Fifth Amendment because it is unconstitutionally broad and vague.

"[T]he Due Process Clause prohibits the Government from taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement."[52] "The prohibition of vagueness in criminal statutes is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law, and a statute that flouts it violates

[51] *See Ex Parte Quirin*, 317 U.S. 1, 24-25 (1942). The Court ultimately ruled in the Government's favor, but only after performing its own legal analysis, with no deference on the subject of jurisdiction. *See also Ex Parte Milligan*, 71 U.S. 2, 124 (1866) (considering and rejecting the proposition that a commander could subject persons to martial law "and in the exercise of his lawful authority cannot be restrained, except by his superior authority or the President . . ."). The Court ruled against the Government and gave the military no deference on the subject of criminal jurisdiction.

[52] *Beckles v. United States*, 137 S. Ct. 886, 892 (2017), *quoting Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015) (internal quotes omitted). *See also* AE 492, Defense Motion to Dismiss Charges IV, V and the Additional Charge as Unconstitutionally Vague, filed 14 February 2017, p. 2-5.

the first essential of due process."[53] An instruction that panel members "should" (but in fact need not) consider various factors, followed by an instruction that they may consider anything else that they want to consider, is the apotheosis of unconstitutional vagueness. If the *Hamdan* footnote were actually written into any statute, that statute would be void for vagueness. Interpreting the MCA to imply this standard would violate Mr. al Hawsawi's due process rights in exactly the same way.[54]

Under the Due Process clause, a conviction must be reversed if it is unsupported by sufficient evidence.[55] As a matter of military practice—to which Mr. al Hawsawi is entitled under the Law of War—an appellate court must conduct a *factual* review of any findings of guilty, and may not affirm any findings unsupported by sufficient facts.[56] But a decision on the jurisdictional element under the *Hamdan* footnote would be immune to any such review. A reviewing court would have to ask itself, "Did the members consider whatever they wanted to consider?" It would have to conclude, *ipso facto*, that they did, and affirm that part of any conviction with no meaningful review.

[53] *Johnson*, 135 S.Ct. at 2556-57, *quoting Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983) (internal quotes omitted).
[54] It would also, at least arguably, deprive Mr. al Hawsawi of effective representation under the Sixth Amendment. "The right to the effective assistance of counsel is thus the right to require the prosecution's case to survive the crucible of meaningful adversarial testing." *United States v. Cronic*, 466 U.S. 648, 656 (1984), *quoted in United States v. Galinato*, 28 M.J. 1049, 1052 (N.M.C.M.R. 1989). The *Hamdan* footnote, because it is so broad and vague, is practically immune from "adversarial testing." It leaves the Defense punching at fog.
[55] *Garner v. Louisiana*, 368 U.S. 157, 170 (1961) (Overturning conviction under breach of peace statute on Due Process grounds, because the State had insufficient evidence that the accused had taken actions that would breach the peace).
[56] R.M.C. 1201(d)(1) (requiring Court of Military Commissions Review to affirm only such findings "as the Court finds correct in law and fact," and permitting that Court to determine controverted questions of fact in so doing).

5. The *Hamdan* footnote neither adopts, nor is, binding precedent, however much the Government may wish it were so.

Happily, the Commission need not defy any binding authority in order to reject the footnote instruction test in *Hamdan*. That test does not occur in the Military Commissions Act of 2009 or the Manual for Military Commissions. It certainly does not occur in the Law of War. It occurs only in a footnote of *dicta* in a decision that was overturned (with all convictions vacated) by the D.C. Circuit Court of Appeals.

The *Hamdan* footnote has no *stare decisis* effect, and would not have it even if the C.M.C.R.'s decision (which turned entirely on other issues) had been upheld. "A point of law merely assumed in an opinion, not discussed, is not authoritative."[57] "[T]he rule of *stare decisis* is never properly invoked unless in the decision put forward as precedent the judicial mind has been applied to and passed on the precise question."[58] "A decision has a *stare decisis* effect with regard to a later case only if the legal point on which the decision in both cases rests is the same, or substantially the same."[59] The *Hamdan* footnote is not the basis for the issues actually litigated on Hamdan's appeal. It has not been tested in the adversarial process through the appellate courts.[60] When and if it ever is so tested, it will prove worthless.

[57] *Matter of Stegall*, 865 F.2d 140, 142 (7th Cir. 1989), *citing, inter alia, Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1984).
[58] *District of Columbia v. Sierra Club*, 670 A.2d 354, 360 (D.C. App. 1996), *citing, inter alia, Hagans v. Levine*, 415 U.S. 528, 533 n.5 (1974).
[59] 20 Am. Jur. 2d Courts § 135 (2007); *see also, Webster v. Fall*, 266 U.S. 507, 511 (1925) (refusing to consider precedential value in cases when "in none of them was the point here at issue suggested or decided"); *American Portland Cement Alliance v. EPA*, 101 F.3d 772, 776 (D.C. Cir. 1996) ("jurisdictional issues that were assumed but never expressly decided in prior opinions do not thereby become precedents").
[60] According to the Prosecution, in the *Hamdan* case, the instruction appeared only "after the case in chief . . . So the commission had already heard all of the evidence that it was going to hear." *United States v. Khalid Shaikh Mohammad, et al.*, Tr. 22447 (25 March 2019). In *United Sates v. al Bahlul*, the accused put on no defense and litigated nothing at trial. *Al Bahlul v. United States*, 767 F.3d 1, 7 (D.C. Cir. 2014) ("Bahlul waived all pretrial motions, asked no

6. The *Hamdan* footnote instruction has proven itself unworkable in this litigation already.

Insofar as the *Hamdan* footnote instruction is supposed to implement the intent of Congress in passing the MCA, its complete unworkability has shown it does no such thing. The Commission "cannot impute to Congress the intention of writing an unworkable statute."[61]

As the Commission noted in the order to which this filing is a response, "the discovery motions at issue here are only two of a significant number pending before the Commission that are all heavily predicated on an asserted Defense need for information regarding the existence and duration of hostilities between al Qaeda and the United States."[62] The Prosecution itself, after nearly two years of litigating against Mr. al Baluchi on "hostilities" discovery, is now complaining about the burden this discovery is placing on it:

> And we went through a tremendous evolution to look for hostilities-related information. We went to two Presidential libraries. We looked at over 600,000 documents. Ultimately, we turned over all that which we believe is discoverable . . .

questions during voir dire, made no objections to prosecution evidence, presented no defense and declined to make opening and closing arguments"). Thus, the *Hamdan* instruction has not even had the benefit of being fully litigated at the trial level, let alone received proper attention in an appellate proceeding.

[61] *Consortium of Cities of Chino, Montclair, Ontario, Rancho Cucamonga, and Upland Municipal Corps. v. Department of Labor,* 811 F.2d 1316, 1317 (9th Cir. 1987); "We would be reluctant to conclude that Congress intended such an unworkable and nonsensical result and we would so conclude only if this result could not be avoided by any fair interpretation of the [] Act" *Federal Maritime Commission v. Caragher,* 364 F.2d 709, 715 (2d Cir. 1966); *see also United States v. American Trucking Association,* 310 U.S. 534, 543 (1940) (statutes are interpreted to avoid "absurd" or "futile" results).

[62] AE 617D/620C, Order, entered 4 April 2019, p. 3 & n. 15, *citing* AE 510 (AAA), Unclassified Notice of Mr. al Baluchi's Motion to Compel Information Relating to Operation INFINITE REACH, filed 25 September 2017; AE 512 (AAA), Unclassified Notice: Defense Motion to Compel Information Related to Operation INFINITE RESOLVE, filed 12 October 2017; AE 514 (AAA), Unclassified Notice: Mr. al Baluchi's Motion to Compel Information Regarding Political Military Plan, filed 20 September 2017; AE 557 (KSM), Defense Motion To Compel Discovery Regarding the attack on the USS Cole, filed 9 February 2018.

> But, again, they are sending us on fools' errands. They are asking for documents that they don't believe exist, and they are having us go look and try to prove a negative. How do we know when we have gotten to the end of the rainbow and we are certain we checked everywhere before we know that something doesn't exist? And that might not be that difficult for the ICRC. I would imagine DoD would have some records of it.
>
> But, again, these are impossible standards for us to meet . . .[63]

The problem is entirely of the Government's own making. The *Hamdan* instruction really is limitless in scope. And under the Constitution, the Government has to prove hostilities in *every* case it makes under the MCA[64]—it cannot rely on implicit or explicit findings in another case for that purpose.[65] That means, if this instruction is used, its opponents will always have the right to

[63] *United States v. Khalid Shaikh Mohammad*, et al., Tr. 22448-49, 22455 (25 March 2019); *see also* AE 617A, Government Response To Mr. Ali's Motion to Compel Communications from the International Committee for the Red Cross Concerning the Existence of an Armed Conflict 1996-2002, filed 24 January 2019, p. 6 (complaining that if the Defense gets discovery that *it* considers relevant to make its case to the panel, "[s]uch a reading would completely eviscerate the actual legal standard and make the discovery phase of this case a never-ending proposition.").

[64] A factual determination in one case is never binding on the parties in another case, if they were not represented in the earlier case. 21 C.J.S. Courts § 219, *Decisions on Questions of Fact* (Dec. 2017 Update) ("Stare decisis applies to questions of law. The doctrine does not ordinarily apply to decisions on questions of fact so as to render them binding in later cases. This is so even though the probative facts and testimony in the former decision were identical with those in the later case."); *see also Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971) ("Some litigants—those who never appeared in a prior action—may not be collaterally estopped [i.e., bound by factual findings in an earlier case] without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position"); *The Diamond Cement*, 95 F.2d 738, 742 (9th Cir. 1938).

[65] On the record in March 2019, the Government referred to the Supreme Court's implicit assumption in *Hamdan v. Rumsfeld* that a non-international armed conflict existed between al Qaeda and the United States, as if that were relevant to the current litigation. *United States v. Khalid Shaikh Mohammad, et al.*, Tr. 22450-51 (25 March 2019). In AE 502FFFF, the Commission referred to a factual finding of hostilities in *United States v. al Bahlul*. AE 502FFFF, Ruling: Mr. al Baluchi's Motion to Schedule Evidentiary Hearing Regarding Personal Jurisdiction, entered 3 April 2019, p. 4 n.16. As noted in footnote 64 *supra*, such earlier findings can never be binding in the current case.

near-limitless discovery to try to counter the Government's abuse of its nebulous standards. If the *Hamdan* footnote standard has proven "impossible" to follow in this case, it is "impossible" to follow generally. As nothing in the statute suggests that Congress intended this unworkable standard to be used, the Commission has no reason to affirm it.

The Government will continue to push this worthless "standard" for one reason and one reason only: because a lawful standard would lead to the immediate dismissal of this case.[66]

C. Whether the Military Judge may determine the existence and duration of hostilities for purposes of 10 U.S.C. § 950p(c) as an instructional matter, while reserving the question of nexus to hostilities to the panel.

1. Answer.

The Commission must, at some point, perform a legal analysis of the existence of hostilities and produce an explicit opinion on the subject that can be reviewed *de novo* by a superior court. This is because the Constitution absolutely requires "hostilities" before any case can be tried by panel in a Law of War military commission instead of by jury in an Article III court. An unreviewable secret decision by a group of lay military officers cannot substitute for a proper judicial determination.

But to comport itself fully with the law, the Commission must *both* make reviewable findings to support hostilities (as required by the Constitution) *and* instruct the panel to make findings on the subject (as required by the statute).

2 The existence of hostilities is a Constitutional requirement for military commission subject matter jurisdiction. It must therefore be reviewable *de novo.*

[66] *See* Att. B, p. 18023; Att. C, ¶ 21. General Mark Martins, the chief prosecutor in this case, is a U.S. Army Judge Advocate. As such, he is bound by the requirements of U.S. Department of the Army, Regulation 27-26, *Rules of Professional Responsibility for Lawyers* (28 June 2018). Rule 3.8(a) of that regulation requires him to recommend withdrawal of *any* specification not supported by probable cause. Under a true instruction following the Law of War as it stood at the time, the 9/11 attacks were part of a highly sporadic campaign of terrorism by a non-state group, so that not even probable cause would support further proceedings in this Commission.

The Constitution confers "no part" of the judicial power of the United States on military commissions.[67] No military officer—nor, by implication, any group of military officers organized as a panel—has the authority to *give himself jurisdiction* over any criminal case.[68] If he tries to do so, that decision is subject to *de novo* judicial review.[69]

3. As the existence of hostilities must be reviewable *de novo*, it cannot be decided alone by a panel deliberating in secret.

Panel decisions are not generally subject to judicial review; at best, they are subject to review under a highly deferential standard.[70] And the jurisdictional issue here—which threatens the constitutional separation of powers and the right to trial by jury, as most jurisdictional issues do not—is far too fundamental to be decided in secret, or based on a deference to military authority. That is why Congress lacks the power to give that decision solely to a panel. Furthermore, "[t]he requirement that jurisdiction be established as a *threshold matter* 'spring[s] from the nature and limits of the judicial power of the United States' and is inflexible and without exception.'"[71] A decision by a panel at the end of the case is the opposite of a "threshold" determination as required by the Constitution.

[67] *Hamdan v. Rumsfeld*, 548 U.S. 557, 591 (2006), *citing Ex Parte Milligan*, 71 U.S. 2, 76 (1866).
[68] *See Ex Parte Milligan* 71 U.S. 2, 124 (1866) (considering and rejecting the proposition that a commander can subject persons to martial law "and in the exercise of his lawful authority cannot be restrained, except by his superior authority or the President . . .").
[69] *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 377 (1940) ("Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination"); *United States v. Daly*, 69 M.J. 485, 485 (C.A.A.F. 2011) (questions of subject matter jurisdiction in military court are reviewed *de novo*).
[70] *See United States v. Martin*, 56 M.J. 97, 106 (C.A.A.F. 2001).
[71] *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94-95 (1998), citing *Mansfield, C. & L.M.R. Co. v. Swan*, 111 U.S. 379, 382 (1884) (emphasis added).

4. The Commission has a duty both to determine its own jurisdiction in a public, reviewable finding, and also to instruct the panel to make a full determination of guilt or innocence on every element of each specification.

As a tribunal of limited jurisdiction, this Commission has both a Constitutional duty[72] and a statutory grant of authority[73] to determine its own subject matter jurisdiction,[74] and, as noted above, to do so in a public ruling that can be reviewed *de novo.*

As a matter of military practice, a panel decides factual questions of guilt or innocence in their entirety, and a Military Judge has a duty to ensure that nothing improperly influences their finding.[75] As the C.M.C.R. has decided that the MCA makes "hostilities" an element of every crime before this Commission, the Commission should require the panel to consider the issue, and should give them a legally correct instruction based on the Law of War as it stood on 9/11.

[72] "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868). "A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999), *citing Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir. 1981) (per curiam) ("Federal courts are courts of limited jurisdiction. We have only the authority endowed by the Constitution and that conferred by Congress. Because we may not proceed without requisite jurisdiction, it is incumbent upon federal courts trial and appellate to *constantly examine* the basis of jurisdiction, doing so on our own motion if necessary.")

[73] 10 U.S.C. § 948d ("A military commission is a competent tribunal to make a finding sufficient for jurisdiction.").

[74] So far, this Commission has not analyzed the constitutional basis for its subject matter jurisdiction. In AE 488I, Ruling: Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction due to the Absence of Hostilities, entered 31 May 2017, p. 4 n.15, the Commission characterized the Defense's constitutional arguments on the subject as "traditional" and "common law" requirements which could be superseded by statute; it otherwise followed the statute-based *Nashiri* decision. AE 488I, p. 4.

[75] *United States v. Birdsall*, 47 M.J. 404, 411 (C.A.A.F. 1998) (reversing when improper credibility testimony exercised "undue influence" on the panel's decision), *cited in United States v. Jackson*, 74 M.J. 710, 717 (C.A.A.F. 2015) (reversing when judge did not counteract "undue influence on the panel's role in determining the ultimate facts in the case").

The question posed suggests a hybrid solution: a public ruling by the Military Judge on the existence of hostilities, after litigation using true Law of War standards, and a panel instruction on the "nexus." Such a solution would be far superior to the Government's preferred procedure, in which the only analysis done is in a secret determination by the panel. But as the burdens of proof are different—a preponderance for a judicial determination, beyond reasonable doubt for a panel[76]—a panel determination of the full question is also required.

D. Whether existence of hostilities for purposes of 10 U.S.C § 950p(c) in this case is to any extent a non-justiciable political question.

1. Answer.

No. Whether issues of war and peace are justiciable, or proper subjects for judicial deference, depends on the legal context in which they are raised. In some contexts, such as lawsuits over targeting or the legality of a U.S. war effort, such issues are arguably beyond the competence of the courts. In others, such as security detention, the political branches receive a certain degree of deference. In the current context, a military prosecution for war crimes in which "hostilities" are both an element of the crimes and an absolute jurisdictional requirement under the Constitution, the Commission may not accept or even defer to a "finding" from the political branches that the accused are guilty under this element. To do so would be an abdication of the Commission's duty to determine its own jurisdiction as well as the panel's duty to determine guilt or innocence.

[76] *See In Re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."), *cited in United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011); *United States v. Sablan*, 6 M.J. 141, 142-43 (C.M.A. 1979).

2. The "deference" due the political branches depends on context.

If a private plaintiff tries to stop a war with a lawsuit, United States courts treat the existence and legality of the war as political questions, deferring completely to the political branches and refusing to answer them.[77] If he tries to claim damages based on the illegality of a U.S. military action, the courts will likewise defer.[78] If a Soldier at court-martial challenges the legality of a war effort as an excuse for desertion or disobedience, the court-martial will defer completely to the political branches and refuse to address the question.[79] In these areas, the political branches receive complete deference.

Under *Ludecke v. Watkins*, [80] the political branches receive considerable (though not infinite) deference in the realm of security detention.[81] In the last ten years, *Ludecke* has spawned many progeny in the D.C. Circuit.[82] The Government never tires of citing these security detention cases in support of its arguments about military criminal jurisdiction.[83]

[77] *See Atlee v. Laird*, 347 F. Supp. 689, 705 (E.D. Pa. 1972).
[78] *Perrin v. United States*, 4 Ct. Cl. 543, 1800 WL 685 at *3 (1868)
[79] *United States v. Huet-Vaughn*, 43 M.J. 105, 113 (C.A.A.F. 1995); *see also Ange v. Bush*, 752 F. Supp. 509, 514 (D.D.C. 1990).
[80] 335 U.S. 160 (1948).
[81] *Id.*, 335 U.S. at 162-69. In that case, the Executive first interned and later deported an "alien enemy" under the President's war powers; the Supreme Court denied the appeal of a *habeas corpus* petition, and treated the cessation of war (three years after active hostilities had ended) as a "political act," so that it would not itself decide whether World War II had ended by 1948. *But see Boumediene v. Bush*, 553 U.S. 723, 798 (2008) (holding that security detainees may invoke the "fundamental procedural protections of *habeas corpus*," and overruling a statutory provision in which the political branches tried to deprive them of it).
[82] *See, e.g., Al-Bihani v. Obama*, 590 F.3d 866, 874-75 (D.C. Cir. 2010) (citing *Ludecke*); *Ali v. Trump*, 317 F. Supp. 3d 480, 486-87 (D.C. Cir. 2018) (citing *Ludecke*); *Bensayah v. Obama*, 610 F.3d 718, 723 (D.C. Cir. 2010) (citing *Al-Bihani*); *Aamer v. Obama*, 742 F.3d 1023, 1041 (D.C. Cir. 2014) (citing *Al-Bihani*).
[83] *See, e.g.*, AE 488E, Government Consolidated Response, filed 28 April 2017, p. 4 n.8 (citing *al-Bihani*); AE 502JJJ, Government Motion to Adopt a Legal Standard, filed 12 December 2017, p. 4 (citing *al-Bihani*, *Bensayah*, and other detention cases).

However, in *Lee v. Madigan*, the Supreme Court has specifically warned against using the principles of *Ludecke* in the realm of military criminal jurisdiction, especially when the death penalty is involved.[84] This warning reflects the Constitution's strict limits on military jurisdiction, limits which do not admit of deference.

3. In the realm of military criminal jurisdiction, the political branches get no deference, and military jurisdiction is constitutionally disfavored.

The political branches have broad authority to make war, and to exercise powers in the making of war. They have *no* power to transfer any part of the judicial authority of the United States from the judicial branch to themselves. Congress cannot grant jurisdiction to any tribunal, not even an Article III court or the Supreme Court, beyond the limits set by Article III.[85] In the realm of military criminal jurisdiction, the political branches receive and ought to receive no deference from the Supreme Court, whose duty is to maintain the separation of powers. Military criminal jurisdiction is a "very limited and extraordinary jurisdiction" and "at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."[86]

These understandings reflect not only the rights of the accused, but the separation of powers under the U.S. Constitution,[87] a principle that must be upheld no matter who is on trial.[88]

[84] *Lee v. Madigan*, 358 U.S. 228, 231-32 (1959). *Ludecke* belongs to a "special category of cases," dealing with "the reach of the war power, as a source of regulatory authority over national affairs," but did *not* apply "in the setting of a grant of military power to try people for capital offenses." *Id.*
[85] *See Muskrat v. United States*, 219 U.S. 346, 361 (1911) (holding a statute unconstitutional when it attempted to extend the judicial power beyond the limits of Article III); *Marbury v. Madison*, 5 U.S. 137, 174 (1803) (Congress was "not at liberty" to confer jurisdiction on the Supreme Court, beyond that allowed by Article III).
[86] *Reid v. Covert*, 354 U.S. 1, 21 (1957).
[87] *See Reid v. Covert*, 354 U.S. at 39; *U.S. ex rel Toth v. Quarles*, 350 U.S. 11, 15-16 (1955) (warning against the danger military criminal jurisdiction poses to the separation of powers).
[88] *See INS v. Chadha*, 462 U.S. 919, 935-36 (1983) (finding that alien had standing to challenge Congressional act on separate-of-powers grounds).

In *Ex Parte Quirin*, the defendants sought writs of *habeas corpus* challenging their trial by military commission. The Government sought deference, but did not get it:

> The Government challenges each of these propositions. *But regardless of their merits, it also insists that petitioners must be denied access to the courts, both because they are enemy aliens or have entered our territory as enemy belligerents, and because the President's Proclamation undertakes in terms to deny such access to the class of persons defined by the Proclamation*, which aptly describes the character and conduct of petitioners. It is urged that if they are enemy aliens or if the Proclamation has force no court may afford the petitioners a hearing. But there is certainly nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case. *And neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.*[89]

In short, the Supreme Court refused deference, and instead performed its own *de novo* review of the question of commission jurisdiction.[90] While it ruled in the Government's favor on that occasion, it did not defer.

In later cases, the Supreme Court warned repeatedly about the dangers of military tribunals, and the reasons for holding them constitutionally disfavored:

> Under the grand design of the Constitution civilian courts are the normal repositories of power to try persons charged with crimes against the United States. And to protect persons brought before

[89] *Ex Parte Quirin*, 317 U.S. 1, 24-25 (1942) (emphasis added). *See also Ex Parte Milligan* 71 U.S. 2, 124 (1866) (considering and rejecting the proposition that a commander can subject persons to martial law "and in the exercise of his lawful authority cannot be restrained, except by his superior authority or the President . . .").

[90] *Quirin*, 317 U.S. at 35-37 & n.12, *citing, inter alia*, Great Britain, War Office, *Manual of Military Law* §§ 445, 449 (1929); 2 Oppenheim, *International Law* § 255 (6th ed. 1940); 4 Calvo, *Le Droit International Theorique et Pratique* § 2119 (5th ed. 1896); Liszt, *Das Völkerrecht* § 58(B)(4) (12th ed. 1925); 4 Bluntschli, *Droit International Codifié* § 639 (5th ed. 1895, tr. Lardy) [The last three titles translate as *Practical and Theoretical International Law* (French), *International Law* (German), and *Codified International Law* (French), and these translations have been verified by counsel.] As may be seen by the range of authorities cited, the Supreme Court was looking to the Law of War, and not simply to the wishes of the executive.

> these courts, Article III and the Fifth, Sixth, and Eighth Amendments establish the right to trial by jury, to indictment by a grand jury and a number of other specific safeguards. By way of contrast the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language in Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.[91]
>
> There are dangers lurking in military trials which were sought to be avoided by the Bill of Rights and Article III of our Constitution. Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service.[92]
>
> Legislatures and courts are not merely cherished American institutions; they are indispensable to our government. Military tribunals have no such standing. . . The established principle of every free people is, that the law shall alone govern; and to it the military must always yield.[93]

Deference to the political branches played no part in these opinions, or in the decisions based on them.

The Framers of the Constitution well understood the temptations that could lead the Government to erode the separation of powers or the liberties guaranteed by the Constitution, when the passions raised by war were at their highest. "Nothing is more common than for a free people, in times of heat and violence, to gratify momentary passions, by letting into the government principles and precedents which afterwards prove fatal to themselves."[94] The Supreme Court put it eloquently in *Ex Parte Milligan*:

[91] *Reid v. Covert*, 351 U.S. 1, 21 (1957).
[92] *United States ex rel Toth v. Quarles*, 350 U.S. 11, 22 (1955).
[93] *Duncan v. Kahanamoku*, 327 U.S. 304, 322-24 (1946)
[94] *United States v. Brown*, 381 U.S. 437, 442 (1965), *quoting* Alexander Hamilton, A Letter from Phocion to the Considerate Citizens of New York (1784).

> When peace prevails, and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty; for the ordinary modes of trial are never neglected, and no one wishes it otherwise; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded—these safeguards need, and should receive, the watchful care of those intrusted with the guardianship of the Constitution and laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution.[95]

In the context of this Commission, the Military Judge holds that trust. If the panel votes on hostilities, it will do so as well. The Military Judge should not imagine, and the panel should not be instructed, that they are deprived of this trust by act of Congress or order of the President.

4. Treating hostilities as "non-justiciable" represents an abdication of the Commission's duty to determine its own jurisdiction, and the panel's obligation to determine facts.

The MCA specifically states that a military commission is competent to determine its own jurisdiction.[96] Tribunals of limited jurisdiction—as this Commission undoubtedly is—have in any case an inherent duty to inquire into their own jurisdiction, and to dismiss when jurisdiction is lacking.[97]

[95] *Ex Parte Milligan*, 71 U.S. 2, 123-24 (1866).
[96] 10 U.S.C. § 948d ("A military commission is a competent tribunal to make a finding sufficient for jurisdiction.").
[97] "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle." *Ex Parte McCardle*, 74 U.S. 506, 514 (1868). "A necessary corollary to the concept that a federal court is powerless to act without jurisdiction is the equally unremarkable principle that a court should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." *University of South Alabama v. American Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999), *citing Save the Bay, Inc. v. United States Army*, 639 F.2d 1100, 1102 (5th Cir. 1981) (per curiam) ("Federal courts are courts of limited jurisdiction. We have only the authority endowed by the Constitution and that conferred by Congress. Because we may not proceed without requisite jurisdiction, it is incumbent upon federal courts trial and appellate to *constantly examine* the basis of jurisdiction, doing so on our own motion if necessary.")

"Hostilities" are a major component of jurisdiction; therefore, the Commission must examine the question of hostilities to decide its own jurisdiction. And, because "hostilities" are an element of every offense under the MCA[98] as well as a requirement for guilt of any war crime, the panel also must examine the question, and the Government must be held to a standard of proof beyond reasonable doubt. To require anything less would be to relieve the Government of its burden to prove every fact necessary for conviction beyond reasonable doubt, and so violate Mr. al Hawsawi's due process rights.[99]

The scheme suggested by this question of non-justiciability would lead to the appalling result of criminal defendants placed before military tribunals instead of Article III courts, without *anyone* performing a legal analysis under the Law of War of whether they belong there. Congress performed no such analysis in passing the MCA,[100] nor would anyone else if the issue were held "non-justiciable."

The Commission, in asking whether it should treat hostilities as "non-justiciable," is asking whether both the Military Judge and the panel should refrain from performing *any* legal analysis on the question of hostilities. Such a practice would leave the appellate courts with nothing to act on—except, of course, the erroneousness of the practice itself. It would also

[98] *United States v. Al-Nashiri*, 191 F.Supp.3d 1308, 1320 (C.M.C.R. 2016).
[99] *See In Re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."), *cited in United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011); *United States v. Sablan*, 6 M.J. 141, 142-43 (C.M.A. 1979).
[100] To see the kind of discussions Congress *was* having in passing the Military Commissions Acts of 2006 and 2009, *see* AE 625, Defense Motion to Dismiss Because the Military Commissions Act of 2009 is a Bill of Attainder, filed 12 April 2019, p. 17-20. Outrage over 9/11, and the desire to strip rights from the 9/11 accused, were prominent in those discussions; the *Tadic* standard and the Law of War were not.

present a shoddy picture in comparison with historical institutions such as the Nuremberg Tribunals and the International Criminal Tribunals for Rwanda and the former Yugoslavia, which never shirked careful analysis under the Law of War before convicting anyone.

What is the point of a "rule of law" mission, if those charged with carrying it out are allowed to ignore the law?

E. Whether existence of hostilities for purposes of 10 U.S.C § 950p(c) in this case is to any extent subject to judicial notice as a matter of legislative fact.

1. Answer.

No. For Congress to "legislate" this answer would be a serious violation of the Due Process Clause of the Fifth Amendment and the Bill of Attainder Clause of Article I of the United States Constitution.

2. Under the Due Process Clause, Congress cannot reverse the burden of proof on any element of a crime, let alone declare an element "already proven" in the Government's favor.

Under the Due Process Clause of the Fifth Amendment, the Government must prove *every fact necessary* to establish a crime to secure a conviction.[101] When Congress attempted to reverse the burden of proof on "consent" in sexual assault cases, the Court of Appeals for the Armed Forces quite rightly found this action to violate due process.[102] If Congress cannot relieve the Government of its burden of proving an element by placing that burden on the

[101] *In Re Winship*, 397 U.S. 358, 364 (1970) ("Lest there remain any doubt about the constitutional stature of the reasonable-doubt standard, we explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."), *cited in United States v. Prather*, 69 M.J. 338, 342 (C.A.A.F. 2011); *United States v. Sablan*, 6 M.J. 141, 142-43 (C.M.A. 1979).
[102] *United States v. Prather*, 69 M.J. 338, 343 (C.A.A.F. 2011) (finding an "unconstitutional burden shift" in the statutory scheme).

Defense, it certainly cannot relieve the Government of its burden by *itself finding the accused guilty* with respect to that element.

In addition, the Due Process Clause limits the ability of Congress to prescribe rules of decision for cases. "The due process clause[] of the Fifth . . .Amendment[] set[s] limits upon the power of Congress . . . to make the proof of one fact or group of facts evidence of the existence of the ultimate fact on which guilt is predicated."[103] If Congress cannot, for example, say "proof of Arab heritage or Islamic faith is proof of participation in hostilities," it certainly cannot say, "hostilities are conclusively proven in Mr. al Hawsawi's case; do not make your own findings on this element at all."

3. Under the Bill of Attainder Clause, Congress cannot impose "legislative facts" leading to military jurisdiction or findings of guilt.

In the context of personal jurisdiction, this Commission has interpreted 10 U.S.C. § 948d as imposing a finding of "hostilities" on the 9/11 defendants for purposes of personal jurisdiction.[104] In the jurisdictional context, this provision violates the Bill of Attainder clause, as the Defense has shown in a recent filing to dismiss this case.[105] In the trial context, if this provision is made to impose a finding in favor of the Government on an element of each crime, it will further violate the same clause.

[103] *Tot v. United States*, 319 U.S. 463, 467 (1943). *See also United States v. Klein*, 80 U.S. 128, 146 (1871) (invalidating an act that made acceptance of a Presidential pardon "conclusive proof" that the acceptor had aided the Confederacy, and so was not entitled to bring a cause in the Court of Claims, because it prescribed a "rule for the decision of a cause in a particular way").
[104] AE 502BBBB, Ruling: Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 25 April 2018, p. 6, *interpreting* 10 U.S.C. § 948d, *citing Bahlul v. United States*, 767 F.3d 1, 14 n.8 (D.C. Cir. 2014)(en banc).
[105] AE 625, Motion to Dismiss Because the Military Commissions Act of 2009 is a Bill of Attainder, filed 12 April 2019, p. 12 & n.60, 25 (showing how this interpretation of the statute makes its finding specific to a certain group, and imposes punishment).

4. **Attachments**:

A. Certificate of Service;

B. Transcript Extract of *United States v. Khalid Shaikh Mohammad, et al*., 7 December 2017 (testimony of Professor Sean Watts).

C. Affidavit of Professor Marco Sassóli, dated 20 February 2017 (originally submitted as att. B to AE 490A, Mr. Al Baluchi's Motion to Decline Joinder in Part and Separate Position Regarding AE490(MAH), filed 24 February 2017).

D. Extract from Professor Leslie Green, *The Contemporary Law of Armed Conflict* (2d Ed. 2000).

//s//
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A

CERTIFICATE OF SERVICE

I certify that on the 19th day of April 2019, I electronically filed **AE 617G(MAH) / AE 620F(MAH) Mr. al Hawsawi's Response to AE 617D / 620C, Regarding Hostilities as an Element of the Charges** with the Clerk of the Court and all the counsel of record by e-mail.

//s//
WALTER B. RUIZ
Learned Counsel for Mr. Hawsawi

B

PROFESSOR SEAN WATTS, civilian, was called as a witness for the defense, was sworn, and testified as follows:

DIRECT EXAMINATION

Questions by the Chief Prosecutor [BG MARTINS]:

CP [BG MARTINS]: Please be seated.

Questions by the Defense Counsel [MAJ WILKINSON]:

Q. Good afternoon, Professor.

A. Good afternoon.

MJ [COL POHL]: Just so we get this down is I'm used to swearing the witness, then having the witness identify himself and the city and state of residence. So I'll do it this time, but I expect the trial counsel to do it in the future.

What is your full name and your city and state of residence?

WIT: My name is Sean Watts; I live in Bennington, Nebraska.

MJ [COL POHL]: Thank you.

Questions by the Defense Counsel [MAJ WILKINSON]:

Q. Tell us about your educational background, Professor Watts.

A. So I have a Bachelor of Arts from the University of Colorado in international affairs. I have a law degree from College of William and Mary Law School, and I have a legal

masters from the United States Army Judge Advocate General School.

Q. Tell us about your education on law of war topics.

A. I also began as an officer, Army officer. So I started before I was a military lawyer as a -- an armor officer. We received law of war training there. Then when I transferred to the Judge Advocate General's Corps, I received law of war training at the Officer Basic Course.

I was assigned to be an operational lawyer and international lawyer at the 2nd Infantry Division in Korea -- that's my first legal assignment -- and was returned to the JAG School for a two-week course in operational law. I would say about half of that course was law of war.

Thereafter, I returned to the Judge Advocate General's School for the legal masters program. When I was identified as a future faculty member for my follow-on assignment, I received significant law of war instruction there as well. So in addition to the core curriculum that each judge advocate going through the program has, I was permitted to specialize in the law of war the second semester of that legal masters program.

Q. So how long in your career, since when have you specialized in this area?

A. Well, so after the -- after completing the graduate course, I joined the faculty of the Army JAG School. I was assigned to the international law department. That was 2004. I have specialized in the law of war since that time.

Q. And does that include in military assignments as well as academic ones?

A. It does. I left active duty following my three-year tour on the faculty. I remained in the reserves, and, in fact, remained on the JAG School faculty as a reservist as well. So I returned to the school periodically to teach a law of war course and an operational law course, usually once per year.

When I left active duty, I left to become a law professor at Creighton University Law School. I continued teaching the law of war there as a semester-long course, actually called it The Law of Armed Conflict there. And all of my research and writing since 2007 has focused on international law and most especially the laws of war.

Q. What other professional activities do you have in this area besides the academic ones you've talked about?

A. From two thousand -- I believe it's 2009 to 2012, I was on a defense team at the International Criminal Tribunal for Yugoslavia, former Yugoslavia. I was involved in the

case, Gotovina, et al. I was assigned to the defense team of General Mladen Markac. I was brought on the team to advise and help litigate law of war matters in addition to command responsibility matters.

Q. Have you done any advising to governments?

A. Yes, I have. I mean, most prominently, the United States Government. I haven't advised governments directly, I would say; however, some governments have brought me in to do training for their own Armed Forces, so -- well, in 2005, in Kabul, Afghanistan, I was assigned to give law of war instruction and human rights law instruction to the Afghan National Army and the Afghan Ministry of Defense there in Kabul.

Q. Have you done any prominent activities with the International Committee for the Red Cross?

A. Yes. Several. I have several projects with them. Currently I'm on a reading committee for the redraft of the commentaries to the 1949 Geneva Conventions. In 1958 through 1961, the International Committee of the Red Cross published a series of four volumes of commentaries on the 1949 Geneva Conventions. A few years ago they determined that they would update and reissue those convections. It's a quite large project. I'm on a committee that reviews every single

commentary that is written. In addition, I have submitted my own three commentaries for inclusion in the new commentaries as well. Those apply to the Third Geneva Convention on prisoners of war.

In addition to that project, I have conducted seminars for them on law of war training or, as they prefer to call it, international humanitarian law. I have done this in a number of university campuses in the United States, including the University of Virginia, Brigham Young University. I have also done this twice in Beijing, China, for them as well.

Q. And your -- the commentaries you're talking about for the ICRC ----

A. Yes.

Q. ---- do those draw on state practice and state conduct and things of that nature?

A. Yes, quite heavily. In fact, most of the effort of the commentaries is to layer a gloss of state practice over the language of the convention itself. Those commentaries do try to account for how states have implemented the conventions, especially this updated version. There wasn't much to work with in the original commentaries because they were still quite new, the conventions were. But this updated

effort is, I think, a much larger attempt to account for state practice and the extent to which state practice has perhaps even in some cases modified the plain meaning of the convention.

Q. Tell us about your teaching in the area of the law of war.

A. I have taught the law of war -- taught initially at the Army JAG School, as I indicated. My teaching profile was exclusively the Fourth Geneva Convention and war crimes initially, but it grew to include other war crime subjects as well. On top of that, every member of the department would cover nearly the entire range of the curriculum in some of the small group sessions as well.

In addition to teaching there at the school, we were often sent to other government agencies to instruct on law of war. Some of the departments we instructed included the United States State Department, the Department of Justice, the Central Intelligence Agency. We would travel frequently to some of these other places to give law of war instruction.

Q. And have you taught seminars at other places?

A. Yes, I have, very frequently. Some of the law schools where I have taught seminars and given talks include Yale Law School, the University of Virginia Law School on at

least five occasions, Duke University Law School, University of Texas Law School on two occasions, Georgetown University Law School, University of California Berkeley. Those are -- those are a few.

Q. On which school are you on the faculty now?

A. Creighton University Law School.

Q. And have you taught law of war topics there?

A. Yes, I have. I have for, I think, a total of five semesters; I taught a course called The Law of Armed Conflict. So this was to Juris Doctor candidates. It covered the entire range of the law of war.

Q. Have you also taught anything on international criminal law that would include war crimes?

A. Yes, I have. I've taught, I believe now, nine iterations of international criminal law at Creighton University Law School. This is both at our home campus in Omaha, Nebraska, as well as a summer school that we have offered now for six consecutive summers. We have partnered with a German University, the University of Erlangen, to offer a month-long international criminal law course. It's headquartered in Nuremberg, Germany. We take the students up to The Hague, Netherlands as well to tour the tribunals.

And we offer two courses, of course, on the law on

the Holocaust and then a more traditional course on international criminal law. I'm responsible for the latter, which involves significant war crimes and law of war instruction as well.

Q. Tell us about your publications in the area of the law of war.

A. I have, I would say, in excess of 25 publications on international law. The majority of these do focus on the law of war, and the majority of them focus on the jus ad bella, the prong of the law of war that is that prong of the law of war that regulates the conduct of hostilities, in addition to a wide range of subjects within the laws of war.

Q. Are any of your publications peer reviewed?

A. Yes, several are peer reviewed. The peer-reviewed publications include the International Law Studies, which is a publication that comes from the Naval War College. There's an Oxford publication that is peer reviewed, the Journal of Conflict and Security Law, that is a publication. I think that came out last year. That is also a peer-reviewed journal.

Q. And does peer review make a difference in your field as far as the status of publications?

A. I would say in law it's a peculiar thing. For the

longest time it was chiefly student-edited journals where law professors placed their pieces. But increasingly, I think we're making the conversion to appreciating the value of peer-edited journals. I certainly have done that in my own publication efforts. I have tried now to achieve a mix of student-edited publications and peer-reviewed publications. The latter, peer-reviewed publications, I have found provided a higher quality of editing and substantive feedback.

Q. Have you received any awards for your publications?

A. Yes. Yes. I have received three writing awards. The first was at the Judge Advocate General's School. The article I wrote for the legal masters received the General Prugh Award for Excellence in International Law Writing. Next I received the Kevin Barry Award from the National Institute of Military Justice; this was for an article on combatant status. And then most recently, I received the Francis Lieber Prize from the American Society of International Law for excellence in law of war writing.

Q. Have you been involved in the writing of any law of war manuals?

A. Yes. Yes, I have. So this was a substantial part of the duties at the Judge Advocate General's School. The international law department publishes two works, first a law

of war deskbook used for instruction; secondly, an operational law handbook which is used by judge advocates assigned to operational billets, I believe, in each of the four services and perhaps even elsewhere. More recently, I was involved -- or invited to participate in a project by the Nato Centre of Excellence. The Cyber Defence Center of Excellence is located in Tallinn, Estonia.

In 2008, we began a project to provide a manual on how the laws of war, both the jus ad bellum regulating the resort to armed force, and the jus in bello, resorting to the conduct of hostilities, how these prongs of the laws of war ought to operate in cyberspace. This is a three-year long project. There were 18 members of what was called an international group of experts. We produced the final product in 2012, which was published by Cambridge University Press.

Q. Do you belong to any professional organizations in this area?

A. Let's see. I'm a member of the Washington State Bar, but that, of course, is not a law of war organization. I am a member of the Institute of International Humanitarian Law in San Remo, Italy. I was invited to join as a member of that institute, I believe, in 2009, and I have been a member of that organization ever since, yes.

Q. And are you involved with the faculties of any other universities, especially any military academies?

A. I was, as a reservist, a member of the department of law at the United States Military Academy at West Point. I provided instruction to summer students while I was assigned there; that included constitutional law, military law, and laws of war.

Q. Have you had any involvement with the U.S. Naval War College?

A. Yes, I have. I am -- or was for three years -- it's a rotating position -- a member of the board of advisors for the International Law Studies series. I've been an invited speaker there numerous times, both on panels at conferences and to two smaller invitation-only workshops.

Q. Have you examined Attachment C to Appellate Exhibit 502Z?

A. Yes, I have.

Q. Is that your curriculum vitae?

A. Yes, it is.

Q. And is it accurate?

A. Yes, it is.

DC [MAJ WILKINSON]: The defense now requests Professor Watts be recognized as an expert in the law of war.

MJ [COL POHL]: Trial Counsel, do you wish to voir dire the witness?

MTC [MR. TRIVETT]: No, sir.

MJ [COL POHL]: Any challenge to that characterization?

MTC [MR. TRIVETT]: No, sir.

MJ [COL POHL]: He's so accepted. Go ahead.

Q. Is the law of war a type of international law?

A. Yes, it is. It's known by various names. Some refer to it as the law of armed conflict, some refer to it as the law of war, some refer to it as international humanitarian law; but it is a subtopic within public international law generally.

Q. Are you familiar -- I mean, to your knowledge, does there exist any separate United States law of war?

A. Like many of its international -- like many of its legal -- international legal obligations, the United States has implemented the laws of war in its own statutory regimes. It is -- we are a dualist system that requires that additional step. I suppose one could describe the extent to which we have integrated the laws of war into our statutes as something U.S. specific, but that's not usually termed its own body of international law or its own body of the law of war, no.

Q. I mean, does any one country have the power to, by

itself, change the law of war?

A. Not by itself, no. I mean ----

Q. Now, what does the term armed conflict mean in international law?

A. It's a term that first appears in the 1949 Geneva Conventions. There are two variants of armed conflict that are described in those conventions. The first is international armed conflict, which describes war or conflict between two states or high-contracting parties to the Geneva Conventions. The second variant of armed conflict recognized in the 1949 Geneva Conventions is what the conventions term conflict not of an international character. That term appears in Common Article 3 of each of the four Geneva Conventions.

Q. And is that commonly called noninternational armed conflict now?

A. Yes, sometimes it is.

Q. What is the principle of legality in the law of war?

A. It's not a principle peculiar to the law of war; but within the law of war, it refers to a principle that requires parties to apply existing law rather than laws that may be in the future, or will be.

Q. So if you're analyzing a war crimes situation, you have to use the law as it existed at the time of the crime,

not what people come up with later on?

A. Yes. The concept of legality appears quite frequently in international criminal law and in war crimes. It was a focus of criticism, frankly, of the Nuremberg Tribunals and the Far East Tribunal.

Q. Now, do the Geneva Conventions of 1949 or any other treaties specifically define armed conflict? I mean, do they provide some formula where you can just look at it and see whether given fighting is armed conflict or not?

A. Well, there is one that goes to some greater length. That is Additional Protocol II.

Q. We'll come back to that one in a little while.

A. Okay.

Q. But in order to classify a conflict as armed conflict or not, do you have to look at customary international law?

A. You do. Because the 1949 Geneva Conventions do not define armed conflict. There were proposals to do so. This was not a point lost on states, that they had adopted a fairly ambiguous term, particularly as it related to conflict not of an international character described in Common Article 3. Several states proposed to provide a definition or to clarify what they meant by armed conflict, especially in the context of noninternational armed conflict; and a working group was

even formed to do that. Several states, including the United States, proffered criteria, but they could come to no agreement, and, therefore, the term was left undefined.

A second working group attempted, actually, and abandoned the effort, and that sealed it. The states were content to leave things with just the term armed conflict. I suspect that ambiguity was probably key to the consensus of all the states.

Q. To determine customary international law, do you have to look at the behavior of governments?

A. The usual formula, the widely accepted formula for customary international law, is general and consistent state practice; not by one state but by the community of states; hence the resort to general state practice. Then in addition there's an element of opinio iuris, a Latin term which describes a sense of legal obligations. That is not only are states undertaking this general and consistent course of practice; they're doing so because they feel legally obligated to as a matter of international law.

Q. What's the relative importance of the pronouncements or the words of governments versus their actions or their deeds?

A. The latter is more persuasive. When accessible and

when publicly available, scholars, academics, other states even, prefer to examine the actual courses of conduct of states. This can be difficult in conditions of armed conflict where states often attempt to hide what they're doing or don't make publicly available what they're doing. But as between state pronouncements and actual state practices, the latter are preferred.

Q. How important are the words and deeds of intergovernmental bodies, such as the United Nations?

A. They're not authoritative. Only states can truly make international law, and only what states do and in some cases say is relevant for the identification of customary international law. That said, many nongovernmental organizations do offer opinions on the state of the law, do attempt to advance the state of the law through dialogue. Some of their products are persuasive.

The International Committee of the Red Cross have, for decades, developed products which many lawyers consider highly persuasive; some have lended them the status of authoritative. That, in my opinion, is incorrect. They're not authoritative.

Q. How about the role of international war crimes tribunals? How important -- how important are those in

determining customary international law?

A. They are relevant to the sources of international law. Decisions by tribunals have been recognized as a source of international law. For instance, in the statute of the International Court of Justice, the decisions of tribunals are a legitimate source of international law in that respect.

Q. Now, how about the statements and actions of private armed groups?

A. They are not acceptable sources of international law. They are not authoritative sources of international law any more than a nongovernmental organization might be.

Recently, the United States expressed a very strong opinion in this regard in its Law of War Manual. The United States judged that the opinions of organized armed groups, for instance, and whether they are involved in a state of armed conflict, the Manual makes clear they are not competent authorities. That's paragraph 3.4.1.2 of the Manual.

Q. Now, when it comes to the law of noninternational armed conflict, when did that law really get started?

A. It really sees its birth in the 1949 Geneva Conventions. There really was not a lot of multilateral treaty-based law, certainly, that regulated noninternational armed conflict prior to the 1949 Geneva Conventions. And even

then, this was a modest effort of the 400 or more articles of the 1949 Geneva Conventions. Only one in the original conventions addresses noninternational armed conflict; that is Common Article 3.

Q. So for the rest of my questions, given that, I'm going to be talking about the period from 1949 to September 11th, 2001.

A. Okay.

Q. So in your study of the law of -- the customary law of noninternational armed conflicts during that period, are there any overall patterns that you have seen in the way governments behaved towards their conflicts with nonstate armed groups?

A. The period that initially follows the 1949 Geneva Conventions saw very little application of Common Article 3. This was, I suspect, for a number of reasons. There was -- this generated frustration among some states. And as early as 1961, there were efforts by states to refine the standard of applicability; that is, to fill out the meaning of that term, armed conflict. Those efforts continued but saw very little state interest, I would say, until the early 1970s. At that time ----

Q. Sorry. In dealing with actual conflicts ----

A. Yeah.

Q. ---- was there anything you would note about their overall willingness or reluctance to refer to them or to treat them as actual noninternational armed conflicts?

A. As a general matter, states were unwilling to regard most situations of violence as rising to the level of armed conflict.

Q. Tell us, then, a little about Additional Protocol II, which is what I think you were coming to.

A. Sure. So after the efforts -- after various efforts by nongovernmental organizations and even some states to clarify the meaning of armed conflict, states convened a diplomatic conference to update the Geneva Conventions more generally. This is the diplomatic conference that runs from 1974 to 1977 and ultimately produces Additional Protocols I and II to the Geneva Conventions of 1949.

Q. And what kind of conflicts does Additional Protocol II apply to?

A. Additional Protocol II applies to all armed conflicts not covered in Article 1 of Additional Protocol I. The convention then elaborates further and describes conflicts that involve a high-contracting party against an organized armed group on the territory of a high-contracting party.

The organized armed group must then satisfy three conditions: A condition of territorial control; secondly, a condition of carrying out sustained and concerted operations against the government forces; and then finally, the organized armed group must implement the protocol itself; that is Protocol II.

It is an elaborate description of noninternational armed conflict. I'm hesitant to say that Additional Protocol II covers noninternational armed conflict because the majority view is it actually only covers a subspecies or a subgrouping of noninternational armed conflicts.

Q. So in other words, under other authorities you might have a noninternational armed conflict that does not meet those exacting criteria to fall under Additional Protocol II?

A. That is correct. The majority view is that there are armed conflicts which satisfy the Common Article 3 and customary standard for conflict not of an international character, but there are also within that grouping conflicts which also satisfy the Additional Protocol II criteria that I enumerated a moment ago.

Q. Now does Additional Protocol II include any negative language about what is not a conflict?

A. It does. Article 1, subparagraph 2, which

immediately follows the criteria I described a moment ago, excludes explicitly riots, isolated and sporadic acts of violence, or other acts of a similar nature.

Q. And does that standard reflect customary international law with respect to all noninternational armed conflict?

A. Yes, it does. That language has been cited in judicial opinions. In fact, it is reproduced verbatim by the United States Law of War Manual, as well, in its 2015 publication.

Q. Does -- at the negotiations over Additional Protocol II, did anyone suggest that in a contest like that, where it's a government versus a nonstate armed group, that the government should just have plenary power to say whether it is or is not armed conflict?

A. That was a proposal made. During the diplomatic negotiations that produced Additional Protocol II, Colombia proposed that it ought to be the state that is fighting the organized armed group who should make the determination whether an AP II conflict is happening.

They proposed this in a working -- a plenary group, rather, of deliberations. The states debated it briefly but rejected it, and it did not appear in the final language of

the treaty.

Q. So -- tell us about the role of international war crimes tribunals in creating or setting forth customary standards for determining what is an armed conflict.

A. Well, they have had a recognized role in clarifying the law and, in some cases, I would say altering the law. Some tribunals have perhaps put a finer point on some parts of the law of war than some states might like, so there's often a dialogue, I think, between these tribunals and the way they're describing the law and how states perceive the law.

Q. What are the most prominent tribunals from the later part of the 20th century?

A. Well, the most active and the most prolific has been the International Criminal Tribunal for former Yugoslavia. They share an appeals chamber with the Rwandan Tribunal, but it is the Yugoslav situation and the Yugoslav work that has been most prolific in its commentary on the laws of war.

Q. Has their work helped to solidify what the real standards are for determining what's an armed conflict?

A. They have. If Additional Protocol II perhaps was too precise or too demanding in its description, I think there is more state sympathy for some of the clarifications that developed in the work of the Yugoslav tribunal, yes.

Q. Have states adopted or begun to teach standards that come from the Yugoslav tribunal?

A. Yes, they have. The work of the tribunal has been integrated into the work of many states' legal instruction. It has also been integrated into the legal instructions they issue to their Armed Forces.

Q. When you were teaching at the Army JAG School graduate course, did you teach standards that came out of the Yugoslav Tribunal to American judge advocates?

A. Yes, we did. We taught, for instance, work that came from the Tadic case.

Q. Tell us about the standard of the Tadic case.

A. So there are a number of issues raised in the Tadic case, but one of the more enduring observations that tribunal made about the law was its description of standards and classifications of conflicts. The Yugoslav situation produced a complicated task for conflict classification, and one of the court's earliest efforts was to develop a clearer framework for distinguishing situations of riots and banditry and isolated violence from situations that were truly noninternational armed conflict.

Q. Do they mention the word terrorism at all?

A. I can't say with -- that I recall. I don't know

if -- specifically if the Tadic situation -- decision uses the term terrorism.

Q. And if you don't remember, you don't remember.

A. Yeah.

Q. But tell us what the test is or that is laid out in Tadic for determining what is an armed conflict versus not an armed conflict?

A. The Tadic tribunal identified two characteristics of noninternational armed conflicts. First, they are violence that rises to a requisite level of intensity. Later decisions elaborated on what that intensity might involve or factors that indicated there was sufficient intensity to the violence.

The second element of noninternational armed conflict identified by the Tadic court is a requirement of organization that applies to the nonstate actor involved in the violence.

Q. Is that then an objective test?

A. Yes, it is. It's an objective test; a de facto standard, if you like.

Q. So it doesn't then depend on what the parties are saying or what they think about it?

A. No. No decision from the Yugoslav tribunal that I'm aware of resorts to the statements of the parties to determine. They look to the conditions of the -- of violence

themselves and to the characteristics of the organization itself.

Q. By the end of the 20th century, would it be fair to say that that standard was customary international law?

A. Yes. Yes, it would. By the end of the 20th century, a number of states had incorporated that standard into their legal manuals, and it was generally accepted as an accurate description of the standard for noninternational armed conflict.

Q. Now, I think you said there was some later cases that helped to refine what goes into the intensity and organization elements of the test.

A. They did, yes. A number of cases refined the Tadic standard as they applied it to the facts of their own cases.

Q. Are there any especially good ones that summarize the refinements?

A. By the late 1990s there were -- there was violence in Kosovo that was addressed by the tribunal. It pitted Serbian armed forces against irregular militia and organized armed groups which had identified themselves as the Kosovo Liberation Army. There were a number of cases that deal with that situation that were called upon to apply the Tadic standard. I'm thinking of the Limaj and the Haradinaj

revisions specifically. Each of these offered some refinements on the Tadic standard.

Q. Now, have you examined footnote 54 of the C.M.C.R. case United States v. Hamdan?

A. Yes, I have.

Q. Does the standard in that footnote reflect customary international law at the end of the 20th century?

A. Parts of it do. It tracks some of the language used by the Tadic chamber and by other chambers of the Yugoslav tribunal. There are references in that instruction to intensity that I think do track some of the customary law applicable to that period. However, there are other provisions of the instruction that do not track customary international law.

Q. Tell us more about those.

A. Well, to my recollection, the footnote reproduces an instruction that refers to the statements of parties, the statement of the organized armed group, or the statement of the state, the country, if you will. Those are not part of customary international law as I understand it.

MJ [COL POHL]: When you say it's not part of customary international law, are you saying that the statements of the parties have no relevance or just not a lot of relevance?

WIT: They have no relevance to the legal standard. I'm not aware of a tribunal or a treaty or a work that takes account of how either party is labeling a conflict.

MJ [COL POHL]: Okay. So if you had one party declaring a war on the United States, you wouldn't give that much credit?

WIT: No, I wouldn't.

MJ [COL POHL]: Okay. And similarly, if you had the President of the United States refer to a certain action as a -- as a criminal action as opposed to a law of war violation, that would equally receive no weight?

WIT: Again, the labeling would not.

MJ [COL POHL]: Okay.

WIT: What the states -- what either party actually does is highly relevant. How they carry themselves out on the battlefield, what assets they choose to use on the battlefield are extraordinarily relevant; however, the labels themselves are not.

MJ [COL POHL]: Thank you. Go ahead.

Q. Now, what about the language in there that says that the fact-finder can use anything else he considers relevant?

A. That's not part of the customary international law standard for noninternational armed conflict. There is no invitation for any party to add factors that it sees fit.

Q. Now, in preparation for your testimony today ----

A. May I -- there's ----

Q. Yes, sir.

A. ---- just one further observation on the footnote. It does not seem to give sufficient weight to the organization of the nonstate actor as well. As I reviewed that footnote, that element did seem to be missing from the instruction. It gave me the impression that someone might read that instruction and deduce that intensity alone would be enough to satisfy the standard. It is missing the organization requirement that is part of the customary standard.

MJ [COL POHL]: What do you believe the organization requirement to be?

WIT: It's several-fold. There are a number of factors. They look to the character of the nonstate organized armed group. Some of the factors included are whether that organization has a command hierarchy, whether it issues instructions to its forces, whether it has tools for and means to recruit members, whether it has a system to enforce discipline within its organization, whether orders are given within the organization, and whether those orders are followed and carried out, whether there is an authority responsible for the actions of that organization. Some cases have examined

whether the organization is capable of issuing communiques in a concerted fashion; speaking with one voice, if you will.

MJ [COL POHL]: Is the size of the organization a factor, just the sheer number?

WIT: No, sir, not on the organizational side; however, the number of participants that organization can bring to bear on a situation of violence is relevant to intensity.

MJ [COL POHL]: Okay. Thank you. Go ahead.

Q. All right. And since the judge has asked about the -- about the organization element, tell us about some of the refinements on the intensity element.

A. Oh, sure. The -- some of the factors that indicate that a situation of violence is sufficiently intense to constitute a noninternational armed conflict are the, as I mentioned a moment ago, the number of participants. The number of casualties can be indicative of sufficient intensity, the types of weapons that are used. The extent to which violence causes displacement among a civilian population has proved relevant. The duration during which hostilities are carried out or violence is carried out, each of these is ----

Q. And if you would, on this question of duration ----

A. Yes.

Q. ---- does that mean how long the fighting is happening, or does that mean how long people suffer from the aftermath of the fighting?

A. It is usually focused on the exchanges between the parties themselves, whether there are sustained -- that's a term that's often used -- whether there are sustained engagements or confrontations between parties to the conflict or parties to the situation.

Q. But I mean, suppose you say one day you have an ambush, some people are hurt, and someone spends a year dying from his wounds. Are you looking at the day or are you looking at the year?

A. Looking at the day. It's the violence itself that is relevant.

Q. In preparing for this case, have you looked at some examples where a conflict or a violence transitioned from being not an armed conflict to being an armed conflict?

A. Yes, several.

Q. Tell us about one of those.

A. The earliest I've looked at in earnest is the situation of violence in Northern Ireland. It begins in 1968, and there is rioting and occasional violence in Northern Ireland. The British Army responds by sending troops, at one

point in the tens of thousands of troops, to quell this violence.

By 1971, the violence evolves. It changes from sporadic attacks on soft targets and civilians to an effort by the Provisional Irish Republican Army, the PIRA, to attack the security forces themselves, including the British Army.

In 1971, there are clashes between the PIRA and British Armed Forces. By 1972, the frequency of these clashes greatly increases. 1972, by one estimate, saw 6,000 shootings and 1,000 bombings. There's a single day in July where there are 22 bombings in Northern Ireland. The violence is contained mostly to two cities, to Londonderry and to Belfast. The British Army responds with widespread roundups and security internments, so there are mass incarcerations undertaken as a response by the British Army.

By the summer of 1972, the British Army mount a six-month operation to regain control of territory. They -- this operation involves as many as 28,000 British Army troops. And eventually they overcome the Provisional IRA in a tactical sense.

After that, the PIRA seemed to have concluded that they can't go toe-to-toe with the British Army and changed tack. So from 1974 -- I'm sorry, 1973 to 1974, we see them

revert to the tactics they were using in 1968 through 1971. These are sporadic bombings against softer civilian-type targets. They'll conduct shootings against British Army soldiers, but these are usually off-duty or lone British Army soldiers rather than attacks on formations of soldiers.

Q. Is it possible, then, that this conflict went from being not an armed conflict, intensified for a while into armed conflict, and then de-escalated into not an armed conflict again?

A. Possible, but I'm not aware of a state that made that legal conclusion. For instance, the United Kingdom throughout the period, including the most intense period that I described from 1971 to 1972, insisted that it was not a noninternational armed conflict. They referred to the situation in Ireland as The Troubles. They continue to do that to this day. As recently as 2004, United Nations ----

Q. Sir, I don't want to get too far into the 21st Century.

A. Okay.

Q. All right. But do you know of some situations where the government -- some government acknowledged that you had moved from not an international or not an armed conflict into being a noninternational armed conflict?

A. Sure. So roughly contemporaneous to the Northern Ireland situation, there were hostilities and violence in Nigeria. Beginning in 1966, Nigeria suffered a number of coup attempts. These attempts initially began with assassinations of regional prime ministers. There was even a federal prime minister killed in 1966, but these were sporadic acts of violence.

However, by fall, there were attacks on government forces. There were widespread attacks then on the civilian population. Armed groups within Nigeria began attacking civilians on the basis of their ethnicity. Some estimate as many as -- civilian casualties are running to the thousands by fall of 1966.

In 1967, several of these groups began to launch independence movements; that is, it turned into an effort to secure independence from the Federal Government of Nigeria. So by March there were concerted efforts in this regard and strong statements by these groups that they regarded themselves as independent.

Beginning in June of 1967, then, there are sporadic clashes between Federal Government troops and armed forces associated with these separatist and rebel groups, so the groups are now clashing with one another. In July, there are

large-scale battalion-sized engagements between these forces. By the end of July, there is as much as a 1,000-long front that separates the groups in some instances.

Q. Can you tell us in this timeline you're giving about when the Nigerian government started to recognize that it was in what would be called a civil war or a noninternational armed conflict?

A. The 6th of July, 1967, the Nigerian government recognized civil war.

Q. And do you know if other governments did the same?

A. I'm not aware of other governments' opinions, no.

Q. Can you tell us about another situation that, you know, again, with some recognition, moved from not an armed conflict into being one?

LDC [MR. RUIZ]: Judge, I'm sorry to interrupt my -- our own counsel, but may we have a five-minute break?

MJ [COL POHL]: Sure.

LDC [MR. RUIZ]: Thank you.

MJ [COL POHL]: While we're having that break, can we bring this up to the case now?

DC [MAJ WILKINSON]: Um ----

MJ [COL POHL]: And I don't need to hear every example of what doesn't apply.

DC [MAJ WILKINSON]: I don't intend to go to every example. In fact, I just really want to hear one more and then move to ----

MJ [COL POHL]: It's always one more. But okay, but let's try to get it ----

DC [MAJ WILKINSON]: Understood, sir.

MJ [COL POHL]: I understand what you're coming at and I understand the parameters of it, but I really want to talk about ----

DC [MAJ WILKINSON]: Understood. One more example, and then the principles and our case.

MJ [COL POHL]: Okay. We'll be in recess for ten minutes.

LDC [MR. NEVIN]: Your Honor ----

MJ [COL POHL]: Commission is in recess.

[The R.M.C. 803 session recessed at 1639, 7 December 2017.]

[END OF PAGE]

[The R.M.C. 803 session was called to order at 1648, 7 December 2017.]

[Professor Sean Watts resumed his seat on the witness stand.]

MJ [COL POHL]: Commission is called to order. Professor Watts is still on the stand. All parties are again present. I'm sorry.

CP [BG MARTINS]: Your Honor, Mr. Groharing is not present.

MJ [COL POHL]: Not present. Okay.

Defense Counsel.

DIRECT EXAMINATION CONTINUED

Questions by the Defense Counsel [MAJ WILKINSON]:

Q. All right. We'll skip over most of the other examples, but can you tell us a bit about that situation in Kosovo in the late 1990s that you mentioned earlier on?

A. Yes. This was a situation addressed by the Yugoslav tribunal. And as I mentioned previously, there was violence between the Armed Forces of Serbia and the Kosovo Liberation Army, as they called themselves. This was in the northern territories of Kosovo. The court was called upon to analyze whether the situation amounted to armed conflict and specifically which dates it had matured into a noninternational armed conflict.

Q. Could you contrast what it was like at the time when it wasn't an armed conflict and the time when it was? Because that's what I'm getting at.

A. Sure. So there was an intermittent violence between the Kosovo Liberation Army and Serbian police as early as 1997.

Q. When you say intermittent, be more specific about that.

A. Sure. Weeks are elapsing between clashes in those cases in some instances. The intensity picks up as 1997 progresses, and by the beginning of 1998, there are fairly regular clashes between Kosovo Liberation Army elements and the Serb police and Serb Armed Forces.

These clashes involve the use of mortars, in some cases armored cars, in some cases even helicopters as well. They are producing casualties in the dozens or so. But again, they are intermittent in the sense that there are weeks in some cases elapsing between each episode.

However, things change on the 22nd of April. The court examines violence after the 22nd of April and determines that this is the starting point of noninternational armed conflict. What occasions this is a great reduction in the periods between violence. Violence is nearly continuous from

this period forward. There are breaks, but these are breaks that involve matters of days rather than matters of weeks.

The intensity picks up as well. There are more casualties produced in this period. The same sorts of armored formations, helicopters, and mortars are used, machine guns are used. And these involve clashes between the actual forces rather than isolated strikes or even strikes against civilians. They are true combat between forces.

Q. So in general, I just want to ask some general questions about customary international law, as it had developed at that point, and about conflict classification.

A. Okay.

Q. What is the importance of sustained versus sporadic fighting in that period?

A. Well, it's captured by state understandings of the term noninternational armed conflict by the late 1990s. There are indications from states that do not regard isolated or sporadic incidents as arising to the level of armed violence, and we see the Kosovo tribunal putting that into practice in its judgment in Limaj and Haradinaj.

Q. And what is the importance of clashes between government and nongovernment forces; that is, those two fighting each other?

A. Well, they are an indication of a high degree of violence. They tend to be more intense in some respects than attacks against softer targets because they provoke responses. They're also relevant because they provoke or speak to the actual purpose of the jus in bello, to the laws of war. The laws of war are designed to regulate combat between forces. And so it's exactly that kind of activity to which these regulations apply.

Q. So when you have just armed persons on one side attacking unarmed civilians on the other side, how does that relate to the standard?

A. Well, it is, in the context of an armed conflict, a violation of the law of war to attack civilians, but ----

Q. But what I'm after is in determining whether you've got an armed conflict in the first place.

A. Yeah. Not especially relevant. There are a number of occasions of state practice that exclude those sorts of attacks. This is the Irish situation I described previously in some phases. This is the Nigerian situation I described previously. This is also the Kosovo situation. In each instance, either the state or the tribunal concerned did not regard this as the kind of violence that amounted to armed conflict.

Q. Have you read about the violence between the United States and al Qaeda as described in the 9/11 Commission report?

A. I have read the report, yes.

Q. So focus on the period ending on September 11th itself, including September 11th itself and before that. How do these factors you're talking about apply to that violence in that period?

A. Well, they are almost quintessentially sporadic. They extend over a period, from my understanding, 1998 through 2001, as you asked me to focus. They are -- there are occasions of violence; however, there are long periods that don't involve violence between each of these episodes

Secondly, there are not the clashes that we were speaking of a moment ago. I'm not familiar with exchanges of fire. I'm not familiar with operations that are typically called combat in any of this period that you asked me to consider.

Q. So when, at the earliest, focusing on intensity, would you say the fighting between the United States and al Qaeda might be an armed conflict?

A. October of 2001. I would say the introduction into Afghanistan of large formations of United States Armed Forces,

sustained bombing, clashes between those forces.

Q. And that's based on the intensity prong?

A. It is. Yes, it is not an evaluation of al Qaeda's organization. I don't know enough about that organization to evaluate them under the organization prong.

Q. And I understand in order to have a truly complete definitive answer, it would have to meet both prongs and not just one or the other.

A. It would, indeed.

Q. Are you familiar with the work of Marco Sassòli?

A. Yes. Yes, I've used it in my instruction.

Q. And can you just tell us about his stature in the field of the law of war?

A. Oh, he's a renowned expert. There are few people in the field that are as influential as Professor Sassòli.

Q. And when you say you've used his work, I mean, have you used any texts of his or things like that in teaching?

A. Yes. In addition to his article, when I taught at the Army JAG School, I used his two-volume casebook in my semester-long Advanced Law of War elective.

Q. Are you familiar with the stature of Professor Leslie Green back when he was alive?

A. Yes, the late Professor Green. Yes, I'm familiar

with his stature.

Q. Tell us about that.

A. Also a giant in the field of the law of war, highly regarded. I still use his work, The Contemporary Law of War, today.

DC [MAJ WILKINSON]: No further questions.

MJ [COL POHL]: Mr. Connell, how long do you think you would need?

LDC [MR. CONNELL]: 15 minutes.

MJ [COL POHL]: Okay. I'll hold you to that. Go ahead and go ahead.

Questions by the Learned Defense Counsel [MR. CONNELL]:

Q. Good afternoon, sir.

A. Good afternoon.

Q. My name is James Connell. I'm an attorney for Ammar al Baluchi. I'd like to follow up on a couple of questions that you were asked by counsel for Mr. Hawsawi.

In your testimony, you discussed the Law of War Manual. What is the Law of War Manual?

A. This is a publication updated most recently in December of 2016 from the United States Department of Defense Office of General Counsel. It issues instructions to United States forces on their law of war obligations.

Q. What is its role in the collection of explanations of the law of war within the United States?

A. That's a subject of some dispute. The manual includes confusing disclaimers, frankly, in its beginning. It disclaims being the view of any agency other than the Department of Defense. It's my understanding that the Department of Justice and the Department of State have not endorsed the manual.

Q. Is it, in fact, the view -- the official view of the Department of Defense?

A. I believe it to be that, yes.

Q. You testified on direct examination about -- during the negotiations over Additional Protocol II, the position of Colombia regarding the statements of leaders?

A. Yes.

Q. You testified on direct examination that a proposal was put forth by Colombia to elevate the stature of statements of leaders in the determination of armed conflict; is that accurate to say?

A. Leaders of states. That Colombian proposal did not speak to the leaders of organized armed groups, but did speak to the leaders of parties to the protocol.

Q. Is there a consensus or majority view on the

significance of the rejection of that amendment in the meaning of Additional Protocol II?

A. There's broad consensus that the state itself cannot make a conclusive determination as a matter of international law whether it is or is not in noninternational armed conflict. It is an objective analysis.

Q. You were asked on direct examination whether there was any language about terrorism in the decision of Tadic itself. Do you recall that question?

A. I do.

Q. Tadic itself, you told us, was not the end of the development of the ICTY's jurisprudence on law of war, right?

A. Correct.

Q. And so are there -- there are later cases that give us a refinement or an explanation of what Tadic meant; is that fair to say?

A. It is.

Q. And do some of those cases speak to the status of terrorism in armed conflict?

A. They do. They do. Several of them. I believe both Limaj and Haradinaj incorporate statements that exclude acts of terrorism from the definition of noninternational armed conflict.

Q. Okay.

A. There are also statements by states. The one that stands out is a French statement made on their submission of ratification of Additional Protocol I that explicitly mentions terrorism as not included, both isolated terrorism and concerted terrorism, in the French statement.

Q. I'd like to move forward to a question that the military commission asked you about footnote 54 in the Hamdan decision. The military commission asked you whether one party declaring war was a relevant factor. Do you recall that question?

A. I do.

Q. Okay. Is there a different answer for when the party declaring war is a state actor versus a nonstate actor?

A. No, there is not.

Q. If one state declares war on another state, does a state of armed conflict exist?

A. Yes, it does. This is an important difference between the standard for international armed conflict on the one hand and the standard for noninternational armed conflict on another. Statements by states, declarations of war, are conclusive as between states.

Q. All right. So, you know, there is a very ----

A. May I correct this?
Q. Of course.
A. Statements as to the existence, that is, when a state declares that it is at war, that is conclusive. If a state declares that it is not at war but it is, in fact, carrying out armed conflict against another state, then the fact of hostilities is conclusive rather than the statement. Whereas, a state may say it is in war, but a state may not conclusively deny that it is not in war with another state.
Q. All right. And applying those two rules that you just described to us, there is what is, in fact, for state-to-state violence sometimes what is called -- strike that. Withdrawn.
So when Japan attacked the United States at Pearl Harbor, their attack was -- immediately preceded a declaration of war by Japan; is that correct?
A. I'm unaware of the timing of a declaration.
Q. All right. I'll move on from there, then.
Can a nonstate actor declare war and have binding effect under the law of armed conflict to create the existence of armed conflict?
A. It cannot.
Q. And why not? Are there various nonstate actors that

declare war on other states from time to time?

A. There are. There are several throughout history. None has been accorded legal effect.

There are -- there are ridiculous declarations, frankly, from some organizations. In the 1970s, the Symbionese Liberation Army declared war on the United States, I believe. The Japanese organization Aum Shinrikyo made similar declarations. They were given no legal effect in either case.

Q. And both of those organizations were otherwise engaged in terrorist activity, correct?

A. That is my understanding, yes.

Q. Okay. Now, I'd like to move forward to Northern Ireland. You described the sort of three phases of violence between the Provisional IRA and the United Kingdom. During that time, did the Provisional IRA declare itself to be at war?

A. It did, yes.

Q. Did that have legal or binding effect?

A. It did not. There were also efforts by the Republic of Ireland government and the United Nations to propose a recognition of armed conflict, and none of those resolutions carried, either.

Q. Was that true -- was that state of affairs obtained even though the Provisional IRA had actual troops in the field against the U.K.?

A. That is my understanding, yes. The PIRA were still deployed at the time they made those statements, yes.

Q. Okay. And you said that the U.K. had never recognized itself -- recognized itself involved in a noninternational armed conflict.

A. Correct.

Q. Did they, in fact, make a reservation or understanding or declaration with respect to Additional Protocol II about that fact?

A. My recollection on that is not perfect. I'm sorry.

Q. That's all right. Now, is it the fact that the United Kingdom did not consider itself to be at war that's determinative or the nonexistence of the NIAC, or is it the objective factors of the facts on the ground?

A. It is the latter, the objective factors.

Q. Okay. Now, your second example that you gave was Biafra. And what about the Biafra situation converted it to a noninternational armed conflict?

A. What seems to have swayed the Nigerian government itself were the clashes with their armed forces being carried

out on a sustained and regular basis rather than being sporadic clashes. There were direct confrontations between Biafran forces and the Nigerian government.

At the time they recognized the civil war, Biafran forces had managed to secure territory that had formerly been held by the Federal Republic of Nigeria. They even carried out operations within the capital of Nigeria itself. And I suspect it was the scale and the prolonged nature of combat between their forces that forced the Nigerian government to concede that state.

Q. Now, is it the fact that the Nigerian government recognized a civil war that created a state of noninternational armed conflict, or was it the objective facts on the ground?

A. The objective facts on the ground. The opinion of the Nigerian government is no more persuasive than any other state's opinion on the state of hostilities or the state of violence there in Nigeria.

Q. All right. And under the international law of war, what significance does the statement of the leaders of the separatists and rebel groups in Nigeria have?

A. It has no significance. As the DoD Law of War Manual says, they are not competent legal authority.

LDC [MR. CONNELL]: Nine minutes, Your Honor. You owe me six.

MJ [COL POHL]: You won't get it back.

Trial Counsel, do you wish to cross-examine? If so, we're going to delay until tomorrow, but if not ----

MTC [MR. TRIVETT]: Yes, sir. We're going to cross-examine.

MJ [COL POHL]: Okay. Before you leave, Professor, let me have one question: Have you read the Military Commissions Act and its definition of hostilities?

WIT: I have, yes.

MJ [COL POHL]: How do you -- and if this isn't in your area, let me know, but Congress wrote the statute clearly to cover, actually, this particular case. Do you believe they wrote the statute when it defined hostilities to take this case out of the jurisdiction of the enabling statute?

WIT: I'm not familiar enough with the legislative history to know why they wrote it.

MJ [COL POHL]: Okay. But would that not be the effect of if -- if you believe that, when it assigns hostilities, means any conflict subject to the laws of war would only apply to activity on or after 27 September 2001, then Congress wrote that this statute intended not to apply to this case?

WIT: That definition of hostilities strikes me, as an international lawyer, as an incorporation of an international legal standard. By referencing the laws of war, they presumably meant the international laws of war and meant for hostilities to refer to situations that the international laws of war would similarly regard as armed conflict.

MJ [COL POHL]: I'm not going to let you off that easy.

But then you're saying that, because your view is the armed conflict in the United States and al Qaeda began on 27 September, on or about, 2001, and, therefore, Congress intended for this statute to incorporate international law, which you say would preclude them from trying this particular case.

WIT: Acts prior to it, correct. To save the statute's -- to apply the Charming Betsy canon, which instructs us to interpret congressional acts consistently with international law when we can, that is the best understanding, that they meant to describe acts and activities that met the international law of war standard.

MJ [COL POHL]: Okay. Thank you. We're going to recall you again tomorrow for cross-examination. I'm not sure exactly what time that will be because we have got one other matter to take, but we'll let you know as quickly as we can.

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DECLARATION OF MARCO SASSOLI

Background

1. My name is Marco Sassoli. I am over 18 years of age and competent to make a declaration.

2. I am currently Professor of International Law at the University of Geneva, Switzerland. I am also an Associate Professor at the University of Quebec in Montreal (Canada). I have been between 2004 and 2013 Chairman of the board of Geneva Call, an NGO working with armed groups to ensure adherence to humanitarian law norms.

3. I obtained a law degree at the University of Basel, Switzerland, in 1982, and was admitted to the bar of the Kanton Basel-Stadt in 1984. I also obtained a Doctor of Laws degree at the University of Basel in 1989.

4. I joined the International Committee of the Red Cross ("ICRC") in 1985, first as a member of the Legal Division. I was Legal Advisor for the ICRC Delegation in Israel and the Occupied Territory from 1990-1991, then coordinator of the Legal Advisors to the Operations of the ICRC and Legal Adviser for the Middle East from 1991-1993.

5. From 1993-1994, I was Head of the ICRC Delegations in Jordan and Syria.

6. I became Deputy Head of the Legal Division of the ICRC in 1994, keeping that position until 1996.

7. In 1996, I worked for seven months as ICRC Protection Coordinator for the Former Yugoslavia, based in Sarajevo, and Chairman of the Working Group on Missing Persons in Bosnia and Herzegovina.

8. I was also Secretary-General of the Swiss Fund for Needy Victims of the Holocaust (Bern, Switzerland) from 1997-1998, and Executive Secretary of the International Commission of Jurists from 1998-1999. From 1999-2000, I have been registrar at the Swiss Supreme Court in Lausanne.

9. I began teaching International Law in 2001. From 2004-2008, I was Chairman of the board of the Geneva Academy of International Humanitarian Law and Human Rights, and have been Director of the Department of Public International Law and International Organization of the University of Geneva from 2009-2016.

10. I am the author of numerous publications on the sources of international law, on international humanitarian law, international human rights law, international criminal law, state responsibility, and non-state actors in international law; including (together with Antoine Bouvier and Anne Quintin) "How Does Law Protect in War?" 3rd ed (ICRC), which is regularly updated online at: https://casebook.icrc.org/. The list of my publications is annexed. Additionally, I have written extensively on the specific legal issues surrounding the conflict with Al Qaeda post-September 11, 2001. I am considered a world-renowned expert on the use, application, and interpretation of international humanitarian law ("IHL").

11. It is my understanding that two of the primary issues being raised before the military commission are whether an armed conflict existed on September 11, 2001, such that the jurisdiction of a military commission is valid; and whether the charge of "terrorism" is triable before a military commission convened under IHL.

12. Pursuant to the following analysis, it is my opinion to a reasonable degree of professional certainty that the United States was not engaged in armed conflict as defined by IHL on September 11, 2001. If there was an armed conflict, the earliest it could have started was on September 11, 2001. In my expert opinion, the armed conflict did not begin until October 7, 2001. It is my further opinion that even if the United States were engaged in an armed conflict on September 11, 2001, "terrorism" does not exist as a crime under IHL, and did not exist as a crime under IHL in 2001. All opinions in this declaration are expressed to a reasonable degree of professional certainty.

Background

13. The September 11, 2001 attacks triggered new debates about the law applicable to transnational armed groups such as Al Qaeda, the organization responsible for those attacks. Shortly after the attacks, Al Qaeda was named the main "enemy" in the "War on Terror" declared by the United States in response. It is certainly my view that international terrorism poses challenges that must be addressed through international law.

14. However, the actions of the United States in classifying terrorism as "war" or "armed conflict," post 9/11, have been highly controversial due to their lack of legal support. This classification has nevertheless formed the basis of the Guantanamo Bay military commissions, which were formed to try individuals pursuant to the "laws of war." There are two interrelated questions that must be examined with reference to the application of IHL to military commission

defendants: whether an armed conflict exists in the first place; and whether the crimes charged at the military commission constitute war crimes.

15. The initial line of argument advanced by the Bush administration to justify indefinite detention without trial of suspected terrorists in Guantanamo and in the so-called "black sites" may be summed up as follows: First, the U.S. is engaged in an armed conflict, the "war on terror." Second, this is a single, worldwide armed conflict against a non-state actor, Al Qaeda and its associates. The U.S. claims that this armed conflict began at some point in time in the 1990s and will continue until victory. Third, as a party to an armed conflict, the U.S. claims all the prerogatives afforded by international humanitarian law, including, in particular, detention of enemy combatants without any judicial decisions. Fourth, however, the Taliban, al Qaeda and associated forces fail to meet the legal criteria required for qualification as prisoners of war – upon capture, their status is that of "unlawful combatants," later "enemy combatants," or, as the Obama administration later called them, "alien unprivileged enemy belligerents." Fifth, as such individuals are said to be engaged in armed conflict against the U.S., the humanitarian law rules protecting civilians cannot apply to them. Sixth, the U.S. maintains that guarantees under human rights law are largely displaced by the laws of war during armed conflicts. In any case, the U.S. holds few international human rights law obligations applicable extraterritorially, although the government did in November 2014 acknowledge the applicability of the Convention Against Torture at Guantanamo Bay. Finally, domestic constitutional guarantees and the corresponding criminal legislation, like international human rights law obligations, were initially claimed not to be applicable to non-citizens extraterritorially, and such application has still not been finally settled. The conclusion of this flawed logic is that "unlawful combatants" may be detained without trial or individual decision until the end of active hostilities in the "war on terror," at least when they are held in Guantanamo, *i.e.,* outside U.S. territory; or if they are granted trials under the purpose-built military commissions, no law applies except for the Military Commissions Act of 2009. This line of argumentation has been met with international (and domestic) criticism and I have personally analysed these arguments extensively in the years since 9/11.[1]

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1 *See in particular* the following articles I authored: "La «guerre contre le terrorisme», le droit international humanitaire et le statut de prisonnier de guerre," Canadian Yearbook of International Law (2001), (Translation: (French) "The War on Terror," International Humanitarian Law and the Convention on Prisoners of War," Canadian Yearbook of International Law (2001)). pp. 211-252; "'Unlawful Combatants': The Law and Whether it Needs to be *Revised*," *Proceedings of the 97th Annual Meeting of the ASIL* 97 (2003), pp. 196-200; "The Status of Persons Held in Guantanamo under International Humanitarian Law," Journal of International Criminal Justice 2 (2004), pp. 96-106; "Use and Abuse of the Laws of War in the 'War on Terrorism,'" Law and Inequality: A Journal of Theory and Practice 22 (2004), pp. 195-221; "Query: Is There a Status of

Existence of an Armed Conflict

16. Relevant factors that determine the existence of an armed conflict include: intensity, number of active participants, number of victims, duration and protracted character of the violence, organization and discipline of the parties, capacity to respect IHL, collective, open and coordinated character of the hostilities, direct involvement of governmental armed forces (vs. law enforcement agencies) and *de facto* authority by the non state actor over potential victims [2] The International Criminal Tribunal for the Former Yugoslavia ("ICTY") puts a particular emphasis on the protracted character of the violence and the extent of organization of the parties.[3]

17. The Bush administration initially argued that by its scale, level of violence, and the degree of organization of the parties, the "war on terror" was one single novel type of international armed conflict that was neither covered by the Geneva Conventions, nor by their Common Article 3 applicable to non-international armed conflicts. This part of the argument was overturned by the U.S. Supreme Court in *Hamdan v Rumsfeld,* which held that any conflict that is not covered by

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'Unlawful Combatant'?" in: JAQUES (ed.), "Issues in International Law and Military Operations," International Law Studies 80 (2006), Naval War College, Newport, Rhode Island, pp. 57-67; "Transnational Armed Groups and International Humanitarian Law," Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, Winter 2006, Nr. 6; "Terrorism and War," Journal of International Criminal Justice 4 (2006), pp. 959-981; "La definition du terrorisme et le droit international humanitaire", Revue quebecoise de droit international (2007) (hors serie), *Etudes en Homage a Katia Boustany,* (Translation: (French) "The Definition of Terrorism and International Humanitarian Law," Quebec International Law Review (2007), Papers in Honor of Katia Boustany) pp. 127-146; "The International Legal Framework for Fighting Terrorists According to the Bush and Obama Administrations: Same or Different, Correct or Incorrect," *Proceedings of the 104th Annual Meeting of the ASIL* 104 (201 1), pp. 277-280; Entry "Guantanamo, Detainees," in: WOLFRUM (ed.), The Max Planck Encyclopedia of Public International Law, Oxford, OUP, 2012, vol. IV, 622-631 (updated in the online version, *available at* http://opil.ouplaw.com/home/EPIL, in 2015); "Legal Framework for Detention by States in Non-International Armed Conflict" Collegium 45 (Autumn 2015), *Proceedings of the Bruges Colloquium, Detention in Armed Conflicts, 16-17 October 2014,* pp. 51-65.

[2] *See* ICTY, *The Prosecutor v. Dusko Tadic aka "Dute,"* Trial Chamber Judgment of 7 May 1997 (Case No. IT-94-1-T), para. 562; ICTY, *The Prosecutor v. Ramush Haradinaj and others,* Trial Chamber Judgment of 3 April 2008 (Case No. IT-04-84-T) (for indicators on intensity see para. 49, for indicators on organisation see para. 60). See also ICRC, *Commentary on the First Geneva Convention* (2nd ed., Cambridge/Geneva, Cambridge University Press/ICRC, 2016), paras. 414-437.

[3] *See ibid.* and ICTY, Decision on Jurisdiction, *Tadic,* Appeals Chamber, 2 October 1995, para. 70; Judgement, *Delalic, Mucic, Delic and Landzo,* Trial Chamber, 16 November 1998;para. 184.

Art. 2 common to Geneva Conventions I-IV must perforce be not of an international character and therefore covered by Art. 3 common to Geneva Conventions I-IV ("Common Article 3"). The acts considered by the Bush administration in assessing the duration and protracted character of the "armed conflict" with Al Qaeda included the 1998 bombings of U.S. embassies by individuals associated with Al Qaeda.

18. Although the Obama administration largely abandoned the phrase "war on terror" and pledged to apply Common Article 3, they continued to apply a wartime paradigm to detention and military commissions at Guantanamo Bay (and indeed to drone operations and other anti-terror strikes outside the scope of this declaration). The amended Military Commissions Act of 2009 "establishes procedures governing the use of military commissions to try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."[4]

19. In my view, neither the Obama nor the Bush administrations have ever provided proper legal reasoning, beyond a semantic notion of "war," to support the position that either terrorist acts committed by Al Qaeda or anti-terror measures against Al Qaeda (other than the armed conflict in Afghanistan that indeed started in October 2001) constitute armed conflict.

20. It is my expert opinion that an international armed conflict ("IAC") existed between the United States and Afghanistan. This IAC was initiated by the United States on October 7, 2001 with air strikes against the Taliban (Operation Enduring Freedom). The majority of the Taliban were disbanded by December 7, 2001, with the fall of Kandahar.[5] The new Afghan Transitional Government was established on June 19, 2002, which marked the end of the IAC between the

[4] 10 U.S.C. §948b(a).
[5] Robin Geiss and Michael Siegrist, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?" International Review of the Red Cross, Volume 93 Number 881 (2011).

United States and Afghanistan.[6] My view is shared by the International Committee for the Red Cross and numerous other international legal experts.[7]

21. Further, it is my expert opinion that other engagements with Al Qaeda (the perpetrators of the 9/11 attacks) outside of U.S. military operations in Afghanistan do not qualify as armed conflict, including the 9/11 attacks and the isolated terror attacks preceding 9/11. The United States never referred to its engagements with Al Qaeda as "war" or "armed conflict" prior to September 11, 2001, and certainly not with regards to acts of terrorism committed by Al Qaeda in the 1990s. While both parties have, since 9/11, referred to their conflict as a "war," the media or descriptive use of that word must not be conflated with the legal terminology. Under international law, the terms "war" and "armed conflict" are used for an important normative purpose - to make certain rules applicable and to provoke certain legal effects.[8]

22. Until the issuance of the Military Commissions Instructions in 2003 by the United States, terrorist acts by private groups have not been viewed as creating armed conflicts.[9] On the contrary, the United Kingdom stated when it ratified Protocol I that "It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted

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[6] *Id. See,* UN Security Council resolution 1419 (2002), of 26 June 2002, welcoming the election of Hamid Karzai. *See also* Report of the Secretary-General, "The situation in Afghanistan and its implications for international peace and security," 11 July 2002, UN Doc. S/2002/737. The International Conference on Afghanistan held in December 2001 led to the 'Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions ("Bonn Agreement")', S/200111 154, of 5 December 2001, establishing an interim authority and calling for the establishment of an emergency Loya Jirga; Lucy Morgan Edwards, "State-building in Afghanistan: a case showing the limits?" International Review of the Red Cross, Vol. 92, No. 880, 2010, pp. 967-991; Norah Niland, "Impunity and insurgency: a deadly combination in Afghanistan" in ibid., pp. 931-950.

[7] Jelena Pejic, "'Unlawful/enemy combatants': interpretation and consequences," in Michael N. Schmitt and Jelena Pejic (eds), International Law and Armed Conflict: Exploring the Faultlines -Essays in Honour of Yoram Dinstein, Martinus Nijhoff Publishers, Leiden, 2007, pp. 335-336; Gabor Rona, "Legal issues in the 'war on terrorism': reflecting on the conversation between Silja N.U. Voneky and John Bellinger," German Law Journal, Vol. 9, No. 5, 2008, pp. 711-736.

[8] *See, e.g.,* Jelena Pejic, "Terrorist Acts and Groups: A Role for International Law?," 75 *British Yearbook of International Law* (2004) pp. 85-88.

[9] Judgement, *Delalic, Mucic, Delic and Landzo,* Trial Chamber, 16 November 1998, para. 184.

or in isolation."[10] The British and Spanish campaigns against the Irish Republican Army and *Euskadi Ta Askatasuna* have not been treated as armed conflicts under IHL.[11] Even though those conflicts existed on the territory of one state, there is no precedent for classification of a situation as an armed conflict simply because it spreads over the territory of several states.

23. In my view, the existence of an armed conflict depends exclusively upon the facts, *i.e.* the quantity and quality of violence. The facts of the Al Qaeda attacks before and after 9/11 do not support a determination of armed conflict. After bombings in 2004 and 2005, the UK and Spanish governments followed the reaction of the U.S. reaction to pre-9/11 terrorist attacks and pursued the perpetrators through criminal investigations. They did not consider themselves involved in an armed conflict and did not, for example, bomb as military objectives the apartments where those responsible were hiding.[12]

24. Finally, it is my expert opinion that members of Al Qaeda do not qualify as members of an "armed group" for the purpose of declaring a non-international armed conflict under IHL. Article 1(1) of Additional Protocol II to the Geneva Conventions sets a relatively high threshold for a group to be an addressee of it. The group must "under responsible command, exercise such control over [a High Contracting Party's] territory as to enable [it] to carry out sustained and concerted military operations and to implement this Protocol." The threshold of application of Article 3 common to the Geneva Conventions is lower, but judicial decisions and scholars insist on a necessary level of organization comprising as indicators

> "the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice

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[10] Reservation by the United Kingdom to Art. 1(4) and Art. 96(3) of Protocol I, *available at* http://www.icrc.org/ihl.nsf.

[11] Hilaire McCoubrey & Nigel D. White, *International Law and Armed Conflict* (Aldershot, Vermont: Dartmouth Publishing, 1992), p. 318.

[12] The responses of France and Belgium to recent ISIS-associated terror attacks on their territory, although involving military forces, were conducted according to a law enforcement paradigm and not according to the laws of war. Those States consider that the laws of war apply only to operations against ISIS in Syria and Iraq, where there is indeed a non-international armed conflict.

and negotiate and conclude agreements such as cease-fire or peace accords."[13]

It is extremely rare for transnational armed groups to fulfil these criteria.[14] In my view, at least outside Afghanistan in 2001, Al.Qaeda does not fulfill those criteria.

25. In my view, the qualification (or lack thereof) of Al Qaeda as a transnational armed group under IHL highlights the difference between IHL applicable to armed conflicts and law enforcement and criminal law directed towards combating crime. The former has to apply to both sides equally and it has to be implemented with and by the parties, while criminal law has to be enforced by the state against the criminals. IHL must take the problems, aims and aspirations of armed groups seriously, while criminal law does not need to do so about criminals. This is an important reason for not classifying in law the "war on terror" as an armed conflict and trans-national terrorist networks as "armed groups."

War Crimes Under International Humanitarian Law (the Law of War)

26. Even if the existence of a non-international armed conflict were to be assumed, "terrorism" is not and has never been considered an autonomous, prosecutable war crime. Under IHL, there is a difference between prohibited acts and acts that are punishable as war crimes. The former are acts that engender state responsibility, whereas war crimes impose liability upon individuals as well.

27. The term "terrorism" appears in prohibitions set out in Article 33 of the Fourth Geneva Convention (concerning, protected civilians, *i.e.* basically civilians who find themselves in the hands of the enemy,[15] in international armed conflicts) and

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[13] ICTY, *The Prosecutor v. Ramush Haradinaj and others,* Trial Chamber Judgment of 3 April 2008 (Case No. IT-04-84-T), para. 60.

[14] In the past, the ICRC pleaded that "the scope of application of the article must be as wide as possible." *See* Jean S. Pictet, International Committee of the Red Cross, *Commentary, JV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958), p. 36. In the meantime, the ICRC has abandoned this position: see ICRC, *Commentary of the First Geneva Convention,* supra note 2, paras 414-437, and has joined the general understanding that even armed conflicts under Art. 3 common need a high level of intensity and of organization of the parties.

[15] Under the text of Convention [No. IV] relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 UST 3516, 75 UNTS 287 –417,, Art. 4, the term "protected persons" covers enemy and certain neutral nationals. The ICTY replaces the nationality standard by an allegiance standard *(See* ICTY, Judgement, *Tadic,* Appeals Chamber, 15 July 1999, paras. 163-69, and our criticism, Marco Sassoli & Laura Olson,

in Article 4(2)(d) of Protocol II (concerning all persons not or no longer taking a direct part in hostilities in non-international armed conflicts). However, that factor is not decisive. The context and field of application of those provisions shows that their purpose was to prohibit collective measures taken by (mainly state) authorities against a civilian population under their control to terrorize them in order to forestall hostile acts.[16] The examples which were before the eyes of the drafters and which they wanted to cover were the measures taken by Nazi Germany in the territories it occupied. Indeed, under Article 33 of Convention IV "[c]ollective penalties and likewise all measures of intimidation or of terrorism are prohibited." Protocol II simply extends this prohibition to non-international armed conflicts.[17] In both provisions, measures or acts of terrorism are mentioned together with collective punishments striking the innocent and guilty alike after a hostile act has been committed. This is not the typical situation of criminal terrorist acts, which are seldom directed at persons who are in the hands of those who commit them and are normally not aimed at preventing those targeted from taking action (although the latter may not be true from the perspective of the terrorists).

28. Most terrorist acts are committed against civilians who are not in the hands of the terrorists or indiscriminately against civilians and combatants. In both international and non-international armed conflicts, "[t]he civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."[18]

"Case Report, Judgment, The Prosecutor v. Dusko Tadic, Case n° IT-94-A, ICTY Appeals Chamber (15 July 1999)," *94 AJIL* (2000) 571, 576-77).

[16] Emanuela-Chiara Gillard, "The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law," in Michael Schmitt, "Deconstructing October 7th: A Case Study in the Lawfullness of Counterterrorist Military Operations," in: Schmitt/Beruto (eds.), *Terrorism and International Law, Challenges and Responses* (San Remo: International Institute of Humanitarian Law and George Marshall European Center for Security Studies, 2002); Jean S. Pictet, International Committee of the Red Cross, *Commentary, IV, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: ICRC, 1958),.225-226.

[17] Yves Sandoz, Christophe Swinarski & Bruno Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, Dordrecht: ICRCi Martinus Nijhoff Publishers, 1987), para. 4538.

[18] *See* Art. 51(2) of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, 1125 UNTS 3 – 434, Art. 13(2) of Protocol [No II] Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609, and a corresponding rule

29. While terrorism as such is not a war crime, certain or even most *acts* of terrorism constitute war crimes. In armed conflicts, any act which could reasonably be labelled as "terrorist" is criminalized by IHL if it is linked with the armed conflict and committed on the territory of one of the states affected by the conflict (or on the High Seas). [19] Therefore, underlying acts of terrorism are considered to be war crimes. Such acts include murder, torture, pillage and plunder, slavery, and attacking civilians and civilian property.

30. The decision of the International Criminal Tribunal for the Former Yugoslavia in *Prosecutor v. Galic* is often cited as an example as a recent conviction for "terrorism." In fact, the ICTY convicted General Galic, the commander of the siege of Sarajevo by Bosnian Serb forces from 1992-1995, for war crimes underlying a terror campaign.[20] In its judgment, the Trial Chamber defined the offence of terrorism by the following specific elements:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
>
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
>
> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population. [21]

Terror was accepted to mean extreme fear, and provoking such fear had to be the specifically intended result.[22] The ICTY correctly held that the violation must involve *acts of violence* – underlying acts - directed at civilians. An attack directed at combatants or military objectives was not considered as prohibited, even if the primary purpose of the attack was to spread terror among the civilian population. [23] Due to this limitation of the "crime of terror" to violence directed at

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of customary IHL (See Rules 1 and 2 of the *ICRC Study on Customary International Humanitarian Law* Henckaerts and Doswald-Beck (eds), *Customary International Humanitarian Law* (2005), Vol. I at 3-11.).

[19] *See generally* Hans-Peter Gasser, "Acts of Terror, "Terrorism" and International Humanitarian Law," 847 *IRRC* (2002) 547-570, at 556; Marco Sassoli, "International Humanitarian Law and Terrorism," in Wilkinson & Steward (eds.), *Contemporary Research on Terrorism* (Aberdeen: Aberdeen University Press, 1987) 466:..474, at 470-472.

[20] Judgment, *Galic,* Trial Chamber, 5 December 2003, paras. 91-137 and 208-597.

[21] *Ibid.* at para. 133.

[22] *Ibid.* at paras. 136-137.

[23] *Ibid.* at para. 135.

civilians, the *Galic* jurisprudence does not go beyond Article 85(3)(a) of Protocol I, which classifies making civilians the object of an attack as a (prosecutable) grave breach.

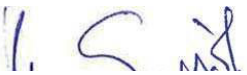
31. I have carefully reviewed the "Crimes and Elements" of offenses deemed to be triable by military commission at Guantanamo Bay. It is my expert opinion that inclusion of terrorism as a war crime triable by military commission was either superfluous – if it only covered other offenses defined – or contradicts established international law because no such distinct war crime exists.

32. I also believe that inclusion of the crime of terrorism is redundant due to the inclusion in the 9/11 case charges of attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war – all of which constitute the acts underlying terrorism that qualify as war crimes. I consider these charges to be triable by military commission in the context of an armed conflict.

33. Even if the autonomous charge of terrorism were to be included, using *Galic* or any international tribunal decisions as a model dictates that the crime include a specific intent requirement. The crime of terrorism as delineated by the military commission manual does not include such a requirement, and is therefore a radical departure from the evolving international practice regarding the prosecution of terrorism. Such a definition of terrorism as a crime unequivocally did not exist on September 11, 2001.

I declare that the foregoing is true under penalty of perjury under the laws of the United States.

Dated this 20th day of February, 2017



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LIST OF PUBLICATIONS

Marco Sassoli

"Les droits populaires en Suisse", in : DELPEREE (ed.), *Referendums,* Bruxelles, 1985, pp. 359-383 (with L.WILDHABER et B. SCHMID).
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second edition

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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).