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 617H (RBS) / AE 620G (RBS)** **Mr. Bin al Shibh's Response to AE 617D and AE 620C Issues of Law** Regarding Proof of the Existence of Hostilities between the United States and Al Qaeda, the Existence and Duration of Hostilities as an Instructional Matter, the Existence of a Non-Justiciable Political Question, and Judicial Notice as a Matter of Legislative Fact 19 April 2019

1. **Timeliness**

This response is timely filed in accordance with AE 617D/620C, entered 4 April 2019.

2. Introductory Note

This Brief responds to the AE 617D / AE 620C Order directing each party (both the Government and the various Accused) to file a brief with the Commission not later than 19 April 2019 on the following specified issues:

> (1) Whether (a) proof of existence of hostilities (as opposed to nexus to hostilities) is a component of the common substantive element established by 10 U.S.C. § 950p(c); and (b) if so, whether this Commission is bound to use the same member instruction used in *United States v. Hamdan* and *United States v. Bahlul*.
>
> (2) 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.

> (3) 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.
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> (4) 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.

AE 617D/AE 620C ORD at 5.

Mr. Bin al Shibh's position is that both proof of existence of hostilities and nexus to hostilities are components of the common substantive element established by 10 U.S.C. § 950p(c); that the Military Judge may not determine the existence and duration of hostilities for purposes of 10 U.S.C. § 950p(c) as an instructional matter; that the existence of hostilities for purposes of 10 U.S.C § 950p(c) in this case is a justiciable question within the Commission's power to decide; and the existence of hostilities for purposes of 10 U.S.C § 950p(c) in this case is not subject to judicial notice as a matter of legislative fact

3. Reservation of Rights

Mr. Ramzi bin al Shibh submits this Brief response to the AE 617D / AE 620C Order directing him to brief the Commission, while simultaneously reserving all of his rights to challenge the personal jurisdiction of this Commission for lack of personal jurisdiction due to an absence of hostilities between the United States and Al-Qā'ida (commonly referred to in these proceedings as "Al Qaeda"). By submitting this Brief and complying with the Commission's Order, Mr. Bin al Shibh does not in any way waive his right to challenge the Commission's jurisdiction. Mr. Bin al Shibh was never joined to Mr. Al-Hawsawi's 502 series Motion to Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities.[1] Mr. Bin al Shibh

[1] Mr. Bin al Shibh declined joinder in the AE 502 series. AE 502H (RBS) (30 Mar 2017). Later, Mr. Bin al Shibh requested permission to cross-examine witnesses on the hostilities issue because the testimony could also be applicable

never had an opportunity to present his own witnesses or evidence to prove that hostilities did not exist and could not have existed on or before 11 September 2001. Further, Mr. Bin al Shibh always understood that any rulings or orders issued in the 502 series could, at the very most, be taken into consideration in rulings subsequent brought by Mr. Bin al Shibh, but such orders and rulings would not be legally binding upon him. This Commission itself made this point clear when permitting the other Accused to abstain from joining in the AE 502 series personal jurisdiction litigation pending receipt of further discovery. The Commission cautioned that future motions on the issue would have to "take into consideration any rulings issued by the Commission,"[2] but the Commission did not state that its rulings with respect to the charges brought specifically against Mr. Al-Hawsawi or its findings with respect to the witnesses and evidence produced by Mr. Al-Hawsawi would be legally binding upon the Accused who had not been joined to the Motion. On the contrary, the Commission was very clear in limiting its ruling as specifically applicable to and legally binding upon only Mr. Al-Hawsawi.

The Commission held, "[w]ith regard to this particular prerequisite for personal jurisdiction, that finding is sufficient to answer the *question currently presented regarding Mr. Hawsawi*." AE 502BBBB (RUL) at 12 (emphasis added). For the Commission to now apply the ruling to Mr. Bin al Shibh, who did not have an opportunity to be heard, to argue his own motion, or present his witnesses or evidence would amount to a violation of both Mr. Bin al

to his future motion on the issue. *See* AE 502II (KSM, RBS) (26 Oct 2017). The Military Commission denied the request, noting that he was not joined on the motion and that "to the extent their testimony may be required for fair consideration of related or similar issues raised in the future by the Movants, such witnesses may be recalled." AE 520PP (RUL) at 3.

[2] AE 502I (RUL), para. 5.a(2).

Shibh's due process rights as well as the spirit and intent of R.M.C. 812 ("Joint and common trials"), which provides that "[i]n joint trials and in common trials, each accused shall be accorded the rights and privileges as if tried separately." The Discussion notes provide the following example to illustrate[3]:

> [W]hen a stipulation is accepted which was made by only one or some of the accused, the stipulation does not apply to those accused who did not join it. In such instances the members must be instructed that *the stipulation or evidence may be considered only with respect to the accused* with respect to whom it is accepted.

In the same vein, R.M.C. 918 states that "[t]he general findings of a military commission state whether the accused is guilty of each offense charged. If two or more accused are tried together, *separate findings as to each shall be made*" (emphasis added). To hold that Mr. Bin al Shibh is bound by a Ruling that was issued in response to evidence and witnesses presented by Mr. Al-Hawsawi for Mr. Al-Hawsawi's defense would defeat not only Mr. Bin al Shibh's due process rights, but also the very purpose of declination of joinder. In many cases, it would result in violations of an accused's right to an adequate defense, which is protected by both customary international law and treaties to which the United States is a state party.[4]

In light of the foregoing, while Mr. Bin al Shibh complies with the Commission's Order by submitting this Brief, he does not waive his rights to subsequently challenge either the personal jurisdiction or the subject-matter jurisdiction of this Commission due to the absence of hostilities between the United States and Al Qaeda at the time of his alleged offenses.

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[3] *Manual for Military Commissions*, 2010 Ed, PART II. Rules For Military Commissions, p. II-83 (emphasis added).
[4] For example, Article 14 of the International Covenant for Civil and Political Rights ("ICCPR") guarantee's the right of an accused to an adequate defense, including his right "to defend himself in person or through legal assistance of his own choosing." In cases of co-joined defendants, binding a defendant to a decision issued to a co-defendant's motion would deprive the accused of his right to legal assistance, unless counsel of his own choosing had an opportunity to argue the motion on his behalf.

4. Answers to the Military Judge's Questions

A. Question (1): Whether (a) proof of existence of hostilities (as opposed to nexus to hostilities) is a component of the common substantive element established by 10 U.S.C. § 950p(c); and (b) if so, whether this Commission is bound to use the same member instruction used in U*nited States v. Hamdan* and *United States v. Bahlul.*

i. Proof of Existence of Hostilities is a Component of the Common Substantive Element Established by 10 U.S.C. § 950p(c)

Both proof of the existence of hostilities as well as proof of nexus to hostilities are components of the common substantive element established by 10 U.S.C. § 950p(c), which states as follows:

> Common circumstances. An offense specified in this subchapter [10 U.S.C.S. §§ 950p et seq.] is triable by military commission under this chapter only if the offense is committed *in the context of and associated with hostilities*.

(emphasis added).

The term "hostilities" is defined as "any conflict subject to the laws of war." 10 U.S.C. § 948a(9). Nowhere in the Military Commissions Act ("M.C.A.") did Congress stipulate that hostilities between the United States and Al Qaeda existed at the time of the alleged offenses of the Accused. Therefore, Congress intended to leave the issue of hostilities to the discretion and determination of the courts on the basis of evidence presented by the Parties. In order to prove that any of the Accused committed an offense punishable by the M.C.A., the Government must therefore prove beyond a reasonable doubt *both* the existence of hostilities as well as nexus of an alleged offense to hostilities. It is not possible to prove nexus to hostilities unless the existence of hostilities is first established. Therefore, the Government must first prove the existence of hostilities beyond a reasonable doubt. Yet it is not enough that the Government prove only the existence of hostilities. The Government's proof of the existence of hostilities absent proof of

nexus between hostilities and an alleged offense results in absurd consequences. As discussed in section 4.C.i.c). "Congress Did Not Include Al Qaeda within the Definition of 'Hostilities' because Doing So would Result in Absurd Consequences," *infra*., it could result in the Commission's personal jurisdiction over a defendant who was a member of Al Qaeda in the 1980s, when the United States trained and equipped him to fight the Soviet occupation of Afghanistan. As discussed further under Question (3), *infra.*, this patently contradicts Congress's intent to try only members of Al Qaeda who directly participate in hostilities *against the United States*, not members of Al Qaeda who, with the direction and support of the United States, participated in hostilities against third-party nations such as the Soviet Union.

Therefore, any logical reading of the plain language of 10 U.S.C. §950p(c) demands that *both* the *existence* of hostilities and *nexus* to hostilities must be proven as components of the common substantive element.

ii. This Commission is Not Bound to Use the Same Member Instruction Used in *United States v. Hamdan* and *United States v. Bahlul*.

The Commission is not bound to use the same member instruction used in *United States v. Hamdan*, 801 F. Supp. 2d 1247 (U.S.C.M.C.R. 2011) and *United States v. Bahlul*, 820 F. Supp. 2d 1141 (U.S.C.M.C.R. 2011); rather, the Commission is bound by the definition of armed conflict established by customary international law. *Hamdan*, in dicta contained in a footnote, provided the following member instruction for the purpose of determining the existence of armed conflict[5]:

[5] *United States v. Hamdan*, 801 F.Supp.2d 1247, 1278 n.54 (U.S.C.M.C.R. 2011), *rev'd with orders to vacate*, 696 F.3d 1238 (D.C. Cir. 2012).

> With respect to each of the ten specifications [of providing material support for terrorism] before you, the government must prove beyond a reasonable doubt that the actions of the accused took place in the context of and that they were associated with armed conflict. 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. Counsel may address this matter during their closing arguments, and may suggest other factors for your consideration. Conduct of the accused that occurs at a distance from the area of conflict can still be in the context of and associated with armed conflict, as long as it was closely and substantially related to the hostilities that comprised the conflict.

There are at least two reasons why this instruction is not binding on the Commission. First, the standard presented in *Hamdan* is found in dicta in a footnote of an overturned U.S.C.M.C.R. opinion. Therefore, it is not binding.[6] Secondly, the standard, which allows members to consider "any other facts or circumstances you consider relevant to determining the existence of armed conflict,"[7] enables the Commission to consider any factors that could potentially be deemed relevant to the existence of armed conflict. It is thus no standard at all. It would permit the

[6] *See Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 737 (2007); *Mullen v. Cameron*, 255F. Supp. 326, 327 & n.1 (D.C. Cir. 1966).
[7] *United States v. Hamdan*, 801 F.Supp.2d 1247, 1278 n.54 (U.S.C.M.C.R. 2011).

introduction of any evidence into the equation, thereby retroactively imposing an ex post facto standard to the detriment of the accused.

Rather, the Commission should use the well-established standard of the International Criminal Tribunal for the Former Yugoslavia, which held in *Prosecutor v. Tadić* as follows[8]:

> The test applied [to confirm] 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 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.

This standard, which is based primarily on two factors—the intensity of the conflict and the organization of the parties to the conflict—has been reiterated in countless learned treatises and international legal decisions. The International Criminal Tribunal for the Former Yugoslavia further fleshed out the meaning of "intensity" for the purpose of determining when internal disturbances rise to the level of armed conflict in *Prosecutor v. Ramush Haradinaj et al.* The ICTY held as follows[9]:

> Trial Chambers have relied on indicative factors relevant for assessing the "intensity" criterion, none of which are, in themselves, essential to establish that the criterion is satisfied. These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict

[8] *Prosecutor v. Dusko Tadić*, IT-94-1-T, I.C.T.Y. Trial Chamber, 7 May 1997 ¶ 562 (emphasis added).
[9] *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Judgement, IT-04-84-T, I.C.T.Y. Trial Chamber, 3 Apr. 2008, ¶49.

In fact, the United States Department of Defense's *Law of War Manual*, in discussing what constitutes non-international armed conflict, cites the *Tadić* standard and other decisions of international criminal courts, including the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, that reiterate the standard based on the intensity of the conflict and the organization of the parties. The *Law of War Manual* states as follows[10]:

> There has been a range of views on what constitutes an "armed conflict not of an international character" for this purpose. The intensity of the conflict and the organization of the parties are criteria that have been assessed to distinguish between non-international armed conflict and "internal disturbances and tensions." A variety of factors have been considered in assessing these criteria and in seeking to distinguish between armed conflict and internal disturbances and tensions.

The *Law of War Manual* cites not only to the 1997 *Tadić* judgment, but also to subsequent international criminal jurisprudence that relied on *Tadić*.[11] The *Tadić* rule forms part of customary international law, which no state can unilaterally change.[12] Rather, states are bound by the rules of customary international law, which by its very definition is undertaken by states because they deem it to be legally binding. In this manner, the Restatement 3d of the Foreign Relations Law of the United States defines customary international law as resulting "from a general and consistent practice of states followed by them from a sense of legal obligation."[13]

[10] United States Department of Defense, Office of the General Counsel, *Law of War Manual* § 3.4.2.2 (2016).
[11] For example, the *Law of War Manual* cites *Prosecutor v. Akayesu*, ICTR Trial Chamber, ICTR-96-4-T, Judgment, ¶625 (Sept. 2, 1998) ("The concept of armed conflict has already been discussed in the previous section pertaining to Common Article 3. It suffices to recall that an armed conflict is distinguished from internal disturbances by the level of intensity of the conflict and the degree of organization of the parties to the conflict.").
[12] *See* American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* § 102(1) (1987) (a rule of international law is "one that has been accepted as such by the international community of states").
[13] *Restatement (Third) of the Foreign Relations Law of the United States* § 102(2).

To allow members to consider any "facts and circumstances you consider relevant to this issue," the Commission opens the door to allow members to consider even a non-state armed group's "declaration of war" against the United States as a factor as to whether hostilities existed. Essentially, this means that a non-state armed group can remove itself from the ambit of a state's criminal law and trigger the application of the laws of armed conflict and the protections that it offers to those who directly participate in hostilities simply by issuing a so-called "declaration of war," thereby reversing a decades-long United States practice whereby captured members of private armed groups have always been treated as "criminals" and tried for domestic crimes, such as terrorism, rather than for war crimes or other violations of the law of war.[14]

On the basis of the foregoing, the Commission is bound to apply the standard for defining the existence of armed conflict established by customary international law, not the incorrect standard used in *United States v. Hamdan* and *United States v. Bahlul*.

B. Question (2): 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.

The Military Judge may not determine the existence and duration of hostilities for purposes of 10 U.S.C. § 950p(c) as an instructional matter. As discussed further under "C. Question (3): 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," *infra*., the questions of both the existence and

[14] *See* AE 488G(MAH)/AE 502E(MAH), at 19-20, for examples and further discussion ("the Government has previously faced private armed groups that issued explicit 'Declarations of War' against itself, such as the Weather Underground, the Symbionese Liberation Army, and the FALN. When it captured their members alive, it invariably sought indictments in civilian courts under civilian statutes, and when possible tried them under those statutes. The groups' communiqués, however warlike in their language, did not change a thing, no more than the groups' self-designation as 'armies' with 'generals,' 'field marshals,' 'campaigns,' 'POWs,' and all the 'pride, pomp, and circumstance of glorious war'").

duration of hostilities require an intensive, fact-based analysis for the fact-finder to determine. As discussed further below, determining whether armed conflict exists requires first determining whether hostilities are of an international or a non-international character, which in turn requires a complex factor-based analysis. If it is determined that an international armed conflict exists, then any "resort to armed force" triggers the application of the law of war.[15] However, if it is determined that conflict of a non-international character exists, a separate test must be applied to determine whether such conflict constitutes isolated and sporadic acts of violence subject to domestic criminal law or full-blown armed conflict subject to the laws of war. Such factors include[16]:

> the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.

Nothing in the black letter of 10 U.S.C. § 950p(c) or in the M.C.A.'s legislative history suggests that; (i) Congress intended to displace the rules under customary international law that determine when conflict subject to the law of war exists; (ii) the existence hostilities could be determined as an instructional matter; or (iii) the Military Judge could select the beginning and end points of such hostilities.

[15] *Prosecutor v. Dusko Tadić*, IT-94-1AR72, I.C.T.Y. Appeals Chamber, Decision, 2 October 1995, ¶ 70.
[16] *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, IT-04-84-T, I.C.T.Y. Trial Chamber, Judgement, 3 Apr. 2008, ¶49.

C. Question (3): 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.

The existence of hostilities in this case is a justiciable question for purposes of 10 U.S.C § 950p(c).[17] Nothing in the text, notes, or annotations of the M.C.A. or in the legislative history suggests that Congress exercised its discretion in deciding that hostilities between the United States and Al Qaeda existed, nor does the M.C.A. commit the issue of hostilities to the Legislative or Executive Branches in a textually demonstrable way.

i. Existence of Hostilities

a) The Only Instance in which the Term "Al Qaeda" Appears in the M.C.A. is in the Definition of "Unprivileged Enemy Belligerents."

In defining "unprivileged enemy belligerents," the M.C.A. states that a member of Al-Qaeda at the time of an alleged offense is deemed to fall within the definition of "unprivileged enemy belligerent." The M.C.A. states:

> Unprivileged enemy belligerent. The term "unprivileged enemy belligerent" means an individual (other than a privileged belligerent) who:
> (A) has engaged in hostilities against the United States or its coalition partners;
>
> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
>
> (C) was a part of al Qaeda at the time of the alleged offense under this chapter.

10 U.S.C. § 948a(7).

[17] Mr. Bin al Shibh reserves his right to argue that the existence of hostilities is a justiciable question for purposes of not only 10 U.S.C.§ 950p(c), but also for all other purposes under the M.C.A, including for purposes of providing personal jurisdiction under 10 U.S.C. § 948c and § 948a(7).

On this basis, whether membership in Al Qaeda at the time of the alleged offense, is, on its own, a sufficient basis to characterize a defendant as an "unprivileged enemy belligerent" is a non-justiciable political question under the M.C.A.[18] This is not an issue to be decided by the judiciary, for there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it." *Baker v. Carr*, 369 U.S. 186 (1962).

However, the 10 U.S.C. § 948a(7) definition of "unprivileged enemy belligerent" is the only instance in which the term "Al Qaeda" (or its alternate English transliterations, including "al Qaida," "Al-Qa'ida," or Al-Qā'ida) appears in the M.C.A.. Nowhere is Al Qaeda mentioned in the §948a(9) definition of "hostilities." Rather, the term "hostilities" is simply defined as "any conflict subject to the laws of war."[19]

b) Congress Could Have Referenced "Al Qaeda" in the Definition of "Hostilities"

If Congress intended to make the question of whether hostilities existed on or before 11 September 2001 a non-justiciable political question, Congress could have easily removed the

[18] Mr. Bin al Shibh reserves his right to argue in a later motion or other submission that Congress did not intend for military commissions to hold subject-matter jurisdiction over accused who were members in Al Qaeda if it could not be shown that their membership in Al Qaeda coincided with a state of hostilities between Al Qaeda and the United States. For example, Congress did not intend for military commissions to hold personal jurisdiction over persons whose membership in Al Qaeda was prior to the commencement of hostilities between the United States and Al Qaeda or subsequent to the conclusion of hostilities with the United States.

Moreover, Mr. Bin al Shibh reserves his right to argue in a later motion or other submission that even if the Commission holds that Congress intended for military commissions to hold personal jurisdiction over all members of Al Qaeda, regardless of whether such membership was prior to or subsequent to the existence of hostilities between the United States and Al Qaeda, that the establishment of such jurisdiction would violate the United States Constitution, the laws of armed conflict, or both. However, given the Commission's instruction to address only the questions posed by Order AE 617D / AE 620C, and given the complexity of arguments addressing the dis-aggregation of personal jurisdiction from the offenses listed in the M.C.A. within the context of hostilities, Mr. Bin al Shibh will present these arguments a future submission rather than in the present Response Regarding Proof of the Existence of Hostilities.

[19] 10 U.S.C. § 948a(9).

question from the decision-making power of the courts by adding to the definition of "hostilities" the clause "or the conflict between the United States and al Qaeda," as follows, "(9) Hostilities. The term "hostilities" means any conflict subject to the laws of war or the conflict between the United States and al Qaeda." Similarly, Congress could have expanded the definition as follows, "(9) Hostilities. The term "hostilities" means any conflict subject to the laws of war. For the avoidance of doubt, the conflict between the United States and al Qaeda is subject to the laws of war." Of course, Congress did not do so. Congress *did* make clear its intent to include membership in Al Qaeda as one of the categories of "unprivileged enemy belligerent' in 10 U.S.C. § 948a, but Congress *did not do so* with respect to the definition of hostilities. By a plain reading of the M.C.A., we can conclude that Congress did not intend to make the issue of hostilities a non-justiciable question.

c) Congress Did Not Include Al Qaeda within the Definition of "Hostilities" because Doing So would Result in Absurd Consequences.

Congress did not include Al Qaeda in the definition of "hostilities" because doing so without any temporal reference as to when such hostilities commenced would result in absurd consequences. Including Al Qaeda in the definition of hostilities in this way would presume that the United States and Al Qaeda have always been in a state of hostilities. Of course, this cannot be true; the United States and Al Qaeda did not always exist, and so they could not have *always* been in a state of hostilities with one another. When the United States and Al Qaeda co-existed, their relationship was not always characterized by a state of hostility.

The relationship of the United States and Al Qaeda over the course of the past 30 years has not always been characterized as "hostile." There have been periods of direct or, at the very

least, indirect, cooperation between the United States and Al Qaeda,[20] particularly in the 1980s, following the founding of Al Qaeda, which many commentators agree occurred in 1988.[21] Relations between the U.S. and Al Qaeda did eventually become adversarial, and by the 2000s could be characterized by outright hostilities arguably subject to the law of war.[22] By interpreting the M.C.A. as establishing hostilities without making any temporal references as to when such hostilities commenced, this Commission would be forced to find itself competent to try any member of Al Qaeda, regardless of whether the underlying offenses and membership in Al Qaeda occurred prior to or subsequent to the commencement of hostilities with the United States. It would thus mean that by proving that a Defendant was a member of Al Qaeda at the time of alleged offenses, the element of hostilities would be met, even if membership in Al Qaeda was during a period in which relations between the United States and Al Qaeda were neutral or otherwise not characterized by hostilities.

For example, including Al Qaeda within the definition of "hostilities" would mean that this Commission would hold jurisdiction in the following scenario. An accused was a member of Al Qaeda during the Soviet-Afghan War in the 1980s. At this time, the CIA funded, equipped, and trained *mujahidīn*, including Al Qaeda members and Afghan Islamist jihadists, in the common goal of expelling the Soviet Union from Afghanistan. The accused received training and funding from the United States throughout the 1980s. He then joined Al Qaeda in 1988, and

[20] *See Salahi v. Obama*, 625 F.3d 745, 748 (D.C. Cir. 2010) ("Although the United States denies having supported al-Qaida directly, it acknowledges that it provided significant economic and military support to the Afghan mujahideen from approximately 1981 to 1991").
[21] *See* Peter Bergen, *The Osama bin Laden I Know* (2d ed.) (Free Press, New York, 2006), at 74-75.
[22] *See, e.g.*, Mohamedou Ould Slahi, *Guantánamo Diary* (Back Bay Books, 2015), where the author, a former detainee at Guantánamo Bay who was released in 2016, describes at length his relationship Al Qaeda at a time when he and fellow *mujāhidīn* were supported and trained by the United States. As late as the 1990s, the United States supported the *mujāhidīn* in Afghanistan who were attempting to topple the communist government of Mohammad Najibullah.

continued to receive support from the United States until 1992, when the former Soviet-backed government in Afghanistan collapsed. While he was a member of Al Qaeda, the Defendant participated in a raid and pillage of a Soviet military installation in Afghanistan in violation of 10 U.S.C. § 950t(5).

If the accused, by virtue of being a member of Al Qaeda without any examination as to when hostilities against the United States commenced, is an "unprivileged enemy belligerent" subject to the personal jurisdiction of this Commission, then the accused will be subject to this Commission's jurisdiction despite the fact that, at the time of committing the offense, the Defendant undertook not a single act within the context of hostilities against the United States. It would mean that the Commission would hold jurisdiction to try a defendant who acted under the overall or effective control of the United States in achieving the United States' interests in expelling the Soviet Union from Afghanistan. Clearly, Congress would not intend to prosecute by military commission such an actor, who had been trained by the United States to participate in hostilities against a common enemy.

d) Legislative Intent

The fact that Congress did not intend to hold personal jurisdiction over members of Al Qaeda absent proving the existence of hostilities against the United States is made clear by the legislative intent of the M.C.A. In its original formulation, the M.C.A. of 2006 stated that its purpose was to "try alien unlawful enemy combatants engaged in hostilities *against the United States* for violations of the law of war and other offenses triable by military commission."[23] In

[23] 10 U.S.C. § 948b (M.C.A. of 2006).

light of this legislative intent, it is not enough for the Government to point to membership in Al Qaeda as the basis for establishing personal jurisdiction. Rather, the Government must prove that the United States and Al Qaeda were in a state of hostilities at the time an accused was a member of Al Qaeda and committed the alleged offenses.

The stated legislative intent makes clear that Congress did not intend to try defendants for war crimes or other offenses that were committed prior to the commencement of hostilities between the United States and Al Qaeda (e.g., during the Soviet-Afghan War). Nor did Congress intend to try members of Al Qaeda following the conclusion of the Soviet-Afghan War, prior to the start of enmity between the United States and Al Qaeda at some indeterminate point in the 1990s. Rather, it was Congress's intent to try defendants who were members of Al Qaeda following the commencement of hostilities between the United States and Al Qaeda. Rather, Congress intended to try such actors *only if their offenses were committed within the context of hostilities against the United States*. However, Congress did not state when such hostilities commenced. Congress therefore intended to leave this question to the courts.

ii. Duration of Hostilities

a) Congress Decided not to Define when Hostilities between the United States and Al Qaeda Commenced because this Would Require a Fact-Intensive Analysis Entrusted to the Courts.

Determining whether a conflict is subject to the laws of war requires an intensively fact-based analysis that first turns on characterizing the conflict as international or non-international and then applying a set of tests to the respective conflict to determine whether it is to be governed by domestic criminal laws or the law of war. In the case of non-international armed

conflict, the factors look closely at the facts of the conflict to determine whether they reach the intensity required to trigger the application of the law of war. In declining to make this determination with respect to the conflict between the United States and Al Qaeda, Congress intended to entrust this question to the courts.[24]

b) Rules for Determining whether a Conflict is Subject to the Laws of War

Because Congress failed to define the conflict between the United States and Al Qaeda as a conflict subject to the laws of war, this Commission must apply customary international law to determine whether an international armed conflict or a non-international armed conflict exists. In international armed conflicts, the employment of any level of force between states triggers the existence of the conflict. However, because the conflict between the United States and Al Qaeda involves hostilities against a non-state armed group rather than against a second state, the conflict between the United States and Al Qaeda is *not* an international armed conflict. Rather, it is a non-international armed conflict. The analysis for non-international armed conflict is far more complex than the rule for international armed conflict, as it requires the application of factor-based tests.

[24] The fact that Congress explicitly included members of Al Qaeda in the 10 U.S.C. § 948a(7) definition of "unprivileged enemy belligerent," but failed to make any reference whatsoever to Al Qaeda in the 10 U.S.C. § 948a(9) definition of "hostilities" or to stipulate when such hostilities commenced makes clear that Congress did not intend to address these questions by statute.

The International Criminal Tribunal for the Former Yugoslavia ("I.C.T.Y.") made the distinction between the tests to be applied in international and non-international armed conflicts clear in *Prosecutor v. Dusko Tadić* (1995).[25] The I.C.T.Y. held[26]:

> [W]e find that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.

As seen from this definition, disparate standards are applied when determining whether an international versus a non-international armed conflict exists. International armed conflict exists whenever there is a *resort to armed force between states* (without distinction as to whether such armed force is protracted or exceeds a particular threshold). Non-international armed conflict exists whenever there is *protracted armed violence* between governmental authorities and *organized armed groups* or *between such groups within a state*. Once it is determined that a conflict is of a non-international character, a separate analysis is required to determine whether the conflict meets the thresholds of "protracted" armed violence as well as an examination of the intensity of the violence and the organization of the parties to the conflict (to distinguish from lesser forms of violence, such as banditry, rioting, or individual terrorist activities, which would be subject to domestic criminal law rather than the laws of war).

[25] To the extent that the Commission's AE 502BBBB Ruling dated 25 April 2018 is inconsistent with Mr. Bin al Shibh's proposed use of customary international law as the test for determining whether hostilities subject to the law of war existed and, if so, when such hostilities commenced, Mr. Bin al Shibh reserves his right to challenge any attempt to apply AE 502BBBB to his case, as he was not joined to the 502 series and did not have an opportunity to present his own evidence or witnesses. Moreover, the Commission went out of its way in holding that its finding with respect to the existence of hostilities did not apply to Mr. Bin al Shibh or other Defendants who were not joined in the Motion. Specifically, the Commission held, "With regard to this particular prerequisite for personal jurisdiction, that finding is sufficient to answer the *question currently presented regarding Mr. Hawsawi*." AE 502BBBB at 12 (emphasis added).

[26] *Prosecutor v. Tadić*, IT-94-1AR72, I.C.T.Y. Appeals Chamber, Decision, 2 October 1995, ¶ 70.

Various academic treatises make clear the distinction between international armed conflict, non-international armed conflict, and acts of banditry or terrorism subject to domestic criminal law. For example, L.C. Green's *The Contemporary Law of Armed Conflict* states as follows[27]:

> [A]cts of violence committed by private individuals or groups which are regarded as acts of terrorism, brigandage, or riots which are of a purely sporadic character are outside the scope of such regulation and remain subject to national law or specific treaties relating to the suppression or punishment of terrorism. Such acts occurring during an international armed conflict may amount to war crimes or grave breaches of the Geneva Conventions or Protocol I and render those responsible liable to trial under the law of armed conflict.

To further support this definition, Additional Protocol II,[28] which applies to non-international armed conflict, states that it does not apply to "riots, isolated and sporadic acts of violence and other acts of similar nature," which are deemed to be "internal disturbances" rather than non-international armed conflicts.[29]

As referenced above, in *Tadić*, the I.C.T.Y. established the following factors for determining whether violence rises to the level of a non-international armed conflict, thus triggering Common Article 3 on the intensity of the violence (duration, types of weapons, civilians affected, number of casualties, etc.)., and organization of the parties to the conflict (to distinguish from lesser forms of violence, such as banditry, rioting, or individual terrorist

[27] L.C. Green, *The contemporary law of armed conflict* (Juris Publishing, Manchester University Press 2008) at 56.
[28] The United States signed Additional Protocol II on 12 December 1977, but it has not yet ratified it. Therefore, while Additional Protocol II is not legally binding upon the United States, the United States recognizes various provisions of Additional Protocol II as restating the position of binding customary international law. Moreover, under Article 18 of the Vienna Convention on the Law of Treaties, in the period between a state's signing a treaty and the ratification of the treaty, the state may not undertake any actions that defeat the object and purpose of the treaty. Because the US has not unsigned Additional Protocol II, it should refrain from taking actions that defeat the object or purpose of the Protocol.
[29] Additional Protocol II, Art. 1.2.

activities). This rule is part of customary international law. Congress was aware that determining whether hostilities existed between the United States and Al Qaeda and, if such hostilities existed, when they commenced, were complex and fact-intensive inquiries that Congress decided not to address by statute. Rather, Congress opted to leave the question to the decision of the courts, which must determine whether an accused was a member of Al Qaeda at a time that hostilities between the United States and Al Qaeda existed.

D. Question (4): 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.

Judicial notice permits facts to be introduced into evidence if the truth of the facts is so well known that it cannot be reasonably doubted. When judicial notice is taken, facts and materials may be admitted without being formally introduced by a witness or other rule of evidence or proof. With respect to adjudicative facts, a judicially noticed fact "must be one not subject to reasonable dispute in that it is either (1) generally known universally, locally, or in the area pertinent to the event or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned."[30] With respect to judicial notice of law, the military judge "may take judicial notice of domestic law. Insofar as a domestic law is a fact that is of consequence to the determination of the action, the procedural requirements of Mil. Comm. R. Evid. 201—except Mil. Comm. R. Evid. 201(g)—apply."[31]

10 U.S.C. § 950P(c) states, "Common circumstances. An offense specified in this subchapter [10 U.S.C.S. §§ 950p et seq.] is triable by military commission under this chapter

[30] M.C.R.E. 201(b).
[31] M.C.R.E. 201A(a).

only if the offense is committed in the context of and associated with hostilities." Nowhere in the text or in the annotations of the M.C.A. did Congress ever state that, for the purposes of the application of the M.C.A., hostilities were presumed to exist between the United States and Al Qaeda or with any other non-state armed group, nor did Congress specify the commencement, duration, or end of such hostilities. Rather, recognizing that the existence of hostilities was a fact-intensive issue that required examining specific facts and circumstances on a case-by-case basis, Congress left the determination of the existence of hostilities to the courts. There is therefore no natural reading of the M.C.A. that supports the proposition that the existence of hostilities for purposes of 10 U.S.C § 950p(c) is to any extent subject to judicial notice as a matter of legislative fact.

5. Attachments:

A. Certificate of Service

Very Respectfully,

//s//
JAMES P. HARRINGTON
Learned Counsel

//s//
WYATT A. FEELER
Defense Counsel

//s//
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//s//
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LT, JAGC, USN

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on 19 April 2019, I electronically filed the foregoing document with the Trial Judiciary and served copies by e-mail on all parties.

//s//
JAMES P. HARRINGTON
Learned Counsel