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

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| **UNITED STATES OF AMERICA**<br><br>**v.**<br><br>**KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI** | **AE 502BBBB**<br><br>**RULING**<br><br>**Defense Motion to Dismiss**<br>for Lack of Personal Jurisdiction<br>due to the Absence of Hostilities<br><br>**25 April 2018** |

1. **Procedural History**.

a. On 7 April 2017, Mr. Hawsawi moved the Commission to dismiss all charges and specifications based on lack of personal jurisdiction.[1] Mr. Ali (a.k.a. al Baluchi) initially moved to unjoin from Mr. Hawsawi's motion,[2] but subsequently indicated that, if the Commission ordered a pretrial personal jurisdiction hearing regarding Mr. Hawsawi, he (Mr. Ali) also wanted to be heard regarding the substantive issues.[3] On 31 May 2017, the Commission ordered an evidentiary hearing as to whether personal jurisdiction existed over Messrs. Hawsawi and Ali (hereinafter, "the affected Accused.")[4]

[1] AE 502 (MAH), Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, para. 2, filed 7 April 2017 (quoting 10 U.S.C. § 948b(a)).
[2] AE502B (KSM, AAA), Mr. al Baluchi and Mr. Mohammad's Joint Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE502 (MAH), filed 14 April 2017.
[3] AE 488F / AE 502D (AAA), Mr. al Baluchi's Reply to AE488E / AE502C (GOV) Government Consolidated Response, filed 24 May 2017, p. 1.
[4] AE 502I, Ruling: Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 31 May 2017, para. 6.a.

b. Evidence and argument pertaining to Mr. Hawsawi were presented during Commission hearings in December 2017.[5] The Commission deferred litigation regarding Mr. Ali pending consideration of his requested witnesses.[6]

c. The Government and affected Accused subsequently filed briefs addressing the appropriate legal standard for determining whether an accused is "part of al Qaeda" for purposes of the Commission's personal jurisdiction.[7] Argument of this issue was completed on 26 February 2018.[8]

2. **Law**.

a. **Burden of Persuasion**. Ordinarily, before the Commission, a movant bears the burden of proving by a preponderance of evidence any fact prerequisite to the relief he seeks. Rule for Military Commissions (R.M.C.) 905(c)(1)-(2). In a motion contesting the Commission's jurisdiction, however, the burden is on the Government to prove by a preponderance any facts required to establish that the Commission does, in fact, have authority to proceed. R.M.C. 905(c)(2)(B).

[5] This process began on 5 December 2017. Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 5 December 2017 from 9:07 A.M. to 2:37 P.M., at p. 17352. It was completed on 8 December 2017. Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 8 December 2017 from 3:10 P.M. to 4:15 P.M., at p. 18281.

[6] AE 502KK, Ruling Regarding the Parties' Proposed Witnesses for the Hearing on Personal Jurisdiction, dated 27 October 2017, para. 2.d.

[7] AE 502JJJ (GOV), Government Motion To Adopt a Legal Standard to Determine What Constitutes "Part of Al Qaeda" For Purposes of Establishing Jurisdiction, filed 12 December 2017; AE 502KKK (MAH) (Corrected Copy) Defense Response to AE 502JJJ(GOV), filed 14 December 2017; AE502OOO (AAA), Mr. al Baluchi's Response to Government Motion to Adopt a Legal Standard to Determine What Constitutes "Part of Al Qaeda" for Purposes of Establishing Personal Jurisdiction, filed 5 January 2018. A further Government pleading on this specific question was filed, but withdrawn upon motion of Mr. Hawsawi's counsel (with which the Government concurred). AE 502VVV, Ruling: Government Motion to Withdraw AE 502SSS (GOV), Government Reply To Defense Response to AE 502JJJ (GOV) To Adopt a Legal Standard to Determine What Constitutes "Part of Al Qaeda" For Purposes of Establishing Jurisdiction, dated 3 February 2018.

[8] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 26 February 2018 from 10:46 A.M. to 11:53 A.M., at pp. 18864-18896.

b. **Personal Jurisdiction of Military Commissions**.

(1) The personal jurisdiction of military commissions is set forth in Section 948d of the Military Commissions Act of 2009 (M.C.A. 2009), which in pertinent part states simply that "military commission[s] . . . shall have jurisdiction . . . to try persons subject to [the Act]." 10 U.S.C. § 948d. The M.C.A 2009 defines such persons as "[a]ny alien unprivileged enemy belligerent" (a status commonly referred to as "AUEB.") 10 U.S.C. § 948c.

(2) This status is clarified in the M.C.A. 2009's definitions section:

> (1) ALIEN.—The term "alien" means an individual who is not a citizen of the United States.[9]
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> . . .
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> (7) UNPRIVILEGED ENEMY BELLIGERENT.—The term "unprivileged enemy belligerent" means an individual (other than a privileged belligerent)[10] who—
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> (A) has engaged in hostilities against the United States or its coalition partners;
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> (B) has purposefully and materially supported hostilities against the United States or its coalition partners; or
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> (C) was a part of al Qaeda at the time of the alleged offense under this chapter.
>
> . . .
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> (9) HOSTILITIES.—The term "hostilities" means any conflict subject to the laws of war.

[9] As noted in the Rules for Military Commissions, "[a] person may become a citizen of the United States only by birth within the territory of the United States, by birth to parents who are United States citizens, or by naturalization." R.M.C. 103(a)(6) (citing 8 U.S.C. §§ 1401, 1427).

[10] "Privileged belligerents" are defined by the statute as "individual[s] belonging to one of the eight categories enumerated in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War." 10 U.S.C. § 948a(6). The referenced treaty article identifies certain categories of belligerent—*e.g.*, members of the regular armed forces of a party to a conflict—who benefit from certain protections under the Convention. Article 4, Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. 3364, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950, *for the United States* Feb. 2, 1956. Irregular forces, in order to qualify for such designation, must meet certain specified requirements, namely: (a) being subject to a responsible commander; (b) having a fixed distinctive sign recognizable at a distance; (c) carrying arms openly; and (d) conducting operations in accordance with the laws and customs of war. *Id*. at para. A.2.

10 U.S.C. § 948a(1), (7), (9). Accordingly, in order for a person to be subject to military commission jurisdiction, he must be (a) a non-U.S. citizen who (b) is *not* a privileged belligerent, and (c) falls in one or more of the categories enumerated in 10 U.S.C. § 948a(7)(A) – (C).

3. **Analysis**. Mr. Hawsawi has stipulated that he is an alien, and has not claimed he is a privileged belligerent. Thus, the only disputed issue before the Commission regarding Mr. Hawsawi is whether, at the time of the charged offenses, he fell into one or more of the categories enumerated in 10 U.S.C. § 948a(7)(A) – (C).

4. **Existence of Hostilities**.

a. **The Meaning of "Laws of War" as Used in the Military Commissions Act**.

(1) Mr. Hawsawi argues he does not fall into any of the three 10 U.S.C. § 948a(7) categories because hostilities did not exist at the time of the charged offenses. The term "hostilities" is defined by the M.C.A. 2009 to mean "any conflict subject to the laws of war." 10 U.S.C. § 948a(9).

(2) Whether Mr. Hawsawi's argument is correct largely depends on the meaning of the term "laws of war" as used by Congress in the cited M.C.A. 2009 provision. Mr. Hawsawi avers that (a) the plain meaning of the term "laws of war" requires application of the customary international law standard recited in *Prosecutor v. Tadic*, a 1997 decision of the International Tribunal for the Former Yugoslavia, and related decisions of that body; and (b) neither the events of September 11, 2001 nor any related events preceding them meet the threshold for hostilities pronounced in those authorities.[11] The Government, on the other hand, argues the correct

[11] AE 488G (MAH) /AE 502E (MAH), Defense Reply to Government Consolidated Response to Defense Motions To Dismiss for Lack of Personal Jurisdiction Due to the Absence of Hostilities and to Mr. Ali's Notice of Declination of Joinder and Motion to Consider Other Arguments or for Other Relief Regarding AE 488 (MAH), pp. 17-21 (relying primarily on *Prosecutor v. Tadic*, Case No. IT-94-1-T-7, Judgment ¶ 562 (Int'l Crim. Trib. for the Former Yugoslavia 1997)(hereinafter, *Tadic*). Per Counsel for Mr. Hawsawi, "[t]he [*Tadic*] test for distinguishing non-international armed conflict (to which the international laws of war apply) from terrorism (to which they do not)

standard is found in a panel instruction cited by the Court of Military Commission Review in its 2011 *U.S. v. Hamdan* opinion.[12]

(3) The question presented here is not *whether* the United States is or was engaged in hostilities with al Qaeda, but *when* such hostilities began. Existence of the armed conflict between the United States and al Qaeda has been repeatedly recognized by both the Legislative[13] and Executive Branches.[14] Appellate courts superior to this Commission have also acknowledged the existence of this conflict.[15]

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relies on the organization of the parties and the intensity of the conflict," as determined in light of certain "specific factors." *Id*. at 19.

[12] *United States v. Hamdan*, 801 F.Supp.2d 1247, 1278 n.54 (C.M.C.R. 2011), *rev'd with orders to vacate*, 696 F.3d 1238 (D.C. Cir. 2012). The Government argues that this case remains binding law for the issue in question because it was reversed on other grounds. AE 502C (GOV), Government Consolidated Response To Defense Motions To Dismiss For Lack of Personal Jurisdiction Due to the Absence of Hostilities and to Mr. Ali's Notice of Declination of Joinder and Motion to Consider Other Arguments or For Other Relief Regarding AE 488 (MAH), filed 28 April 2017, pp. 16-17.

[13] Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, §2(a), 115 Stat. 224 (2001)(authorizing the President to use military force against "those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001"—now generally recognized to include al Qaeda); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1021, 125 Stat. 1298 (2011) (affirming President's 2001 AUMF law of war authority to detain any person "who planned, authorized, committed or aided the terrorist attacks [of] September 11, 2001" and/or "who was part of or substantially supported al Qaeda," and to, among other avenues of disposition, try them by military commissions); 10 U.S.C. §948a (7)(C) (omitting any requirement to prove hostilities as a prerequisite for military commission personal jurisdiction over al Qaeda affiliates, while requiring such proof under the two other available bases, which do not reference al Qaeda).

[14] *See, e.g.*, Executive Order 13,400, 72 Fed. Reg. 40,707 (July 20, 2007)("The United States is engaged in an armed conflict with al Qaeda." *Id*. at §1(a)); Exec. Order No. 13, 823, 83 Fed. Reg. 37, 635 (January 30, 2018)("Today, the United States remains engaged in an armed conflict with al-Qa'ida." *Id*. at §1(b)).

[15] *See, e.g.*, *Hamdan v. Rumsfeld*, 548 U.S. 557, 629-632 (2006)(in considering the validity of military commissions system established by the President, recognizing existence of armed conflict between the U.S. and al Qaeda to which Common Article 3 of the Geneva Conventions applies); Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 8 December 2017 from 1:18 P.M. to 2:25 P.M., at p. 18210-11 (Defense expert on law of war, when asked if the Supreme Court in *Hamdan* "clearly believed that there was an armed conflict between al Qaeda and the United States," responded, "They concluded that there was, yes." *Id*.); *Obaydullah v. Obama*, 402 U.S. App. D.C. 149 (2012) (upholding denial of writ of habeas corpus based solely on petitioner's al Qaeda affiliation, and expressly noting, "As this court has now repeatedly held, the AUMF gives the United States . . . authority to detain a person who is found to have been part of al Qaeda *or* Taliban forces." *Id*. at 156, 162 (internal quotation marks omitted; emphasis added)); *see also Al Alwi v. Obama*, 653 F.3d 11, 16 (D.C. Cir. 2011)(listing habeas cases in which the D.C. Circuit has held AUMF to authorize detention of persons who are part of either al Qaeda or Taliban forces); *see also Prosecutor v. Boskoski & Tarculovski*, Case No. IT-04-82-T, Trial Chamber Judgment (Int'l Crim. Trib. for the Former Yugoslavia July 10, 2008) (hereinafter, *Boskoski*) (foreign tribunal recognizing that "[t]he Supreme Court of the United States held in 2006 that the United States was in a state of armed conflict with the non-State group known as Al Qaeda," and factoring that holding into its state practices analysis regarding hostilities. *Id*. at ¶ 182 (citing *Hamdan*)).

(4) In assessing the meaning of the term "laws of war" as incorporated by Congress in the M.C.A. 2009, the Commission notes that the term is itself, to an extent, ambiguous. Superior courts reviewing military commissions cases have, for example, debated at length in similar contexts whether the term means the law of war as understood only in international law, or as informed by the historical practices and interpretations of the United States (referred in those discussions as the "domestic law of war.")[16] Accordingly, the meaning of the phrase "laws of war" is not incontestably plain, as asserted by Mr. Hawsawi. The Commission, therefore, determines it appropriate to examine relevant contextual information to help determine what Congress meant when it defined military commission jurisdiction in terms of "the laws of war," and the implications of that intended meaning for determining when hostilities with al Qaeda began.

(5) To begin with, the Commission finds the plain language of the M.C.A. 2009 contemplates prosecution for offenses occurring "on, before or after September 11, 2001."[17] The fact that Congress expressly so stated runs directly contrary to any assertion that its intended formulation of the term "laws of war" in the same statute would foreclose military commission jurisdiction on or before September 11, 2001. Clear legislative history indicates such an application of the term "laws of war" would defeat the primary purpose for which Congress enacted the statute in the first place, which was "to authorize trial by military commission of the 9/11 conspirators."[18]

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[16] *See Bahlul v. U.S.*, 767 F.3d 1, 22-24 (D.C. Cir. 2014)(*en banc*)(discussing Court's wrestling with ambiguity of phrase "law of war" as used in 10 U.S.C. § 821, another statute concerning scope of military commission jurisdiction); *see also Janko v. Gates*, 741 F.3d 136, 140-141 (D.C. Cir. 2014)(looking to contextual information to interpret the seemingly-plain statutory term, "the United States," noting "[b]ecause many words are susceptible of multiple meanings, plain meaning is frequently not so plain." *Id*. at 140.)

[17] 10 U.S.C. § 948d.

[18] *See Bahlul*, 767 F.3d at 14, n8 ("Supporters and opponents of the [MCA 2006] alike agreed that [its] purpose was to authorize the trial by military commission of the 9/11 conspirators." *Id*.), and authorities cited therein. In the same decision, the D.C. Circuit declined to construe the MCA 2006 as permitting prospective prosecution only, noting

(6) In short, the Commission concludes that, whatever Congress may have had in mind in when they employed the term "laws of war" in the M.C.A. 2009 jurisdictional provisions, they manifestly did not intend a formulation which would foreclose military commission jurisdiction for offenses occurring on, and at least some time before, September 11, 2001. To the extent this indicates a Congressional conception of "hostilities" to some degree inconsistent with *Tadic* or other customary international law standards prevailing before that time, the M.C.A. 2009—a federal statute occurring later in time—controls.[19]

b. **Congressional Authority to Scope Military Commission Jurisdiction**.

(1) Having determined that (a) Congress intended in the M.C.A. 2009 a formulation of the term "laws of war" recognizing that the armed conflict between the United States and al Qaeda existed on (and for some time before) September 11, 2001, and (b) preexisting international law (to the extent it may be contrary) cannot bar Congress from doing so, the Commission must then determine whether Congress possessed the power to formulate military commission jurisdiction in this way.

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that, "If it were otherwise, [10 U.S.C. § 948d's] conferral of jurisdiction to prosecute . . . enumerated crimes occurring on or before September 11, 2001 would be inoperative." *Id*. at 12, citing *Corely v. United States*, 556 U.S. 303, 314 (2009)("A statute should be so construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Id*.). In its arguments, the Defense relies heavily on *Lee v. Madigan*, 358 U.S. 228 (1959), in which the Supreme Court declined to interpret a statute to extend capital military jurisdiction over a former service member in the absence of clear Congressional intent to do so. Here, such intent is clear, and the Commission distinguishes *Lee* on that basis.

[19] *See U.S. v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991) ("Our duty is to enforce the Constitution, laws, and treaties of the United States, not to conform the law of the land to norms of customary international law." *Id*. at 1091); *see also Bihani v. Obama*, 619 F.3d 1 (D.C. Cir. 2010) (in denial of petition for *en banc* rehearing, three circuit judges in separate opinions discussing significant limitations on domestic application of customary international law (*id*. at 1-9 (Brown, J., concurring in denial), 9-53 (Kavanaugh, J., concurring in denial), 53-56 (statement of Williams, J.)); *see also* Restatement (Third) of Foreign Relations Law § 115(1)(a) (1987). In the face of this clear and specific Congressional intent, the Commission finds the general interpretive principle of *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804), does not control.

(2) It is axiomatic that a law of war military commission lacks the authority to try offenses that are unconnected to a war.[20] However, the law of war is not static, and its precise contours may shift to recognize the changing realities of warfare.[21] Military commissions by their nature are intended to have sufficient flexibility to address the needs presented by the armed conflict they address.

> Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our commonlaw war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. *It has been adapted in each instance to the need that called it forth.*[22]

The overall armed conflict against al Qaeda—a transnational terrorist organization operating primarily outside the United States—might itself be viewed as an anomaly under pre-September 11, 2001 law of war standards, which generally held armed conflicts cognizable under international law only if they were "international armed conflicts" or "internal armed

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[20] *See*, *e.g.*, *In re Yamashita*, 327 U.S. 1 (1950) ("The trial and punishment of enemy combatants who have committed violations of the law of war . . . is without qualification . . . so long as a state of war exists." *Id*. at 11-12).

[21] For example, the Nuremberg Tribunals themselves departed in some respects from traditional understandings of international law at the time in response to unique aspects of the conflict they addressed—which was fully understood by those effectuating the tribunals.

> International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs. But every custom has its origin in some single act, and every agreement has to be initiated by the action of some state. Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to meet situations. Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct.

Report of Robert H. Jackson to the President on Atrocities and War Crimes, United States Department of State Bulletin, Washington, DC, Government Printing Office, 1945 (June 7, 1945).

[22] *Madsen v. Kinsella*, 343 U.S. 341, 347-348 (1952)(emphasis added).

conflicts."[23] Nevertheless, such an armed conflict—repeatedly recognized by the Legislative,[24] Executive,[25] and Judicial Branches[26] of the United States—has arisen. These determinations are questions within the purview of the political branches.[27] The decisions made by the Legislative and Executive branches regarding whether and when an armed conflict exist receive are owed great deference by the Commission.[28] Even assuming (without so deciding) that their determination in some measure departs from traditional international law standards, the commission finds that departure is not so stark as to constitutionally warrant overriding the combined action of the political branches in this regard.[29]

[23] *Tadic* itself recognized this dichotomy in the law of war as it stood at that time. *Tadic*, ¶ 561 ("an armed conflict exists whenever there is a resort to armed force *between States* or protracted armed violence between government authorities and organized armed groups . . . *within a State*." *Id*. (emphasis added)). *See also* Sasha Radin, *Global Armed Conflict? The Threshold of Extraterritorial Non-International Armed Conflicts*, 89 Int'l. L. Stud. 696, 697-98, 714-15 (2013)( noting that "[t]he law of armed conflict is structured around State-centric concepts of sovereignty and territory, and is designed for either inter-State conflicts or for purely internal armed conflicts," and that, as a consequence, "[n]on-international armed conflicts . . . or conflicts where armed groups either fight a State or each other, have traditionally been geographically limited to the confines of a State." *Id*. at 697-98), and authorities cited therein. The armed conflict between the United States and al Qaeda, recognized by all three branches of Government, arguably fits neatly into neither category.

[24] *See* fn 13, *supra*.

[25] *See* fn 14, *supra*.

[26] *See* fn 15, *supra*.

[27] *See Al Magaleh v. Hagel*, 738 F.3d 312, 331 (D.C. Cir. 2013) ("Whether an armed conflict has ended is a question left exclusively to the political branches.")

[28] Deference regarding this specific question is appropriate due to its implication of both (1) national security issues, *see Dep't of Navy v. Egan*, 484 U.S. 518 (1988); and (2) significant political questions, *see, e.g.*, *Baker v. Carr*, 369 U.S. 186 (1962); *Ludecke v. Watkins*, 335 U.S. 160, 168-169 (1948)(noting with regard to a "state of war" that "[w]hatever its modes, its termination"—and, by implication, its beginning—"is a political act." *Id.*) Overlaying all these considerations is the extraordinary deference this Commission owes the clear, concerted action of the two political branches. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)("When the President acts pursuant to . . . authorization of Congress, his authority is at its maximum . . .. If his act is held unconstitutional under these circumstances, it usually means that the Federal Government as an undivided whole lacks power. *Id*. at 635-37 (Jackson, J., concurring)).

[29] The Commission notes there is some authority indicating relevant international law standards are not so rigid as to necessarily preclude a determination that violence of the type at issue—even that occurring pre-2001—can amount to an internal armed conflict. *See, e.g.*, *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. (1997) (finding a single, relatively brief, but well-organized and violent attack by a non-state actor militia to qualify as an internal armed conflict triggering the law of war); *Boskoski* at 77-136 (citing to, *inter alia*, the *Hamdan* decision and a similar Israeli Supreme Court decision in its application of *Tadic* to conduct occurring from January to September 2001).

(3) Such deference is particularly appropriate given the unique circumstances here, specifically, that: (a) the Accused, a non-U.S. citizen,[30] is charged based on his alleged involvement in a violent, large-scale attack against the United States on September 11, 2001;[31] (b) a bare four days after that attack, Congress unequivocally responded by underwriting the President's employment of the War Power "against those nations, *organizations, or persons* he determines *planned, authorized*, committed, or *aided* the terrorist attacks that occurred on September 11, 2001, *or harbored such organizations or persons*;"[32] (c) superior judicial authorities have subsequently recognized a state of hostilities between the United States and al Qaeda has in fact arisen;[33] (d) in response to express suggestions by the Supreme Court,

[30] At bottom, Mr. Hawsawi's claim is that he is being denied certain Constitutional protections that inhere in an Article III, as opposed to Article I, proceeding. *See* AE 502E, pp. 7-8. However, the M.C.A. 2009 is by its terms limited to non-U.S. citizens, and there is no dispute for these purposes as to Mr. Hawsawi's alienage. The Supreme Court cases disfavoring military jurisdiction over non-military personnel each dealt with trial of American citizens. *See, e.g.*, *Ex Parte Milligan*, 71 U.S. 2 (1866)(invalidating military commission jurisdiction over a U.S. citizen located in the United States); *U.S. ex rel Toth v. Quarles*, 350 U.S. 11 (1955)(finding court-martial of former service member unconstitutional); *Reid v. Covert*, 354 U.S. 1 (1957)(finding exercise of court-martial jurisdiction over U.S. citizen military dependents overseas unconstitutional). To date, the Supreme Court has determined that the Suspension Clause—and, thus far, that provision only—extends to the Guantanamo detainees. *Boumediene v. Bush*, 553 U.S. 723, 771 (2008). No court has further extended the narrow holding of *Boumediene* in this regard. *See, e.g.*, *Kiyemba v. Obama*, 555 F.3d 1022, 1026, fn 9 (D.C. Cir. 2009) (in a habeas case, finding that the Due Process Clause of the Fifth Amendment does not apply to aliens at Guantanamo), *vacated*, 559 U.S. 131 (2010) (per curiam), *reinstated on remand*, 605 F.3d 1046 (D.C. Cir. 2010) (per curiam), *cert. denied*, 563 U.S. 954 (2011); *Bahlul*, 840 F.3d at 796 (Millett, J. concurring)(discussing overall lack of precedent supporting further extension of constitutional rights to aliens located outside the United States). In the Commission's view, these considerations significantly inform the degree to which Mr. Hawsawi should benefit from rigid application of the separation of powers principles he asserts, particularly with regard to a system of military commissions that all three branches of government have, through a persistent and protracted dialogue, crafted to try these cases. *See Bahlul*, 767 F.3d at 12-15 (discussing the multi-year back-and-forth between all three branches of Government through which the present system of military commissions was developed); *see also U.S. v. Ali*, 71 M.J. 256 (C.A.A.F. 2012), *reconsid. denied*, 71 M.J. 389, *cert. denied*, 569 U.S. 972 (recognizing sufficiency of statutorily authorized court-martial proceedings to uphold any rights applicable to a non-U.S. citizen contractor tried overseas).

[31] *See, e.g.*, Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 5 December 2017 from 10:16 A.M. to 11:45 A.M., at pp. 17388-17420 (testimony of FBI Special Agent who was member of the FBI team investigating the attacks of September 11, 2001, describing the attacks and noting that over 2, 900 people were killed).

[32] 2001 AUMF (emphasis added). The four days referenced above is calculated based on the date Congress presented the AUMF to the President for signature—15 September 2001. Library of Congress Web Page Concerning S.J. Res. 23, Authorization for Use of Military Force, https://www.congress.gov/bill/107th-congress/senate-joint-resolution/23/all-actions (last retrieved 2 March 2018). The AUMF was signed by the President and entered into force three days later—a single week after the September 11 attacks. *Id*.

[33] *See* fn 15, *supra*.

Congress statutorily affirmed the President's determination to try offenses associated with that conflict by military commission;[34] (e) Congress clearly intended those commissions to try offenses occurring "on, before or after September 11, 2001" generally, and the case of this Accused specifically;[35] and (f) superior judicial authorities have recognized that the question of whether the armed conflict between the United Stated and al Qaeda arose on or before September 11, 2001 is, at least, an "open question."[36]

(4) Under these unique and specific circumstances, the Commission (a) has little difficulty finding it appropriate to defer to the effective determinations of the political branches that hostilities existed as of September 11, 2001, and for at least some period before; (b) finds that, as applied to this case and its facts, the system of military commissions thus established does not so clearly offend separation of powers principles that the relief Mr. Hawsawi seeks here is warranted;[37] and (c) finds it unnecessary to decide a date certain for the commencement of hostilities. "[The Commission has] no occasion now to define with meticulous care the ultimate

[34] *See Hamdan*, 548 U.S. at 636 (Breyer, J., concurring)("Congress has denied the President the legislative authority to create military commissions of the kind at issue here. Nothing prevents the President from returning to Congress to seek the authority he believes necessary." *Id*.); fn 17-18, *supra*, and accompanying text.
[35] *See* fn 17-18, *supra*, and accompanying text.
[36] *In Re al-Nashiri*, 835 F.3d 110, 137 (2016)(finding in context of mandamus petition that, even as early as 1996, it was not "clear and indisputable" that hostilities with al Qaeda had not commenced).
[37] Mr. Hawsawi also argued the Commission should opt for his interpretation of 10 U.S.C. § 948a(9) on constitutional avoidance grounds—specifically, to avoid risk of running afoul of the constitutional prohibitions against Ex Post Facto laws and bills of attainder. U.S. Const., art. I, sec. 9, cl. 3; AE 502E, pp. 2, 17; Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 8 December 2017 from 3:10 P.M. to 4:15 P.M., at pp. 18281, 18265. The Commission assesses these risks to be minimal, however. The Ex Post Facto prohibition is not offended by what amounts to a change in forum. *Bahlul*, 767 F.3d at 19 (citing *Collins v. Youngblood*, 497 U.S. 37, 51 (1990). With regard to the prohibition against bills of attainder, the fact of these judicial proceedings demonstrates that the M.C.A. 2009 is not such a law. A bill of attainder "appl[ies] either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them *without a judicial trial*." *U.S. v. Lovett*, 328 U.S. 303, 315 (1946) (emphasis added); *see also Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 323 (1866) ("A bill of attainder is a legislative act which inflicts punishment *without a judicial trial*." *Id*. (emphasis added).) As Defense Counsel have declined to brief these specific issues in more detail, the Commission similarly declines to further address them here. *See Abdullah v. Obama*, 753 F.3d 193, 200 (D.C. Cir. 2014)(quoting *N.Y. Rehab. Care Mgmt., LLC v. NLRB*, 506 F.3d 1070, 1076 (D.C. Cir. 2007) ("It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work." *Id*.)

boundaries of [its] jurisdiction . . .. It is enough that [the] petitioner[] here, upon the conceded [and, in this case, demonstrated] facts, [is] plainly within those boundaries."[38]

c. **Finding Regarding Hostilities**. Based on the foregoing, the Commission finds, for purposes of its personal jurisdiction over Mr. Hawsawi, hostilities—specifically, armed conflict between the United States and al Qaeda—existed as of September 11, 2001, and for an indeterminate period before that date. With regard to this particular prerequisite for personal jurisdiction, that finding is sufficient to answer the question currently presented regarding Mr. Hawsawi.

5. **Remaining Personal Jurisdiction Requirements**. In light of the above, to determine whether Mr. Hawsawi is subject to the personal jurisdiction of the Commission, only the following question remains: whether he otherwise meets the requirements of at least one of the three bases established in 10 U.S.C. §948a(7). The Government did not assert direct participation in hostilities as a basis for personal jurisdiction over Mr. Hawsawi.[39] Accordingly, the Commission will assess whether he (a) materially supported the hostilities identified above; and/or (b) was a part of al Qaeda at the time of the alleged offenses.

a. **Findings**.

(1) **Affiliation with Al Qaeda**. Based on the evidence presented, the Commission makes the following findings: (a) even before the September 11 attacks, Mr. Hawsawi had long-standing connections to al Qaeda—having traveled from Dubai to Afghanistan in January 2000 to attend a month-long al Qaeda-funded training camp, and having become a member of al Qaeda's media support service in May of 2000; (b) by September 2001, Mr. Hawsawi routinely

[38] *Quirin*, 317 U.S. at 45-56.
[39] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 8 December 2017 from 3:10 P.M. to 4:15 P.M., at pp. 18239, 18247.

exercised discretionary authority over the management and disbursement of significant al Qaeda organizational funds and resources; (c) he was trusted to do so in direct support of highly important and sensitive al Qaeda attack operations; (d) he did so in direct coordination with al Qaeda field operatives and at the command of highly-placed al Qaeda officials; (e) even after September 11, 2001, despite being a fugitive, he traveled to Afghanistan to meet with al Qaeda leadership (including a personal meeting with Osama bin Laden); and (f) he thereafter returned to working on al Qaeda's media support committee for a time.

(2) **Support to Hostilities**. Based on the evidence presented, the Commission further finds: (a) Mr. Hawsawi knowingly and willfully provided direct and substantial financial and logistical support to several of the al Qaeda hijackers who carried out the September 11, 2001 attacks; (b) he knew the activities he was supporting were intended to facilitate and/or effect hostile acts within the United States, to include potential violent attacks; and (c) the attacks of September 11, 2001 did in fact proximately result from the activities he supported.

b. **Conclusion Regarding Material Support to Hostilities**. Based on the findings above, the Commission concludes it is clear Mr. Hawsawi has, at least, purposefully and materially supported[40] al Qaeda in the above-referenced hostilities against the United States.

c. **"Part of al Qaeda" Jurisdictional Basis – Functional Analysis Required**. With regard to the "part of al Qaeda" jurisdictional analysis, the Commission finds that a functional analysis of Mr. Hawsawi's activities is the only practicable approach. Mr. Hawsawi's Counsel essentially argue that whether a person was "part of al Qaeda" must be determined based on a number of ill-defined formalistic indicia of membership—such as, *e.g.*, the swearing of oaths and other internal practices of al Qaeda, the subjective and speculative perceptions of its leaders and

[40] *See*, *e.g.*, 18 U.S.C. § 2339A(b)(1)(analogous Federal criminal statute prohibiting "material support" to terrorist activities, and defining such support to include "financial services, lodging [and] safehouses.")

members, and *post-hoc* assertions of accused themselves. The Commission declines to find that the scope of 10 U.S.C. § 948a(7)(C) was intended to be so narrow. Given the illegal and secretive nature of al Qaeda and similar groups, relying on such indicia alone would make little sense.[41] The Commission will appropriately consider evidence of such formalistic factors in its analysis, but finds that they cannot practicably be the *sine qua non* of what it means to be "part of" al Qaeda for purposes of the statute.

d. **"Part of al Qaeda" Jurisdictional Basis – CCF Not Required**.

(1) The Commission finds similarly unpersuasive arguments that only a "Continuous Combat Function" (CCF)—essentially, the equivalent of an actual combat soldier or leader—will suffice; a military or paramilitary organization can clearly include members whose ordinary function does not include direct attack, but who substantially and proximately support combat activities. Mr. Ali has asserted the CCF standard to be controlling.[42] This standard, defined in an International Committee of the Red Cross (ICRC) study, essentially states that, in a non-international armed conflict, a member of an organized armed group (OAG) is targetable based on that status if he or she assumes a CCF, described as "a continuous function for the group involving his or her direct participation in combat" or a continuous function "involv[ing] the preparation, execution, or command of acts and operations amounting to direct

[41] *See* Dep't of Defense, *Law of War Manual* § 4.18.4.1 (2015 ed., incl. 2016 update)(hereinafter, DoD LOW Manual)(discussing inherent challenges of establishing membership in such groups); Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* 32-33 (2009)(hereinafter, ICRC Guidance)(same).

[42] *See* AE502OOO (AAA). Note that Mr. Hawsawi's counsel expressly argued against application of the CCF standard. *See* Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 26 February 2018 from 10:46 A.M. to 11:53 A.M. (Mr. Ali's counsel noting that he "parts company" with Mr. Hawsawi's counsel on this specific question (*id*. at 18879), and Mr. Hawsawi's counsel arguing that the CCF standard, as part of the law of targeting, "shouldn't be used" to analyze a jurisdictional issue (*id*. at 18895)). However, since (a) Mr. Ali's counsel has raised the general question of whether persons tried by military commission benefit from the CCF standard, and (b) the question was fully argued as part of Mr. Ali's response to AE 502JJJ (GOV), the question of whether that standard in fact applies will be considered and resolved here.

participation."[43] Per the ICRC guidance, the standard for direct participation in combat is only met by activities that directly (a) inflict death, injury or destruction on persons or objects protected against direct attack; or (b) adversely affect the military operations or military capacity of a party to a conflict.[44] Mere "war-sustaining activities" that do not directly cause such harm are not, in the ICRC's view, sufficient.[45]

(2) Contrary to argument of Mr. Ali,[46] the United States has never adopted this standard; and, in fact, has taken steps indicating affirmative rejection of it.[47] For example, the U.S. Department of Defense's Law of War Manual asserts that affiliation with an OAG sufficient for targeting can be established by functions "traditionally performed by military forces in conducting military operations against the enemy," to include not just direct combat roles, but also "combat support[] and combat service support functions."[48] With regard to the present motion specifically, the Commission notes that traditional combat support functions performed by military forces include financial services in proximate support of combat operations.[49]

(3) Furthermore, the Commission is not persuaded that the cases cited by Mr. Ali bear the import he claims for equating the "part of" language of 10 U.S.C. § 948a(7)(C) with the ICRC's CCF standard.

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[43] ICRC Guidance, 33-34.
[44] *Id*. at 47-50.
[45] *Id*. at 51-58.
[46] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 26 February 2018 from 10:46 A.M. to 11:53 A.M., at p. 18893-94
[47] *See U.S. Dep't of Army, Operational Law Handbook,* 19-20 (2017 ed.)(noting that "[the ICRC's] proposals . . . remain debated by nations, warfighters, and scholars alike," and that while "some allies [have] implement[ed]" the ICRC guidance, "[t]he United States has not," instead "rel[ying] on a case-by-case approach." *Id*. at 20); see also Maj. Ryan T. Krebsbach, *Totality of the Circumstances: the DoD Law of War Manual and the Evolving Notion of Direct Participation in Hostilities*, 9 J. Nat'l Security L. & Pol'y 125 (2017)(discussing the significant differences between the U.S. and ICRC positions regarding this issue).
[48] *DoD LOW Manual* 230-31.
[49] *See*, *e.g.*, U.S. Dep't of Army, Field Manual 1-06, *Financial Management Operations*, ¶¶ 1-23, 2-20 (Apr 2014).

(i) *Ex Parte Milligan* is inapposite for several reasons, the foremost being that the Court significantly relied on certain indicia of attenuated connection between the petitioner and the entity the United States had been fighting—*i.e.*, the Confederate States of America (CSA) and its armed forces.[50] It is clear the Court viewed Milligan, not as a "part of" CSA forces, but as a domestic criminal conspiring internally to assist such forces. Because, in the Court's view, there was no indication Milligan was formally affiliated with CSA forces, the propriety of military jurisdiction over him turned on whether he had participated in hostilities—*i.e.*, whether he had "engaged in legal acts of hostility."[51] The Court found the support activities Milligan had engaged in did not rise to that level.[52]

(ii) This is further borne out by *Ex Parte Quirin*,[53] in which the Court readily found sufficient indicia that the petitioners were affiliated with the armed forces of Germany, and thus subject to military commission jurisdiction for law of war violations.[54] Some of the indicia of the *Quirin* petitioners' affiliation are inapplicable here (for example, the *Quirin* petitioners had been directed by a German senior officer to wear German military uniforms when embarking on their mission, and to destroy them shortly after landing in the United States).[55] However, the Court also specifically noted the following in its factual recitation: (a) the petitioners had received training in a German sabotage school; (b) they had entered the United States on orders from German military leadership to conduct operations there; (c) these operations included plans to engage in clandestine, violent attacks against targets the German

[50] *Milligan*, 71 U.S. at 118 (noting that Milligan was "a citizen of the United States and the State of Indiana, and had not been, since the commencement of the late Rebellion, a resident of any of the States whose citizens were arrayed against the government." *Id*. at 2).
[51] *Id*. at 130-31.
[52] *Id*.
[53] 317 U.S. 1 (1942).
[54] *Id*. at 30-31, 45-46.
[55] *Id*. at 21-22.

military perceived as valuable; and (d) before embarking, the saboteurs "had received substantial sums in United States currency" from "an officer of the German High Command" to facilitate their mission.[56] In these respects, the facts indicating affiliation between the *Quirin* petitioners and the German armed forces are strikingly similar to those regarding Mr. Hawsawi and al Qaeda.

(iii) With regard to *Hamdi v. Rumsfeld*,[57] the Commission notes that petitioner's association with a hostile force was not substantially at issue (in that he was detained while fighting against the U.S. with Taliban armed forces in Afghanistan).[58] *Hamdi*'s discussion of *Milligan*, significantly relied on by Mr. Ali, found only that *Milligan* was clearly distinguishable based on the *Hamdi* petitioner's having openly fought against U.S. forces alongside enemy armed forces on a foreign battlefield.[59] *Hamdi* did not purport to define those facts as a minimum bar for establishing affiliation with a hostile force; and, in fact, expressly declined to do so:

> Here the basis asserted for detention by the military is that Hamdi was carrying a weapon against American troops on a foreign battlefield; that is, that he was an enemy combatant. The legal category of enemy combatant has not been elaborated upon in great detail. The permissible bounds of the category will be defined by the lower courts as subsequent cases are presented to them.[60]

Similarly, *In re Territo*[61] presented no substantial question as to the petitioner's affiliation with an entity in conflict with the United States.[62] Accordingly, nothing in either *Hamdi* or *Territo* prevents or militates against the Commission's application of *Milligan* here.

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[56] *Id*.
[57] 542 U.S. 507 (2004).
[58] *Id*. at 510-11, 518 (noting the AUMF clearly applied to "the limited category" into which the petitioner fell, which was "individuals who fought against the United States in Afghanistan." *Id*. at 518).
[59] *Id*. at 521-22.
[60] *Id*. at fn 1.
[61] 156 F.2d 142 (9th Cir. 1946).
[62] *See id*. at 143 (noting that the petitioner was serving in the field as a uniformed private in the Italian army at the time of his capture).

(iv) Finally, the Commission notes that every decision cited by Mr. Ali predates the 2009 publication of the ICRC Guidance. Accordingly, it is self-evident that none of the judges deciding these cases had the CCF standard from that guidance in mind. Given the limited acceptance of the ICRC's CCF standard in the international community,[63] it is also not tenable that the standard was otherwise clearly founded in the law of war when those cases were decided.

(4) Based on the foregoing, the Commission finds it is not necessary for an individual to be shown to have had a CCF in order to meet the "part of al Qaeda" requirement of 10 U.S.C. § 948a(7)(C).

e. **"Part of al Qaeda" Jurisdictional Basis – Conclusion**.

(1) In determining whether an Accused is "part of al Qaeda," the Commission finds the reasoning of *Bensayah v. Obama*[64] to be persuasive, and a useful model. The *Bensayah* Court noted that, given the nature of the organization,

> it is impossible to provide an exhaustive list of criteria for determining whether an individual is "part of" al Qaeda. That determination must be made on a case-by-case basis by using a functional rather than a formal approach and by focusing upon the actions of the individual in relation to the organization.[65]

At the same time, the *Bensayah* Court recognized that "the purely independent conduct of a freelancer is not enough."[66]

(2) The degree of discretionary authority given to Mr. Hawsawi over al Qaeda's funds and resources in support of important operations clearly indicates he was not a mere external functionary or service provider. The Commission finds it highly unlikely that someone

[63] *See* fn 47, *supra*, and authorities cited therein.
[64] 610 F.3d 718 (D.C. Cir. 2010).
[65] *Id*. at 725.
[66] *Id*.

not a "part of" al Qaeda would be entrusted with substantial direct authority over its funds—particularly funds spent in knowing support of significant and sensitive operations. The support Mr. Hawsawi provided was closely proximate in time and causation to major violent attacks conducted by al Qaeda, and was necessary for their success. His long-standing and persistent involvement with al Qaeda, to include regular interaction with senior officials and leaders, demonstrates his affiliation was neither casual nor superficial. This sufficiently establishes that Mr. Hawsawi was "part of al Qaeda" for purposes of this Commission's personal jurisdiction over him.

6. **Ruling**.

a. With regard to Mr. Hawsawi, the Commission finds that:

(1) Mr. Hawsawi is not, and has never been, a citizen of the United States;[67]

(2) Mr. Hawsawi is not a "privileged belligerent" within the meaning of 10 U.S.C. § 948a(6);

(3) A state of hostilities existed between the United States and the transnational terrorist organization known as al Qaeda on, and for an indeterminate time before, September 11, 2001; and

(4) Mr. Hawsawi both (a) materially supported al Qaeda in the hostilities referenced in the subparagraph above; and (b) was part of al Qaeda at the time of the offenses alleged.

b. The Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities is therefore **DENIED** as to Mr. Hawsawi.

[67] In accordance with the stipulation on which it is primarily based, this finding is made for purposes of the present motion only. *See* Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 5 December 2017 from 9:07 A.M. to 2:37 P.M., at pp. 17353 (Counsel for Mr. Hawsawi noting that he is stipulating "only for purposes of this motion and this narrow issue," not for the merits. *Id.*)

c. The Commission rules as follows regarding the below-specified ancillary motions within this series:

(i) The relief Mr. Hawsawi sought from the Commission in AE 502BB (MAH)[68]—specifically, maintaining certain statements of his under seal and admitting them for purposes of this motion only—is **GRANTED**, as verbally directed by the Commission on the record.[69]

(ii) AE 502QQ (MAH)[70] is **GRANTED**, in that the Commission, giving each discrete item the weight it was due, considered the filing and its attachments in their entirety.[71]

(iii) AE 502JJJ (GOV) is **GRANTED**, in that the Commission has in its discussion above adopted a standard regarding the "part of al Qaeda" requirement of 10 U.S.C. § 948a(7)(C).

d. Per the Commission's order in AE 502QQQ,[72] further consideration of AE 502 and all motions in that series regarding Mr. Ali remains **DEFERRED** unless and until the conditions specified in that order are fulfilled.

So **ORDERED** this 25th day of April, 2018.

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

[68] AE 502BB (MAH), Defense Response in re AE 502X, Government Updated Notice of Witnesses for Defense Motion to Dismiss for Lack of Personal Jurisdiction Due to Absence of Hostilities, filed 6 October 2017.
[69] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 6 December 2017 from 3:33 P.M. to 3:56 P.M., at p. 17730.
[70] AE 502QQ (MAH), Defense List of Exhibits and Facts for Which the Defense Requests Judicial Notice in Connection With AE 502, filed 21 November 2017.
[71] Unofficial/Unauthenticated Transcript of the *US v. Khalid Shaikh Mohammad, et al.*, Motions Hearing Dated 6 December 2017 from 3:33 P.M. to 3:56 P.M., at p. 17740-42.
[72] AE 502QQQ, Trial Conduct Order: Defense Motion to Dismiss for Lack of Personal Jurisdiction due to the Absence of Hostilities, dated 18 January 2018.