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| UNITED STATES OF AMERICA | **D-_____** |
| v. | **Joint Defense Motion** to Dismiss All Charges for Lack of Subject Matter Jurisdiction (Absence of Armed Conflict) |
| KHALID SHEIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN 'ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL-AZIZ ALI, AND MUSTAFA AHMED ADAM AL HAWSAWI | 3 November 2008 |

1. **Timeliness**: This motion is filed within the time frame permitted by the Military Commissions Trial Judiciary Rules of Court and the Military Judge's order dated 27 August 2008.

2. **Relief Requested**: With the consent of the *pro se* accused, Khalid Sheikh Mohammed and Ali Abdul-Aziz Ali[1], standby counsel, joined by detailed counsel for Messrs bin al Shibh[2] and al Hawsawi, respectfully request the Military Judge to dismiss all charges for lack of subject matter jurisdiction.

[1] Mr. Bin 'Attash reserves his right to join this motion at a later time, once he is able to fully consider it in his primary language of Arabic. Due to the inability of the contracted linguists to accomplish the necessary translations, as explained in Defense's Special Request for Relief D-047, prior to the military judge's 3 November 2008 law motions deadline, Mr. Bin 'Attash is unable to review the material and make an informed decision in a timely fashion such that he can represent himself before this court.

[2] Mr. bin al Shibh joins in this motion provisionally. In so joining, he does not waive any argument or motion relating to the pending question of his competency to stand trial.

3. **Overview**:

a. On October 16, 2002, Congress authorized the use of military force against Iraq. *See* Pub. L. No. 107-243, 116 Stat. 1498 (2002).

a. The Commission has jurisdiction over only actions that violate the law of war. 10 U.S.C § 948b(a) To invoke such jurisdiction, the Manual for Military Commissions (MMC) explicitly requires, and the charge sheet has alleged as an independent element of Charges II through IX and by incorporation in Charge I, that the conduct took place in the context of and be associated "with armed conflict." While the charge sheet states that the alleged offenses took place in the contact of an armed conflict, it does do not identify the timeframe of this purported armed conflict or the conduct that would demonstrate the possible existence of an armed conflict.

b. "Armed conflict" is a term of art in the law of war, and means either an international or non-international armed conflict. An international armed conflict exists when there is a resort to armed force between High Contracting Parties to the Geneva Conventions. A non-international armed conflict exists when there is a prolonged period of sustained combat between a government and an organized armed group within the state.

c. Isolated terrorist acts by a loosely-affiliated group from outside the United States do not, as a matter of law, constitute either an international or a non-international armed conflict. The government cannot establish jurisdiction because, as a matter of law, the government cannot prove the offenses charged occurred within the context of, or were associated with, an "armed conflict."

d. Therefore, the accused respectfully request the Military Judge to dismiss all charges for lack of subject matter jurisdiction.

4. **Burden of Proof**: Since the motion is jurisdictional, the government bears the burden of persuasion, and it must prove, by a preponderance of the evidence, any factual issue bearing on the question presented. R.M.C. 905(c)(1), R.M.C. 905(c)(2)(B).

5. **Facts**:

a. There are nine charges in this case. Each charge alleges an offense committed in violation of the law of war. The charge sheet appears to allege that a war began in either 1996 or 1998, with declarations from Osama bin Laden. *See* Overt Acts 1, 4, 5 of Charge I.

b. The charge sheet alleges three hostile acts purportedly committed since the time of Osama bin Laden's declarations. Two of these acts, the bombings of U.S. embassies in Kenya and Tanzania, occurred in August 1998. The second act, the bombing of the U.S.S. Cole, took place in October 2000. *See* Specification 1 of Charge IX.

c. The Authorization for Use of Military Force (AUMF) was passed on September 18, 2001 in response to the terrorist acts of September 11, 2001. *See* Pub. L. No. 107-40, 115 Stat. 224 (2001).

d. Pursuant to the AUMF, on October 7, 2001, the United States began military operations against the Taliban in Afghanistan. *See* CRS Report, *Instances of Use of United States Armed Forces Abroad* 34 (2008), *available at* *h*ttp://fpc.state.gov/documents/organization/101751.pdf.

6. **Law and Argument**:

## I. The Military Commission Has Jurisdiction over Only Violations of the Law of War that Occurred "in the Context of and W[ere] Associated with Armed Conflict."

1) Limited Jurisdiction

a. The Military Commissions Act of 2006 ("MCA") established a military commission for "offenses triable by military commission as provided" in the MCA. 10 U.S.C. § 948b(b). The substantive offenses in the MCA were intended to "codify offenses that have traditionally been triable by military commissions" and do "not establish new crimes." *Id.* § 950p. By so declaring, Congress manifested an unambiguous intent to grant the Commission jurisdiction over only traditional law-of-war offenses.[3]

b. The Supreme Court has long recognized that a military commission has jurisdiction over only violations of the law of war. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 597, 126 S.Ct. 2749 (2006) ("[A] law-of-war commission has jurisdiction to try only two kinds of offenses: 'Violations of the laws and usages of war cognizable by military tribunals only,'" and breaches of military orders or regulations); *In re Yamashita*, 327 U.S. 1, 13 (1946) ("Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war"); *Ex Parte Quirin*, 317 U.S. 1, 29 (1942) ("We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal.").

[3] Despite this declared Congressional intent, the Military Commissions Act (MCA) encompasses offenses that are not recognized by the common law of war, such as conspiracy, which "does not appear in either the Geneva Conventions or the Hague Conventions – the major treaties on the law of war." *Hamdan v. Rumsfeld*, 548 U.S. at 604 (plurality opn.). As discussed more fully in paragraph 6.I.1)e., proof of conspiracy requires the government to prove the individual substantive charges, which each include the element of "armed conflict."

c. *Ex Parte Quirin* made clear that, for a violation of the law of war to occur, "the offense charged 'must have been committed within the period of the war'" and "[n]o jurisdiction exists to try offenses 'committed either before or after the war.'" 317 U.S. at 29.

d. Violation of the law of war can only occur in the context of armed conflict. *See, e.g.*, Helen Duffy, *The "War on Terror" and the Framework of International Law* 83 (2005) [hereinafter Duffy, *War on Terror*] ("[W]ar crimes must (as the name suggests) take place in war, which for legal purposes is more properly referred to as armed conflict."); *see generally*, *Hamdan*, 548 U.S. at 641 (Kennedy, J., concurring) (stating the law of war "is the body of international law governing armed conflict"). The Manual for Military Commissions ("MMC") requires, as an individual element of every substantive offense, not including conspiracy, that "[t]he conduct [take] place in the context of and [be] associated with armed conflict." *See* MMC, Part IV, Crimes and Elements (1)–(27).

e. Conspiracy (alleged in Charge I of this case) applies only to a person "who conspires to commit one or more substantive offenses triable by military commission." *See* 10 U.S.C. § 950v(b)(28); *but see Hamdan*, 548 U.S. at 610 (stating that conspiracy "is not a recognized violation of the law of war"). An independent element of all the substantive offenses in Charges II–IX is that the offense took place in the context of and was associated with "armed conflict." *See* MMC, Part IV, Crimes and Elements (1)–(27). The government has the "obligation to prove beyond a reasonable doubt the elements of each substantive offense." R.M.C. 202(b) "Discussion." Hence, to prove any conspiracy charge, the government will have to show the existence of "armed conflict."

f. Therefore, for the Commission to have jurisdiction over any of the charges against the accused, the government must establish by a preponderance of evidence, R.M.C. 905(c)(2)(B), that it will be able to prove beyond a reasonable doubt the existence of "armed conflict" at the time the alleged conduct took place.

2) "Armed Conflict" and the Law of War

a. To determine what constitutes "armed conflict," the Commission must look to the law of war, because military commissions have jurisdiction over only violations of the law of war, *see Hamdan*, 548 U.S. at 597; because the MCA is only "declarative of existing law," *see* 10 U.S.C. § 950p(b); and because "armed conflict" is not defined in the MMC.

b. The law of war is defined by looking to the "'universal agreement and practice' both in this country and internationally." *Hamdan*, 548 U.S. at 603 (quoting *Ex Parte Quirin*, 317 U.S. at 30); *see also The Paquete Habana*, 175 U.S. 677, 711 (1900) ("[T]he laws of nations . . . rest[ ] upon the common consent of civilized communities. It is [in] force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct."); *Kadic v. Karadzi*, 70 F.3d 232, 238–39 (2d Cir. 1995) ("We find the norms of contemporary international law by 'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" (citing *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160–61 (1820))); *United States v. Schultz*, 4. C.M.R. 104, 114 (C.M.A. 1952) ("[T]he common law of war has its source in the principles, customs, and usages of civilized nations"); L.C. Green, *The Contemporary Law of Armed Conflict* 51–52 (2d ed. 2000) [hereinafter Green, *Law of Armed Conflict*] ("[T]he law of armed conflict is still governed by those principles of international

customary law which have developed virtually since feudal times, together with such considerations of humanity as may be considered as amounting to general principles of law recognized by civilized nations.").

c. The Geneva Conventions, which established the term "armed conflict," distinguish between (1) international "armed conflict" between High Contracting Parties to the Geneva Conventions (Common Article 2 conflicts) and (2) "armed conflict not of an international character" (Common Article 3 conflicts). *See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* arts. 2–3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter *First Geneva Convention*]. International armed conflict is "[a]ny difference arising between two States and leading to the intervention of armed forces." *See* Int'l Comm. Red Cross, *Commentary to Geneva Convention I* 32 (Jean S. Pictet ed. 1952) [hereinafter *Commentary*]. Non-international armed conflict addresses "civil disturbances," but does not include every "form of anarchy, rebellion, or [] plain banditry." *See id.* at 49; *see also* Lindsay Moir, *The Law of Internal Armed Conflict* 31 (2002) [hereinafter Moir, *Internal Armed Conflict*] (explaining that a non-international conflict must "take place 'in the territory of one of the High Contracting Parties' (in the sense of being *limited* to the territory of a High Contracting Party)").

d. Traditionally, violations of the law of war could occur in only international armed conflicts. *See Ex Parte Quirin*, 317 U.S. at 27–28 ("From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, *for the conduct of war*, the status, rights and duties of enemy nations as well as of enemy individuals.") (emphasis added); Green, *Law of Armed Conflict* 54 ("[F]or an armed

conflict to warrant regulation by the international law of armed conflict it was necessary for the situation to amount to a war, that is to say a contention between states.").

e. The International Criminal Tribunal for the former Yugoslavia (ICTY) broke with the traditional application of the law of war to hold it would be possible to prosecute for violations of the law of war in the unique non-international armed conflict occurring among parts of the former Yugoslavia that have since become nations. *See The Handbook of International Humanitarian Law* 56-57 (Dieter Fleck ed., 2d ed. 2008) ("In its groundbreaking decision in *Prosecutor v. Tadic*, the Appeals Chamber of the ICTY held that the customary international law applicable to non-international armed conflicts was very much more extensive . . . and that violations of that law constituted war crimes."); Moir, *Internal Armed Conflict* 140 ("The Tribunal went beyond a simple declaration that civilians were to be protected during non-international armed conflicts, however, and asserted that a body of customary international law has also developed regulating the means and methods of warfare in internal conflict.").

f. Like the Commission, the ICTY has jurisdiction over only crimes "committed 'within the context of' an 'armed conflict.'" *See Prosecutor v. Tadic*, Case No. IT-94-1, Opinion and Judgment, ¶ 559 (May 7, 1997) [hereinafter *Tadic*]. To determine the existence of an armed conflict, the ICTY established an influential test: "An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." *Prosecutor v. Tadic*, Case No. IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995) [hereinafter *Tadic*, Jurisdiction]; *see Tadic*, ¶ 561; *United States v. Prosperi*, --- F.Supp.2d ----, 2008 WL 4003171, at *11 (D. Mass. Aug. 29, 2008) (applying the

same standard to determine whether and when armed conflicts existed in Afghanistan and Iraq after Congress passed the AUMF); *Prosecutor v. Kunarac*, Case Nos. IT-96-23 & IT-96-23/1, ¶ 56 (June 12, 2002) (applying the *Tadic* test); Moir, *Internal Armed Conflict* 42 (suggesting that the *Tadic* test has become "an internationally accepted definition" for determining the existence of an armed conflict).

g. The test contemplates international armed conflicts ("a resort to armed force between States") and non-international (Common Article 3) armed conflicts (either "protracted armed violence between governmental authorities and organized armed groups" or "between such groups within a State"). *Tadic*, Jurisdiction, ¶ 70.

i. The test adopted by the ICTY to determine whether "an armed conflict for the purposes of . . . Common Article 3" exists between governmental authorities and organized armed groups considers two aspects of the conflict: (1) the intensity of the conflict and (2) the organization of the parties to the conflict." *Tadic*, ¶ 562 (considering criteria from the *Commentary to Geneva Convention I*). These 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*." *Id.* (emphasis added); *see also* Duffy, *War on Terror* 255 (stating that "the commission of 'terrorism' . . . should not be confused as bearing upon the key question whether particular groups meet the necessary criteria to constitute parties to a conflict").

ii. The ICTY in *Tadic* found that a Common Article 3 armed conflict existed in former Yugoslavia between the Government of the Republic of Bosnia and Herzegovina and the Bosnian Serb forces. ¶ 568. Considering the organizational prong,

the court found that the rebel Bosnian Serb forces were in revolt against the de jure State; that they had an "organized military force" with an official command structure, an administration, and a president; and that they occupied and operated from a definite territory comprising a significant part of Bosnia and Herzegovina. *Tadic*, ¶¶ 563–64. Regarding the intensity of the conflict, the ICTY stated that there was continual armed conflict from January 9, 1992, through June 14, 1992, including "attacks on towns," the "bombardment of Sarajevo, the seat of government," an "invasion of south-eastern Herzegovina," a two-day "artillery bombardment" of the town of Kozarac, and "the military occupation and armed seizure of power" in the town of Prijedor. *Id.* ¶¶ 565–70.

iii. In addition to determining the existence of an international or non-international armed conflict, the ICTY test requires that the acts of the accused "must also be committed within the context of that armed conflict." *Tadic*, ¶ 560. "[T]here must be a close nexus between the armed conflict and the alleged offence, meaning that the acts of the accused must be 'closely related' to the hostilities." *Naletilic & Martinovic*, ¶ 225 (Mar. 31, 2003) (citing *Kordic & Cerkez*, ¶ 32 (Feb. 26, 2001) ("[F]or a particular crime to qualify as a violation of international humanitarian law . . . the Prosecution must also establish a sufficient link between that crime and the armed conflict.")); *see also Prosecutor v. Blaskic*, Case No. IT-95-14, ¶ 69 (Mar. 3, 2000) ("[I]t is imperative to find an evident nexus between the alleged crimes and the armed conflict as a whole.").

h. With respect to the questions surrounding the presence of an armed conflict in cases before the Guantanamo military commission, the U.S. government argued, in *Hamdan v.*

*Rumsfeld*, that neither Common Article 2 nor Common Article 3 conflicts applied to the conflict with al Qaeda. 548 U.S. at 629. The *Hamdan* Court declined to decide the merits of the argument, but found that regardless of the nature of the conflict, Common Article 3 "afford[ed] some minimal protection . . . to individuals associated with neither a signatory nor even a nonsignatory 'Power' who are involved in a conflict 'in the territory of' a signatory." *Id.* at 630 (citing *First Geneva Convention* art. 3).

## II. No Violation of the Law of War Occurred Since There Was Neither an International Armed Conflict Nor a Non-International Armed Conflict.

1) Violations of the Law of War Can Occur Only in International Armed Conflicts.

a. Under the law of war, terrorist attacks by al Qaeda on the United States do not constitute an international armed conflict. International armed conflicts are, by definition, between High Contracting Parties. Because al Qaeda is not a High Contracting Party to the Geneva Conventions, its attacks cannot constitute an international armed conflict.

b. Here, any attempt by the government to equate the "war on terror" with an international armed conflict must fail. This position has been widely rejected. *See, e.g.*, Bruce Ackerman, *The Emergency Constitution*, 113 Yale L.J. 1029, 1034 (2004) ("stating "the 'war on terrorism' is merely a metaphor without decisive legal significance, more like the 'war on drugs' or the 'war on crime'); David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 958 (2002) ("This war [on terrorism] is more akin to the metaphorical (and indefinite) 'war on drugs' or 'war on crime' than to a conventional war. As yet, it finds no nation on the other side. We are fighting an international criminal organization, Al Qaeda."); Adam Roberts, *The "War on Terror" in Historical Perspective*, 47 Survival 101, 125 (2005) ("A better term [than "war on terror"], more accurate if less dramatic, would be 'international campaign against terrorism'").

2) Sporadic Terrorist Attacks Do Not Constitute a Non-International Armed Conflict.

a. Assuming, for purposes of the motion, that the law of war can be violated in a non-international armed conflict, al Qaeda's terrorist attacks do not rise to the level of a non-international armed conflict.

b. In Charges I through VIII, the U.S. government alleges a conspiracy from in or about 1996 to in or about May 2003, and conduct associated with the terrorist attack of September 11, 2001. In Charge IX, the government alleges the charge of Providing Material Support for Terrorism over the time period from in or about 1996 to in or about May 2003; this charge references the attack against the U.S.S. Cole in October 2000 and the embassy bombings in Kenya and Tanzania in August 1998. Taken together, the referred charges allege three terrorist attacks spread out over three years in various countries. None of the overt acts charge the kind of sustained, protracted, and continual combat required to establish a non-international armed conflict. The charged acts, even taken together, do not constitute an "armed conflict." Instead, they are no more than isolated terrorist attacks by al Qaeda against the United States. Therefore, no Common Article 3 armed conflict existed by reason of al Qaeda's actions, even under a broad definition of non-international armed conflict.

c. Isolated or sporadic terrorist activities are specifically excluded from the definition of non-international armed conflict. *See Tadic,* ¶ 562; *see also* 32 C.F.R. § 47.3 (2008) (defining "armed conflict" as "[a] prolonged period of sustained combat"); U.S. Dept. of the Air Force, *International Law – The Conduct of Armed Conflict and Air Operations: Air Force Pamphlet 110-31* § 1-5(c) (1976) (pending reissue as AFP 51-710) ("[T]he international community has not regarded a few sporadic acts of violence, even between states, as indicating a

state of armed conflict."); Duffy, *War on Terror* 254 ("The view that armed conflict may arise between states and organizations such as al-Qaeda has relatively little support, even in the post September 11 era."). Therefore, since al Qaeda's activities alleged in the referred charges are strictly of a terrorist nature, the charges fail to allege that al Qaeda was engaged in a Common Article 3 armed conflict with the United States.

d. Second, although the MMC does not define "armed conflict." the Code of Federal Regulations defines "armed conflict" as: "A prolonged period of sustained combat involving members of the U.S. Armed Forces against a foreign belligerent. The term connotes more than a military engagement of limited duration or for limited objectives, and involves a significant use of military and civilian forces." 32 C.F.R. § 47.3 (2008). The *American Heritage Dictionary* defines "conflict" as "[a] state of open, often prolonged fighting." (4th ed. 2006). Even without turning to international law, therefore, isolated terrorist attacks cannot constitute a "prolonged period of sustained combat."

e. Third, assuming even further that isolated terrorist attacks could potentially constitute a non-international armed conflict, the *Tadic* test would still apply to determine whether the attacks reached a serious enough level to constitute a non-international armed conflict. *Tadic*, Jurisdiction, ¶ 70 ("An armed conflict exists whenever there is . . . protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."). Applying that test, it becomes quickly apparent that a non-international armed conflict did not exist at the relevant time:

i. The attacks of 9/11 clearly did not constitute protracted armed violence between groups within a State. Therefore, the only possibility of establishing a non-

international armed conflict is by considering whether protracted armed violence existed between governmental authorities and organized armed groups.

ii. A single attack in no way resembles the kind of continual armed conflict present in *Tadic*. Even considering the al Qaeda attacks on the U.S.S. Cole and the Kenya and Tanzania embassy bombings, three discrete terrorist attacks across four countries over three years are not the same as the "invasion," "occupation," "armed seizure of power," or two-day bombardment before the court in *Tadic*. *See Tadic*, ¶¶ 565–70. Moreover, the lack of any major attack by al Qaeda after 9/11 seriously undermines any claim of an "intense" conflict. In comparison, in ruling that the intensity of the conflict in the former Yugoslavia reached the level of a non-international armed conflict, the ICTY test focused on "the intensity of the conflict and the organization of the parties to the conflict," *Tadic*, ¶ 562, and found "ongoing conflicts" over a period of months during 1992, including multiple attacks on locations within the country. *Id.* ¶¶ 565–70. The conflict in *Tadic* was sustained, protracted, and continual.

iii. Additionally, al Qaeda is not an organized group in the traditional sense. It is frequently described instead as a "loosely-affiliated group." *See, e.g.*, Douglas W. Kmiec, *Yoo's Labour's Lost: Jack Goldsmith's Nine-Month Saga in the Office of Legal Counsel*, 31 Harv. J.L. & Pub. Pol'y 795, 803 n.36 (2008) (stating that al Qaeda "exists worldwide in loosely affiliated 'cells' . . . officials say that al-Qaeda has no single headquarters, with autonomous underground cells in over 100 countries" (citing Council on Foreign Relations, http://cfrterrorism.org/groups/alqaeda.html)) Al Qaeda does not possess the organizational attributes that the *Tadic* court found dispositive, such as

occupation and control of a definite territory, a command structure with a president, and being in revolt against the de jure State. *Tadic*, ¶¶ 563–64; *see also* Duffy, *War on Terror* 253 ("[I]t is widely considered, even post 9/11, that these organizations [such as al Qaeda] lack the characteristics of armed groups.").

3) *Hamdan* Did Not Address Whether an Armed Conflict Exists for Purposes of Pursuing Criminal Prosecutions Under the Law of War.

a. In *Hamdan*, the government argued that the protections of the Geneva Conventions did not apply to detainees. *Hamdan v. Rumsfeld*, 548 U.S. at 628. The government argued that since al Qaeda was not a High Contracting Party, Common Article 2 did not apply, and because the conflict with al Qaeda was international in scope, it could not qualify as a Common Article 3 conflict, that is, a "conflict not of an international character." *Id.* at 630. The Court declined to address the merits of this argument, instead finding in the *travaux préparatoires* that Common Article 3 was designed to "furnish minimal protections" as "wide[ly] as possible." *Id.* at 631.

b. The Court cited *travaux préparatoires* that Common Article 3 mandated basic protections for those in "enemy hands," regardless of the nature of the conflict. *Id.* at 631 n.63 (citing *Commentary to Geneva Convention III* 35 (Common Article 3 "has the merit of being simple and clear . . . . Its observance does not depend upon preliminary discussions on the nature of the conflict"); *Commentary to Geneva Convention IV* 51 ("[N]obody in enemy hands can be outside the law"); U.S. Army Judge Advocate General's Legal Center and School, Dept. of the Army, *Law of War Handbook* 144 (2004) (Common Article 3 "serves as a 'minimum yardstick of protection in all conflicts, not just internal armed conflicts'" (quoting *Nicaragua v. United States*, 1986 I.C.J. 14, ¶ 218, 25 I.L.M. 1023))).

c. The Court's holding that Common Article 3 furnished minimal protections for those held by the United States, therefore, explicitly did not turn on whether the conflict with al Qaeda amounted to an international or non-international armed conflict or whether the law of war applied to a non-international armed conflict. *Hamdan* does not address the nature of the conflict between the United States and al Qaeda, and, accordingly, that ruling does not elucidate the argument presented here

4) Even if 9/11 Gave Rise to an Armed Conflict to Which Prosecutions for Violations of the Law of War Apply, No Armed Conflict Existed at the Time of the Alleged Conduct.

a. *Ex Parte Quirin* makes clear that "the offense charged 'must have been committed within the period of the war'" because "[n]o jurisdiction exists to try offenses 'committed either before or after the war.'" 317 U.S. at 29; *see also Hamdan*, 548 U.S. at 600 ("[T]he offense alleged must have been committed both in a theater of war and *during*, not before, the relevant conflict") (emphasis in original). Substituting "armed conflict" as the modern analog for "war," to establish the Commission's jurisdiction, the U.S. government must establish a timeframe for the armed conflict and must show that the charged offenses were committed during—not before or after—the armed conflict.

b. The U.S. government may argue that the AUMF, enacted on September 18, 2001, created some form of non-international armed conflict between the United States and al Qaeda. This argument is principally flawed because, as explained above, sporadic terrorist attacks do not rise to the level of a non-international armed conflict.

c. The AUMF did initiate an "armed combat" against the sovereign state of Afghanistan. In a recent federal criminal prosecution, the U.S. government sought to toll a statute of

limitations under the Wartime Suspension of Limitations Act, which required the court to consider whether, where, and when an armed conflict existed after the passage of the AUMF. *United States v. Prosperi*, --- F.Supp.2d ----, 2008 WL 4003171, at *1 (D. Mass. Aug. 29, 2008). Applying the *Tadic* test, the court found that pursuant to the AUMF, a war existed between the United States and Afghanistan from September 18, 2001, until December 21, 2001, and between the United States and Iraq from October 10, 2002, until May 1, 2003. *Id.* at *9, *13. This limited holding further undermines any claim of "armed conflict" between the United States and al Qaeda. In fact, the federal district court stated: "The use of the metaphor of war to describe the struggle against terrorism has been criticized. . . . I do not understand the government to be pressing the argument that the United States is 'at war' with al Qaeda, at least in any traditional legal sense." *Id.* at *1 n.5.

d. Of the three alleged overt acts that took place on or after September 18, 2001, only two relate to any of the accused, alleging that these two met to videotape and present propaganda. Charge I, ¶¶ 167–69. It is far from clear that these acts took place in the context of or were associated with armed conflict. Even assuming they were, they hardly present evidentiary support for the substantive offenses, all of which occurred on or before September 11, 2001.

e. The U.S. government may argue that the attacks of September 11 themselves created a non-international armed conflict that began on September 11, 2001. *But see* Duffy, *War on Terror* 85 ("[I]t is doubtful that an armed conflict arose on September 11 as a matter of law at the time of those attacks.") The government still bears the burden of proving that the charged offenses came during, not before, the "armed conflict." One hundred and sixty of the

169 alleged overt acts alleged in Charge I occurred before the attacks of September 11, 2001. The only alleged acts related to the accused occurring after the attacks of 9/11 add merely the acts of recording propaganda and making six ATM withdrawals -- hardly support for the referred charges. Charge I, ¶¶ 165–66.

f. Notably, the Supreme Court has rejected the argument that the AUMF may be applied to conduct prior to September 11, 2001. *See Hamdan*, 548 U.S. at 599 n.31 (plurality opinion) (stating that "Justice Thomas' further argument that the AUMF is 'backward looking' and therefore authorizes trial by military commission of crimes that occurred prior to the inception of war is insupportable" since "the law of war permits trial only of offenses 'committed within the period of the war'").

g. Fundamentally, even assuming the 9/11 attacks gave rise to a non-international armed conflict, there was no "armed conflict" before the attacks. Arguably, there was no "armed conflict" until after the attacks. Many of the offenses allege actions occurring as part of the attacks. The great majority of alleged overt acts in Count I occurred before the September 11, 2001 attacks. The very charges referred demonstrate that the government cannot prove, as it must in order for the Commission to have jurisdiction over the offenses charged, that the offenses occurred while in the context of and were associated with "armed conflict."

**III. Conclusion**

a. The Commission has criminal jurisdiction over only actions that violate the law of war. The MMC explicitly requires that conduct must take place in the context of and be associated with "armed conflict." For the Commission to exercise jurisdiction over the accused, the government must prove the offenses charged took place in the context of and were associated with "armed conflict." The charges allege existence of no "armed conflict" at the time of the

alleged offenses. "Armed conflict" is a term of art in the law of war, and is either an international armed conflict between High Contracting Parties to the Geneva Conventions or a non-international armed conflict of prolonged armed violence between a government and an organized armed group. Al Qaeda is not a High Contracting Party, so there cannot be an international armed conflict.

b. Moreover, assuming the law of war applies to non-international armed conflicts, sporadic acts of violence do not legally constitute a non-international armed conflict. Non-international armed conflicts do not include every act of violence; instead, they apply to sustained, protracted armed violence. The U.S. government has not alleged a single overt act that remotely establishes the existence of a non-international armed conflict. The U.S. government has not alleged and cannot establish an armed conflict that encompasses the alleged acts of the accused—either international or non-international—and consequently the Commission has no jurisdiction over the accused. Therefore, the accused respectfully request that all charges be dismissed for lack of subject matter jurisdiction.

7. **Request for Oral Argument**: The defense respectfully requests oral argument on this motion.

8. **Request for Witnesses**: The defense does not intend to call any witnesses on this motion, but reserves the right to do so after reviewing the government's response.

9. **Conference with Opposing Counsel**: On 03 November 2008, the defense conferred with trial counsel. The government opposes this motion.

10. **Attachments**: None.

DATED this 3rd day of November, 2008.

Respectfully submitted,

FOR:_____/s/_____


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