UNITED STATES COURT OF MILITARY COMMISSION REVIEW

en banc

UNITED STATES, Appellee, *v.* ALI HAMZA AHMAD SULIMAN AL BAHLUL, Appellant.	APPELLANT'S REPLY ON THE CERTIFIED ISSUES CMCR CASE NO. 09-001 Tried at Guantanamo, Cuba on 7 May 2008, 15 August 2008, 24 September 2008, 27 October – 3 November 2008 Before a Military Commission convened by Hon. Susan Crawford Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF 15 March 2011

TO THE HONORABLE, THE JUDGES OF THE COURT OF MILITARY COMMISSION REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Rules & International Agreements

Other Authorities

QUESTION 1

1. Appellee concedes that the crimes charged here were not plain and unambiguous war crimes at the time of Mr. al Bahlul's alleged conduct.

The parties agree on the most important legal issue in this case. The source of Congress' authority to vest military commissions with jurisdiction is "its explicit constitutional power to 'define and punish . . . Offenses against the Law of Nations . . . ." Appellee Resp. at 1 (quoting U.S. CONST., art. I § 8 cl. 10). Appellee seems to argue, however, that Congress' power under the Define and Punish Clause is more than a legislative power. On the strength of 10 U.S.C. § 950p, Appellee argues that the Military Commissions Act is a binding declaration of the law as it was and has always been, not simply as it will be. This Court should, in short, not "second-guess Congress' conclusion that conspiracy to commit war crimes has 'traditionally been triable by military commissions.'" Appellee Resp. at 18.

The first problem with their approach is that it has never been accepted by any Court, let alone the Supreme Court. "Whether the offense as defined is an offense against the law of nations depends on the thing done, not on any declaration to that effect by Congress." *United States v. Arjona*, 120 U.S. 479, 488 (1887). In the war crimes context, the Supreme Court has consistently required a plain and unambiguous showing that a war crime was established under the laws of war. *Hamdan v. Rumsfeld*, 548 U.S. 557, 602 (2006); *In re Yamashita*, 327 U.S. 1, 17 (1946); *Ex parte Quirin*, 317 U.S. 1, 36 (1942); *see also United States v. Yousef*, 327 F.3d 56, 106 (2d. Cir. 2003) ("Unlike those offenses supporting universal jurisdiction under customary international law-that is, piracy, war crimes, and crimes against humanity –that now have fairly precise definitions and that

have achieved universal condemnation, 'terrorism' is a term as loosely deployed as it is powerfully charged.").

Appellee retorts that the standard is somehow different, or non-existent, when Congress has passed legislation pursuant to the Define and Punish Clause. For the reasons stated in Appallant's merits brief, that proposition is not only contrary to precedent, it is dangerous. Such an argument would imply that Congress could not only circumvent the Ex Post Facto Clause, but all of the other constitutional limits on its legislative authority by simply declaring violations of the law of nations, *ipse dixit*. The Supreme Court has never endorsed this view. It has even rejected laws designed to implement international agreements when they conflict with the Constitution. "[N]o agreement with a foreign nation can confer power on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution." *Reid v. Covert,* 354 U.S. 1, 16 (1957); *see also Boos v. Barry*, 485 U.S. 312 (1988) (invalidating a law implementing the Vienna Convention on free speech grounds).

During the time relevant to the charges in this case, Appellee concedes that this standard would not have been met. Appellee is candid that prior to the Military Commissions Act, the acceptance of conspiracy in the laws of war was "hardly so clear to preclude the exercise of congressional power under the [Define and Punish] Clause." Appellee Resp. at 17. Congressional action in 2006, however, says nothing about whether it was plain and unambiguous seven years earlier.

Appellee's concession that the acceptance of inchoate war crimes was "hardly so clear" is the single clearest answer to this Court's specified issues relating to the Ex Post Facto Clause. If the crimes charged were not plain and unambiguous violations of the

laws of war at the time they were allegedly committed, then they were not war crimes at the time they were allegedly committed.

Appellee attempts to evade this conclusion by asking this Court to take a leap that no Court has ever been willing to take before. Conceding that the charges they brought were "hardly so clear" under the laws of war, Appellee spends most of its brief listing all of the things that the charges are like.

Appellee makes various references to "conspiratorial type conduct," Appellee Resp. at 5, "conspiracy-like liability," *id*., "conspiracy-like offenses," *id*. at 6, and "conspiracy-like charges," *id*. at 14, most of which arise under various nations' domestic laws. Some of these laws deal with terrorism, while others are directed at organized crime.

This list, however, is irrelevant because none of these international authorities even reference war crimes, let alone purport to create them. Irrespective of whether foreign nations or even regional organizations have encouraged the adoption of conspiracy-like liability or actual conspiracy into domestic law, domestic law is not the law of war. In the context of civil liability for war crimes, the Supreme Court and the Circuit Courts have emphasized that "the law of nations . . . does not include a norm simply because the norm is enshrined in the domestic law of all civilized societies. Auto theft is not a violation of international law." *Cisneros v Aragon*, 485 F.3d 1226, 1231 (10th Cir. 2007).

What matters here is whether there was a plain and unambiguous norm establishing inchoate conspiracy, solicitation and material support as war crimes a decade ago. This Court does not need to look to other national jurisdictions for whether these

offenses could be triable under domestic law. The U.S. federal courts are open and would conceivably have jurisdiction over comparable charges.

2. Like inchoate crimes, crimes by analogy have also been resoundingly rejected from the laws of war.

When addressing joint criminal enterprise directly, Appellee concedes that joint criminal enterprise is not an inchoate crime. But that should not matter, they argue, because it is "nearly identical" to one. Appellee Resp. at 3. For Appellee, "JCE largely mirrors the definition of conspiracy," and "international tribunals have made an analogous judgment" to the one it is urging upon this Court. *Id*. at 2-3.

Their argument is the same with respect to Material Support. Though it has never been tried as a war crime and though it is a novel federal crime, this Court should defer to its charging decisions because "material support for terrorism is legitimately characterized as equivalent to conduct constituting Aiding the Enemy." Appellee Resp. at 21. Though Nazis were not charged with Material Support nor were they "formally charged with Aiding the Enemy, their conduct is nevertheless analogous." *Id*. at 29.

In short, Appellee insists that because there are crimes analogous to those charged here, moral disgust for al Qaeda should compel this Court to take the leap and accept inchoate war crimes where all other Courts have rejected them.

Appellee cites no constitutional precedent that has adopted the approach it proposes. To be sure, the principle of crime by analogy is nowhere in the constitution, but instead was peculiar to the Soviet Union. Soviet law included an "article permitting a judge to consider the social danger of an individual even when he had committed no act

defined as a crime in the specialized part of the code. He was to be guided by analogizing the dangerous act to some act defined as crime." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 169, n.12 (1972) (*quoting* J. HAZARD, THE SOVIET LEGAL SYSTEM 133 (1962)). The Supreme Court rejected this because "[p]unishment by analogy . . . though long common in Russia, [is] not compatible with our constitutional system." *Id. at* 169; s*ee also Zaimi v. Untied States*, 476 F.2d 511 (D.C. Cir 1972).

The mere fact that Appellee could have charged war crimes that would be "like" conspiracy does not by analogy mean the charges they actually brought are themselves war crimes. There is "a qualitative difference between conspiracy-like crimes and the substantive offenses upon which they are predicated." *Rutledge v. United States*, 517 U.S. 292, 300, n. 12 (1996); *see also United States v. Sutton*, 68 M.J. 455 (C.A.A.F. 2010) (solicitation to commit indecent liberties with a minor could not be sustained merely because the evidence could have sustained the underlying charge); *United States v. Navrestad*, 66 M.J. 262, n. 11 (C.A.A.F. 2008) (where government did not charge attempted distribution or pursue aiding and abetting, the appellate court is precluded from affirming on either basis).

Appellee does not appear to contest the fact that it did not charge Mr. al Bahlul with underlying war crimes on the basis of a joint criminal enterprise or any other theory of vicarious liability. Appellee Resp. at 2-3. Nor do they argue that the evidence would support charging Mr. al Bahlul for underlying substantive war crimes. Nor do they contend that they actually brought to trial someone who was involved in the USS COLE

Attack or the atrocities committed on September 11th.[1] Appellee implies, however, that this Court could find Mr. al Bahlul criminally culpable for the "execution of that common plan" to perpetrate them. *Id*. at 5.

As stated in Appellant's initial brief, criminal complicity in the execution of war crimes was not what prosecutors charged, what the evidence showed, what the military judge instructed, nor what the members found. Appellee cannot now vary its theory of the case two and half years after trial. *See Schmuck v. United States*, 489 U.S. 705, 717 (1989); *De Jonge v. Oregon*, 299 U.S. 353, 362 (1937).[2] Prosecutors built their case

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[1] The only evidence of Mr. al Bahlul's connection to Atta and Jarrah are his statements that he stayed at the same guesthouse as Atta and Jarrah for one to two weeks at a time when Atta and Jarrah were just arriving in Afghanistan and before the 9/11 plot was hatched. (Pros. Ex 13, pp. 2, 6; Pros. Ex. 5, p. 4). The only evidence to support the government's allegation he "prepared the propaganda declarations styled as martyr wills" of Atta and Jarrah comes in the form of a fan letter Mr. al Bahlul wrote in 2005 to a 9/11 conspirator, in which he admits to typing up or transcribing the martyr wills from the videos on the computer and printing them for delivery to UBL. (Pros. Ex. 15; R. 545-548). This activity apparently happened after 9/11. Elsewhere in the record, it is shown that he was unaware of Atta or Jarrah's involvement in any operation until he saw their photographs in the media after 9/11. (Pros. Ex. 5, p. 4) Significantly, none of Mr. al Bahlul's many statements made to interrogators mentions any involvement in arranging bayat or transcribing the martyr wills for Atta and Jarrah. (*see, e.g.,* Pros. Ex 13, pp. 2, 6; Pros. Ex. 5, p. 4).

Consistent with the testimony of the government's witness, martyr wills are personal statements, written by those giving them. (R. at 548). The videos of Atta and Jarrah rehearsing and then taping their martyr wills in fact show them reading from handwritten statements and editing them by hand. (Pros. Ex. 26 and 28 (in Ex. 28, the tapings appear in the video after bin-Ladin's Id Al-Fitr sermon, about 40% of the way through the video; the camera zooms in on the handwritten notes about 60% into the video)). These tapings took place on 5 and 18 January 2000. (Pros. Ex. 26 and 28; Pros. Ex. 27 (from which Ex. 26 apparently derives, although the date is removed in the version presented in Pros. Ex. 26)). In addition, Mr. al Bahlul was in Yemen from early December 1999 (before Atta and Jarrah were recruited for the 9/11 plot), until sometime well after 18 January 2000. (Pros. Ex. 6, p. 4; Pros. Ex. 9, p. 1; Pros. Ex. 13, p. 2). A copy of UBL's Id Al-Fitr sermon, recorded near contemporaneously with the martyr wills, was delivered to Mr. al Bahlul while he was in Yemen. (Pros. Ex. 13, p. 2; Pros. Ex 28).

[2] The CAAF has repeatedly enforced due process notice requirements, most recently in *United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010); *United States v. Medina*, 66 M.J.

around a video that Mr. al Bahlul made and the criminality of "the thoughts, the beliefs, the ideals of the accused." (R. at 879). Appellee cannot now resort to an alternative theory for which this Court might be more sympathetic. *Chiarella v. United States*, 445 U.S. 222, 236 (1980); *Dunn v. United States*, 442 U.S. 100, 106 (1979).[3]

Instead of constitutional law, Appellee claims that this Court should rely on what they view as the less stringent principle of *nullum crimen sine lege*, or the principle of legality. Appellant fully embraces the application of the principle of legality in this case. The result and the analysis that this Court would undertake is identical to what is required under the constitution.

As authoritatively defined, the principle of legality demands that "A person shall not be criminally responsible . . . unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court." Rome Statute of the International Criminal Court (Rome Statute), art 22(1), opened for signature July 17, 1998, 37 I.L.M. 1002, 1016.

21, 26-27 (C.A.A.F. 2008). Due process notice requirements are also firmly routed in the jurisprudence of international criminal tribunals, specifically in the context of joint criminal enterprise. *See, e.g., Prosecutor v. Prlić*, et al., Decision on Petković Appeal on Jurisdiction, Case No. IT-04-74-AR72.3 ¶ 20 (ICTY App. Chamber, Apr. 23, 2008) (failure to plead joint criminal enterprise adequately resulted in defective charges); *Prosecutor v. Gacumbitsi*, Judgment, Case No. ICTR-2001-64-A ¶ 167 (Jul. 7, 2006) (failure to plead joint criminal enterprise adequately in indictment required reversal); *Prosecutor v. Kvočka*, Judgment, IT-98-30/1-A ¶ 28 (ICTY App. Chamber, Feb. 28 2005) (notice requirements satisfied only where prosecutors plead, with specificity, which of the three types of joint criminal enterprise they intend to pursue).

[3] In examining a similar charge of conspiracy, the Justices in *Hamdan* issued a warning that other theories of liability should not "be read into" the charge of conspiracy. *Hamdan*, 548 U.S. 557, n. 32 (addressing Justice Thomas' argument that Hamdan's charge sheet could be read to include joint criminal enterprise-type allegations).

Just as the Supreme Court rejected crimes by analogy, the principle of legality requires that "the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted." Rome Statute at art. 22(2); *see also Prosecutor v. Vasilević*, Judgment, IT-98-32-T (I.C.T.Y. Tr., Nov. 29, 2000) ("[U]nder no circumstances may the court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable and punishable, or by criminalising an act which had not until the present time been regarded as criminal.") (internal quotations omitted).

From the ICTY, Appellee cites to language from *Prosecutor v. Delalić*, Judgment, IT-96-21-A ¶ 179 (I.C.T.Y. App., Feb. 20, 2001). They argue that *Delalić* supports the proposition that a crime can be prosecuted so long as the reviewing Court is satisfied the defendant was doing something he should have known was wrong in some way. The defendants in *Delalić* were prison guards convicted for murdering, torturing and exacting cruelty upon detainees. In finding that bringing these charges as war crimes was consistent with the principle of legality, the Appeals Chamber did not just rely on a general sense of wrongfulness. It examined the elements of the offenses and held that they fully encompassed "fundamental offences such as murder and torture." *Id*. at ¶ 163.

The centrality of the same kind of elements test that is constitutionally compelled was also clear in the Appeals' Chamber decision in *Prosecutor v. Stakić*, Judgment, IT-97-24-A (I.C.T.Y. App., 22 March 2006). The Appeals Chamber rejected as ex post facto charges that removed elements of established offenses, irrespective of the characterization of the defendants' conduct as morally blameworthy. And there was no

doubt that Stakić was morally blameworthy. He was convicted of murder, extermination, forcible deportation and other crimes against humanity. Nevertheless, the Appeals Chamber held that eliminating elements "expand[ed] criminal responsibility by giving greater scope to the crime of deportation than exists under customary international law, and thus violate[ed] the principle of *nullum crimen sine lege*." *Id.* at ¶ 302.

3. Appellee's arguments are not unique, having been pressed and rejected by all previous war crimes tribunals.

Appellee asks this Court to ignore the opinion of Justice Stevens in *Hamdan* because it was only joined by four members of the Court. With respect to whether conspiracy was a violation of the law of war, it is undisputed that the Court split 4-1-3, with Justice Kennedy abstaining. With respect to whether "joining" or "supporting" a criminal enterprise was itself a war crime, the Court split 4-2-2. Appellant does not dispute that any decision rendered by fewer than five justices is not controlling precedent.

Appellee's position that this Court should decline to give it any persuasive force, however, is contrary to settled law. "While not a binding precedent, as the considered opinion of four Members of this Court it should obviously be the point of reference for further discussion of the issue." *Texas v. Brown*, 460 U.S. 730, 737 (1983). This is especially so when "every Court of Appeals that considered the question" has treated the opinion as authoritative. *See Marks v. United States*, 430 U.S. 188, 194 (1977). As noted in our initial brief, Circuit Courts have viewed the Justices' rejection of inchoate conspiracy as an authoritative description of the international humanitarian law. Appellant Resp. at 14.

Appellant does not rely on formalism. The persuasive force of the plurality opinion in *Hamdan* stands on its own as a scholarly analysis of the historical record by a Justice who had first-hand knowledge of the legal climate surrounding World War II. And while Appellee would like this Court to believe that Justice Kennedy endorsed its view that Congress can adjudicate the laws of war, it is clear that he was referring to its prospective action. More than any other justice writing in the *Hamdan* case, it was Justice Kennedy who repudiated opportunistic lawmaking and emphasized the reliance on tradition to protect against crimes tailored to fit the defendant. *Hamdan*, 548 U.S. at 637 (Kennedy, J., concurring) ("The Constitution is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.").

On the merits of the historical precedent, Appellee reiterates many of its prior arguments with respect to conspiracy. They argue that Winthrop identified conspiracy as triable by military commission, while again failing to acknowledge that Winthrop is addressing martial law, not the law of war.[4] Appellee analogizes to conspiracy cases in what they now concede were martial law situations in the Philippines and during the Civil War. And they again point to what are at best ambiguous precedents dealing with domestic saboteurs.[5] For the reasons stated in Appellant's prior briefing, none of these deal with inchoate war crimes or joint criminal enterprise.

With respect to joint criminal enterprise after World War II, Appellee attempts to muddle the distinction between the acceptance of "common plan" as a theory of liability

[4] As the Justices in *Hamdan* noted, Winthrop "excludes conspiracy of any kind from his own list of offenses against the law of war." *Hamdan*, 548 U.S. at 608.

[5] Appellee again cites *Ex parte Quirin*, 317 U.S. 1 (1942) and adds *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). *Colepaugh* is near identical to *Quirin* and relies on *Quirin* as controlling. It provides no discussion, positive or negative, of conspiracy under the laws of war.

and the rejection of inchoate conspiracy as a crime. The *American* view, this Court has been told, was cast aside for the sake of a "compromise decision." Appellee Resp. at 15.

The problem with this revisionism is that the judgment of the IMT was not a compromise document. The Russian judge wrote a lengthy dissent reflecting his views on those parts of the judgment with which he disagreed. The IMT articulated a lengthy rationale for what a Conspiracy to Wage Aggressive War entailed and its positive foundations under international law. In fact, the IMT described Conspiracy to Wage Aggressive War in a manner that looks more like modern notions of command responsibility than what is now thought of as conspiracy under federal law.

In the judgment of the IMT, "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action." Nuremberg Judgment at 467 (A-111). The IMT went on to put special emphasis on the fact that criminal liability only reached the central organizers of what were by that time unquestionably completed acts of illegal war. Being a Nazi ideologue was not sufficient. "The planning, to be criminal, must not rest merely on the declarations of a party programme, such as are found in the twenty five points of the Nazi Party, announced in 1920, or the political affirmations expressed in *Mein Kampf* in later years." *Id*.

While Appellee's assertion that Mr. al Bahlul was "al Qaeda's chief propagandist" is belied by the record, Appellee Resp. at 2,[6] the Nazi's chief propagandist

[6] The media office that Mr. al Bahlul headed was controlled by the al Qaeda Media Committee, which was chaired by Dr. Ayman al-Zawahiri. (Pros. Ex. 5, p. 6). Mr. al Bahlul had no authority to distribute propaganda, including video tapes; distribution was the purview of the Security Committee and bin Laden. (Pros. Ex. 5, p. 5; Pros. Ex. 7, p. 3; Pros. Ex. 9, p.2; Pros. 13, p. 3). There was a separate military media office, which was responsible for filming bin Laden's speeches and interviews, as well as all martyr wills. (Pros. Ex. 9, p. 2; Pros. Ex. 13, p. 3).

before the IMT was acquitted precisely because "[n]ever did he achieve sufficient stature to attend the planning conferences which led to aggressive war. . . ." 22 TRIALS OF THE MAJOR WAR CRIMINALS 582-85 (1946). This finding was made despite the fact that he was responsible for a "vigorous propaganda campaign [that] was carried out before each major act of aggression." *Id*.

What Appellee's revisionism can also not explain is why the International Military Tribunal for the Far East (IMTFE) reached the same result. Prosecutors charged conspiracies to commit war crimes and crimes against humanity, which the IMTFE likewise rejected as outside its jurisdiction. *See* THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (I.M.T.F.E.), 29 APRIL 1946-12 NOVEMBER 1948, VOL. 1 33-34 (Ed. Roling, B.V.A. & Ruter, C.F. 1977).

Unlike the IMT, the IMTFE was not split between civil and common law judges. Of the eleven judges, a majority haled from common law countries and the United States was recognized as having the dominant influence over the proceedings. *See Hirota v. MacArthur*, 338 U.S. 197, 207 (1948) (Douglas, J., concurring). Far from judges who buckled for the sake of political consensus, three dissented from the judgment and two wrote separately.

For all of Appellee's insistence on the uniquely *American* view of the law of war, their inability to cite any war crimes trials from the postwar period is poignant. The U.S. military brought hundreds of defendants before military commissions for war crimes perpetrated in both the Pacific and Europe. Appellee has given this Court no precedent from these trials because inchoate liability was rejected by all of them.

As cited in Appellant's initial brief, the most prominent military trials were convened under Ordinance No. 7 and Control Council Law No. 10. Military Government – Germany, United States Zone, Ordinance No. 7, 18 October 1946 (Ordinance No. 7); Allied Control Council Law No. 10, 20 December 1945 (Control Council Law No. 10). These gave U.S. military tribunals sitting in Nuremburg broad jurisdiction over "violations of the laws or customs of war," the ability to pursue liability on the basis of a "common plan or conspiracy" and even appeared to provide jurisdiction over "conspiracies to commit any such crimes." Ordinance No. 7, at art. 1; Control Council Law No. 10, at art. 2.

Prosecutors again attempted to bring charges of conspiracy to commit war crimes and crimes against humanity. Recognizing the importance of the precedent, the presiding judges convened an *en banc* hearing to decide whether such crimes were triable. 15 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 64-1100 (G.P.O 1949) (US-NMT).

Prosecutors made the same arguments then that they are making now. Here, Appellee argues that "conspiracy as an independent offense exists through Common Law jurisdictions." Appellee Response at 6. There, they argued that conspiracy was a "venerable as well as an ancient concept in the jurisprudence of England and the United States." US-NMT at 1085.

Here, Appellee argues that Mr. al Bahlul's conduct was clearly wrongful because he joined the "common plan . . . to commit violations of the law of war." Appellee Resp. at 5. There, they argued "the conspiracies involved in these cases are conspiracies to commit acts well-established as crimes at international law . . . ." US-NMT at 1086.

Here, Appellee argues that prosecutors at the IMT were frustrated by a "careful parsing of the language of the London Charter as part of a larger compromise judgment." Appellee Resp. at 15. There, they highlighted the language of Ordinance No. 7 and Control Council Law No. 10, and tried to persuade the *en banc* panel that the IMT "was clearly wrong and overlooked the express language of the Charter." US-NMT at 1092.

Here, Appellee argues that "The United States has long considered conspiracy and solicitation to be violations of the laws of war, punishable by military commission." Appellee Resp. at 13. There, they argued that the broad jurisdictional grant over war crimes "remits us for a fuller exposition to the 'laws and customs of war,'" which naturally included inchoate conspiracies on the same terms as attempts. US-NMT at 1096.

The Prosecutors arguments, however, were not persuasive. The *en banc* judges unanimously concluded, like the IMT before them and like the ICTY half a century later, that the inchoate offense of conspiracy was not among those crimes covered by the general phrase the "laws and customs of war." "Therefore, this tribunal has no jurisdiction to try any defendant upon a charge of conspiracy considered as a separate substantive offense." US-NMT at 1100 (note).

The same result was reached by the military commissions the Army convened to prosecute concentration camp atrocities, the Malmedy Massacre and other Nazi war crimes in Europe. *See* Dachau Trials Report (A-113). The so-called "Dachau Trials" had no need to make political compromises and were established over a year before the IMT issued its judgment. They operated under a general directive from GA Eisenhower to prosecute "violations of the laws or customs of war, of the laws of nations, or of the law of occupied territory or any part thereof." Letter, Headquarters, United States Forces,

European Theater, to Eastern Military District, et al., file AB 250.4 JAG-AGO, subject:" Military Commissions," 25 August 1945 *in* Dachau Trials Report at 161.

Joint criminal enterprise, called "common design," was the prosecution's theory of liability in almost every case. Dachau Trials Report at 61. When defense counsel objected that it could lead to inchoate liability, the commissions "pointed out that the accused were charged with participation in the execution of a common design to commit described unlawful acts and not a common design as a separate offense." *Id*. at 62.

Prosecutors bring charges and make motions. Their trial tactics do not decide the content of the law. Judges decide the law. And when prosecutors made the same arguments against Nazis and Japanese that they are making against Mr. al Bahlul today, judges overruled them and made precedent that settled the law.

Appellee has given this Court nothing to indicate that Congress, pursuant to its power to define and punish violations of the laws of nations, ever expressed disagreement with these precedents until the Military Commissions Act of 2006. To the contrary, the United States treated these precedents as settled as recently as seven years ago; be it in the prosecution of the Ba'athists in Iraq or death squads in Bosnia. Appellee has given this Court nothing to show why it should view the law of war applicable to Afghanistan a decade ago any differently.

It is not surprising that prosecutors then, as now, would like to bring inchoate charges. There are fewer elements to prove and in the fog of war, nearly any enemy could be shown to have consorted with those who actually perpetrated war crimes. Just as a

matter of trial strategy, it makes obtaining convictions and plea agreements much easier. But that is precisely the problem.

War criminals are enemies of all humanity. Their acts compel all nations of the world to exercise universal jurisdiction to ensure against their impunity. After World War II, a variety of war crimes not expressly listed in the Nuremberg charter were brought and led to convictions. None of them were inchoate crimes of the kind alleged here. Instead, they constituted plain and unambiguous acts of criminality and victimization. *See*, *e.g.*, *United States v. Karl Brandt, et al.*, 1 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 175-178, 193-196 (G.P.O. 1949) (*inter alia*, "plans and enterprises involving medical experimentation without the subject's consent"); *United States v. Ulrich Greifelt*, 13 L. REP. TRIALS OF WAR CRIMINALS 28 (1948) (*inter alia*, kidnapping of children for Germanization); *United States v. Max Schmid*, 13 L. REP. TRIALS OF WAR CRIMINALS 151 (Dachau 1947) (offenses committed against a dead body – beheaded and then kept skull of dead allied soldier); *United States v. Heinz Hagendorf*, 13 L. REP. TRIALS OF WAR CRIMINALS 146-148 (Dachau 1946) (improper use of Red Cross insignia – shot at allied troops from within a Red Cross ambulance); *Trial of Oberleutant Gerhard Grumpelt*, 1 L. REP. TRIALS OF WAR CRIMINALS , 67-70 (Hamburg, 1947) (The Scuttled U-Boats case; convicted of destroying surrendered property by perfidy and violating terms of surrender by scuttling U-boats).

Throughout our history, judges in war crimes cases have left their natural hatred for the enemy on the battlefield. This has meant reserving the stigma of "war criminal" to those who commit actual war crimes. "[T]he jurisdiction of the military commission

should be restricted to cases of offence consisting in *overt acts, i.e.* in unlawful commissions or actual attempts to commit, and not in intentions merely." COL William WINTHROP, MILITARY LAW AND PRECEDENTS 841 (2d Ed. 1920) (emphasis in original).

The "chief evidence you have in this case" is a video. (R. at 879). Mr. al Bahlul is not in this video and it does not show him committing any crime. It is not a do-it-yourself guide on the means and methods of terrorism. It is not a snuff film. It remains available on Google Video and the government has not sought, nor expressed any intention, to have it taken down. As the prosecution described it, this video is "propaganda, political argument, and indoctrination of solicitation." (R. at 315). Mr. al Bahlul was prosecuted because he shared and advocated the beliefs of the enemy. Appellee relies on this Court's disgust for al Qaeda. But that does not overcome the fact that they did not charge him with actual war crimes.

QUESTION 2

Appellee's response to the second specified issue is without precedent. While contesting the fact that Aiding the Enemy turns on the defendant's "traitorous" and "disloyal" conduct, Appellee concedes that Aiding the Enemy cases from the insular territories of the Philippines all involved defendants who breached a duty of allegiance to the United States. "Consequently, if one is looking for examples of where Aiding the Enemy is charged in the absence of any duty, one is not going to find such cases in the Philippine Insurrection materials, and must look elsewhere." Appellee Resp. at 28.

Though Appellee does not make the same explicit concession with respect to the Civil War precedents, the same reasoning must apply with no less force to military commissions cases arising within the continental United States during the Civil War, or to persons caught supplying hostile Native Americans in the territory of New Mexico, Appellee Resp. at 26-27, or to domestic saboteurs caught during World War II. *Id*. at 28-29. In every case, the defendants would have been within the territorial jurisdiction of the United States at the time of the alleged offenses and thus owed at least the same duty of allegiance to the United States that native Filipinos did.[7]

Most surprising is Appellee's argument that the government chose "to treat the Confederacy as a privileged belligerent under the laws of war." Appellee Resp. at 30. This may be the first time that counsel for the government of the United States has ever taken this position. During and after the Civil War, the federal government *never*

[7] As Appellee acknowledges, *Quirin* pointedly declined to affirm on the Aiding the Enemy charge against foreign saboteurs. Appellee Resp. at 29, n. 16. But in the parallel case that arose in the 10th Circuit, the Court of Appeals made a point of describing the offense as turning on the defendant's "passing through the naval and military lines." *Colepaugh*, 235 F.2d at 432.

recognized the Confederacy as a legitimate belligerent. Until now, the government's legal position, as accepted by the Supreme Court, has been that the entire rebellion was unlawful and that the conflict was essentially a law enforcement action, albeit on a massive scale. *See Lamar v. Brown*, 92 U.S. 187, 195 (1875); *The Prize Cases*, 67 U.S. 635, 673-74 (1862) ("[T]he citizens [in the Confederate states] owe supreme allegiance to the Federal Government. . . . They have cast off their allegiance and made war on their Government, and are none the less enemies because they are traitors.").

It is true that, as a matter of policy, the government treated captured Confederate soldiers as prisoners of war. But like U.S. policy toward the Viet Cong a century later, this status was "accorded as a matter of grace" rather than of right, "in order to mitigate the rigors of war." *The Prize Cases*, 67 U.S. at 673. To be sure, if participation in and support for the Confederacy was deemed lawful, there would have been no need for President Johnson's blanket pardon after the war.[8]

As was made explicit by the Supreme Court in *Young v. United States*, 97 U.S. 39, 64 (1877), the only hostile actors in the Civil War who "committed no crime against the laws of the United States or the laws of nations" were non-resident aliens such as Alexander Collie. Collie, and others like him, committed no crime because he was "not a traitor." *Id*. at 66. He breached no legal duty in giving support to insurgents, just as the government repeatedly recognized that Americans who supported insurgents in

[8] Indeed, some 15,000 individual Southerners were given special pardons for their participation in the Rebellion, including about 2,000 persons convicted by military commission, and more than 200,000 persons subscribed to a written loyalty oath to bring themselves within the scope of an amnesty proclamation. *See* Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. CIV. R. & CIV. LIB. 253, 310 (2010). The validity of these pardons was repeatedly affirmed by the Supreme Court. Morison at 311-23.

Colombia, Cuba and elsewhere during the nineteenth century committed no crime. *The Santissima Trinidad*, 20 U.S. 283, 340 (1822) (Story, J.); *International Law – Cuban Insurrection*, 21 Op. Atty. Gen. 267, 270 (1895); Sec. of State Hay to Senior Marquez, Sec. of the Columbia Legation (Aug. 1, 1900), in PRFR, 1897-1901, William McKinley, 405 (1902).

Appellee therefore concedes that it has no precedent from the Civil War or the Philippines for the proposition that Aiding the Enemy was ever viewed as anything other than a loyalty-based offense. Appellee nevertheless presents a novel argument that Aiding the Enemy, including as it is defined under Article 104 of the UCMJ, turns not the rule of non-intercourse but on the premise that it can be satisfied by "otherwise wrongful conduct." Appellee Resp. at 19.

Whatever it merits as an academic theory, this Court is offered no legal authority that endorses Appellee's view. Indeed, it is contradicted by a long history of authority that has described Aiding the Enemy crimes as loyalty-based offenses that "are treasonable in their nature." WINTHROP at 629.

This was not simply how it was understood in the nineteenth century. It was how Article 104 was understood at the time of its enactment. M.C.M. ¶ 185a (1951) ("All the citizens of one belligerent are enemies of the government and all of the citizens of the other."); *id*. at 185d ("The law requires absolute nonintercourse"); LT. COL. THOMAS MARMON, ET AL., MILITARY COMMISSIONS 22-23 (JAG School 1953) ("[Article 104] is a strictly national offense that can be committed in the United States by resident aliens and at any place of contact with enemy persons by United States citizens. . . . [N]ational treason and the statutory offense of aiding the enemy are based on the higher duty,

although it may be one arising from temporary residence, of allegiance to the injured state."). In fact, the Aiding the Enemy offense prescribed in the Military Commissions Act is called "Wrongfully Aiding the Enemy" and a breach of loyalty is how "wrongful" is defined. 10 U.S.C. § 950t(26).

Appellee's theory also appears to be circular. In order for the elements of Aiding the Enemy to be a crime, "the conduct must be wrongful." Appellee Resp. at 22. But Appellee defines this wrongfulness standard as the defendant having "a general criminal intent to commit the acts forming the basis of the crime." *Id*. Beyond *post hoc* judgments about whether the defendant seems morally blameworthy in some way, Appellee's description of the offense has no limiting principle. As long as any argument concerning the moral wrongfulness of the defendant's state of mind can be made, anyone who aids the enemy, including the enemy him or herself, would be a criminal. Nothing like this has gained acceptance into the laws of war.

The only case that arguably supports Appellee's theory is an infamous trial from the Indian Wars. Arbuthnot and Ambrister were what would now be viewed as abolitionists. *See* Linda Kerber, *The Abolitionist Perception of the Indian*. 62 J. AM. HIST. 271, 295 (1977). With the sanction of the British and Spanish governments, they traded with and provided other support to Seminoles and escaped slaves, who had taken refuge in Spanish Florida. JAMES COVINGTON, THE SEMINOLES OF FLORIDA 39-46 (Florida 1993). They were caught toward the end of the First Seminole war and, as Appellee describes, tried by a "special court-martial" for supporting the Seminoles and freed slaves.

In the lead up to the First Seminole War, Florida remained under the nominal control of Spain, but Spanish authorities were unable to "enforce peace on the border,"

and more importantly, "were unable to prevent black slaves from fleeing to Florida and joining the Seminole Indians." John K. Mahon, *The First Seminole War, November 21, 1817–May 24, 1818*, 77 FLORIDA HIST. Q. 62 (1998). While the motivation for the invasion of Florida was partly territorial expansionism, the "principal objective was to break up the free Negro settlements which were becoming increasingly a menace to the slave systems of adjacent states." Kenneth Wiggins Porter, *Negroes and the Seminole War, 1817–1818*, 36 J. NEGRO HIST. 249, 254 (1951).[9]

The campaign into Florida began with the annihilation of what was at the time referred to as the "Negro Fort" community. As the British withdrew from Florida after the War of 1812, they built Negro Fort as a fortified haven for blacks, known as the "Black Seminoles," who had escaped from slavery. It grew to a community of over a thousand and a beacon for slaves escaping from the South. DANIEL LITTLEFIELD, AFRICANS AND SEMINOLES 7 (Greenwood 1977); Porter at 260.[10]

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[9] S*ee also* Deborah A. Rosen, *Wartime Prisoners and the Rule of Law: Andrew Jackson's Military Tribunals during the First Seminole War*, 28 J. EARLY REP. 559, 562-63 (2008) ("Jackson invaded Florida with the stated goal of stopping the ongoing border conflict with the Indians, but with the additional underlying objectives of ousting the Spanish from Florida and ending the territory's role as a sanctuary for fugitive slaves."); David S. Heidler, *The Politics of Aggression: Congress and the First Seminole War*, 13 J. EARLY REP. 501, 504 (1993) ("Americans interpreted [Indian land] claims as open hostility, especially when Seminoles began providing refuge for runaway slaves."); Linda K. Kerber, *The Abolitionist Perception of the Indian*, 62 J. AM. HIST. 271, 275 (1975) ("Because the raids had begun as retribution for the harboring of runaway slaves, the debate also became one on slavery and the extent to which the national government was responsible for its protection."); Mahon at 62 ("Slaveholders considered these people [free blacks] renegades and . . . a menace to their lives and property.").

[10] As Joshua Giddings, a prominent abolitionist politician from Ohio, observed with the perspective of forty years:

> Perhaps no portion of our national history exhibits such disregard of international law, as this unprovoked invasion of Florida. For thirty years, the slaves of our Southern States have been in the habit of fleeing to the British Provinces. Here they are admitted to all the rights of citizenship, in the same manner as they were

Although the garrison and the surrounding settlement were located sixty miles within Spanish territory, Jackson ordered that it be destroyed, stating in his orders that he harbored "little doubt . . . that this fort has been established by some villains for the purpose of rapine and plunder, and that it ought to be blown up, regardless of the ground on which it stands; . . . destroy it and return the stolen negroes and property to their rightful owners." JOSHUA R. GIDDONS, THE EXILES OF FLORIDA 37 (1858) (quoting Jackson's order to General Edmund P. Gaines). The attack resulted in the deaths of as many as three-hundred men, women and children. Those who survived were either captured and sold back into slavery, or fled deeper into Spanish territory. ROBERT REMINI, ANDREW JACKSON AND HIS INDIAN WARS 131 (Viking 2001); Porter at 264-65.

The ground invasion of Florida began in the spring of 1818. The Black Seminole villages on the Suwanee River were Jackson's principal target. On April 1, Jackson's campaign began by burning and looting the largest of the Seminole towns, which stretched for several miles on the shore of Lake Miccosukee. A week later, he occupied Fort St. Marks without resistance. While none of the black "banditti" or Indian "savages" could be found, the seventy-year-old Arbuthnot had sought refuge in the governor's quarters and was arrested. Frank L. Owsley, Jr., *Ambrister and Arbuthnot: Adventurers or Martyrs for British Honor*, 5 J. EARLY REP. 289, 294 (1985).

> in Florida. They vote and hold office under British laws; and when our Government demanded that the English Ministry should disregard the rights of these people and return them to slavery, the British Minister contemptuously refused even to hold correspondence with our Secretary of State on a subject so abhorrent to every principle of national law and self-respect. Our Government coolly submitted to the scornful arrogance of England; but did not hesitate to invade Florida with an armed force, and to seize faithful subjects of Spain, and enslave them.

JOSHUA R. GIDDONS, THE EXILES OF FLORIDA 37 (1858) (quoting Jackson's order to General Edmund P. Gaines).

Jackson then turned his attention to Bowlegs Town, the largest of the settlements, which was one hundred miles deeper into Spanish territory. He reached the town on April 16, where after a brief engagement, the majority of the Seminoles and black settlers broke into small groups and disappeared into the woods and his forces suffered no causalities. Mahon at 65-66. Ambrister "blundered into the camp at midnight on [his] way back to Suwanee, not having heard of its capture," and was promptly arrested. Porter at 276.

Over seventy-two hours, the two men were charged, tried, convicted and executed. 1 AMERICAN STATE PAPERS: MILITARY AFFAIRS, 15th Cong., 2d sess., at 734. Both were convicted of "aiding, abetting and comforting the enemy" and "supplying them with the means of war," while being "subject[s] of Great Britain." *Id*. In addition, Arbuthnot was convicted of "exciting and stirring up the Creek Indians to war against the United States," and Ambrister was convicted of "[l]eading and commanding the Lower Creeks in carrying on a war against the United States." *Id*. Arbuthnot was hanged and Ambrister was shot. Jackson summarized the proceedings by saying that the two men had been tried "by a special court of selected officers; legally convicted as exciters of this savage and negro war; legally condemned and most justly punished." KENNETH PORTER, THE BLACK SEMINOLES: HISTORY OF A FREEDOM-SEEKING PEOPLE 24 (Florida 1996).

The trial and execution of the two created an international incident and, as Appellee recognizes, led to Congressional investigations in the House and Senate that ultimately condemned the trial. Winthrop later characterized Jackson's order to execute Ambrister as "wholly arbitrary and illegal," and observed that "[f]or such an order and its execution a military commander would *now* be indictable for murder." WINTHROP at 464-65 (emphasis in original)

While Appellee offers these charges to show that loyalties do not matter, Rep. Philip Reed condemned Jackson because, "These offenses can only apply . . . to our own citizens or others within the limits and territories of the United States, who may engage in . . . unlawful acts against the public authority. The law provides for offenses of this sort [conspiracies, confederacies, and combinations], but it cannot apply to persons out of the limits of the United States, owing no obligations or allegiance to the United States." Annals of Congress, 15th Cong., 2d sess., at 1069 (Jan. 1819).

Appellee argues, much like Jackson's defenders at the time, that Arbuthnot and Ambrister's criminality arose from the fact that they aided individuals who carried on "unlawful belligerency and to violate the laws of war." Appellee Resp. 25. The judgment of scholars who have studied the First Seminole War has been that it is a "distortion simply to say that fugitive Negroes and hostile Indians stirred up by unscrupulous British subjects were making unprovoked attacks on innocent American frontiersmen." J. Leitch Wright, Jr., *A Note of the First Seminole War as Seen by the Indians, Negroes, and Their British Advisors*, 34 J. SO. HIST. 565, 574 (1968).

Finally, it is worth comparing Jackson's actions with the supposed "banditti" and "savages." Following the destruction of Negro Fort, two apparent slave traders named William Hambly and Edward Doyle were captured by the Seminoles. They were put on trial for what was shown to be their complicity in the destruction of the Negro Fort community and sentenced to death. The black chief Nero, however, intervened and commuted their sentences, handing them over to the Spanish for incarceration in Fort St. Marks. PORTER at 20. These two men were freed when Jackson invaded and, ironically, acted as key witnesses against Arbuthnot.

In sum, therefore, the only precedent Appellee can find to support its position is one of the most widely and rightly condemned military trials in U.S. history. This Court should decline the government's invitation to incorporate the trial and execution of Arbuthnot and Ambrister into the tradition of American military justice.

CONCLUSION

For the reasons stated herein and in Appellant's prior briefing, this Court should set aside the findings and sentence as outside the jurisdiction of a military commission.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via e-mail to CAPT Edward White on the 15th day of March 2011.

Dated: 15 March 2011

/s MAJ Todd Pierce, USA

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