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ASCULUM DEFEATS:  
PROSECUTORIAL LOSSES IN THE MILITARY COMMISSIONS  
AND HOW THEY HELP THE UNITED STATES

**John M. Bickers\***

*Small but consistent failures have marked the U.S. endeavor to use military commissions in the struggle against Al Qaeda. The handful of cases have mostly ended in reversals of convictions and sentences. This article will consider the possibility that conflating two kinds of crimes created the legal errors that led to these defeats. Law of war military commissions have historically been used not only as extraordinary venues for prominent war criminals, but also for preserving the vital role of combatant immunity. Commissions thus tried those accused of grave breaches of international law as well as the kind of ordinary belligerency offenses that would not even have been illegal had the perpetrators been legitimate combatants. Because the military commissions stemming from the War on Terror drew precedent from all manner of past military commissions, whose rules contemplated trials for both kinds of accused, the government wandered into an ever-more labyrinthine view of the law appropriate to the commissions. The article will consider the completed cases, focusing on the prosecution's choice to emphasize inchoate offenses. It will then compare international and domestic law and suggest that the government's losses occurred because of the inappropriate amalgamation of grave breaches and belligerency offenses, and that the assessment of liability is very different between the two.*

*International law has long recognized some species of expansive liability for grave breaches, but not for belligerency offenses. Because*

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*most detainee trials to date have been for belligerency offenses, the reliance on offenses like conspiracy and material support for terrorism has led to a string of reversals. This article will suggest, however, that these defeats suffered by the United States have actually been to its benefit. In the short term, the loss of confidence in the military commissions might make possible a federal trial for some of the remaining detainees, such as Khalid Shaikh Mohammed. The world benefits from a public trial of persons accused of grave breaches, but a U.S. military commission can no longer realize most of that potential benefit. In the long term, a regime of international law that provided expanded liability for belligerency offenses would greatly harm U.S. strategic interests. By losing a series of small judicial battles, the United States is positioned to win a much more significant war.*

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## INTRODUCTION

*“Pyrrhus replied to one that gave him joy of his victory that one other such would utterly undo him.”<sup>1</sup>*

The victory of King Pyrrhus of Epirus over the Romans<sup>2</sup> is such a well-known feature of modern Western culture that it has become its own trope for movies,<sup>3</sup> television,<sup>4</sup> and books.<sup>5</sup> After the battle at Asculum, Plutarch reports the quote above as Pyrrhus’s morose response to the good news. Pyrrhus clearly recognized that his victory was so costly that the tactical advantage he gained was not truly worth the strategic loss he had suffered.<sup>6</sup> Such a “Pyrrhic victory” offers an oddly counterintuitive lesson: winning is, in such a case, only the precursor to ultimate loss. King Pyrrhus, and his struggle for Hellenic dominance in the Mediterranean, would have been much better off had he never fought the battle. His brief successes led to the failures that enabled Rome to conquer all of Italy.<sup>7</sup>

Seldom do we notice the other side of the equation. The Romans, this suggests, were better off for having fought and lost this battle. Had Pyrrhus husbanded his forces, he might have frustrated Roman plans much longer.<sup>8</sup> In the long term, the Romans benefitted

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<sup>1</sup> PLUTARCH, *THE LIVES OF THE NOBLE GRECIANS AND ROMANS* 483 (JOHN DRYDEN TRANS., MODERN LIBRARY 1932).

<sup>2</sup> *Id.*

<sup>3</sup> See, e.g., Randall King, *Cruise Control: Star’s Presence Overpowers What Could Be a Smart Science-fiction Story*, WINNIPEG FREE PRESS (Apr. 19, 2013) (characterizing Earth’s victory over an alien enemy in “Oblivion” as Pyrrhic); Shea Conner, *Movie Review: ‘Lincoln’*, ST. JOSEPH NEWS-PRESS (Nov. 8, 2012) (noting that winning the civil war before passage of the Thirteenth Amendment could have proved a Pyrrhic victory for the cause of emancipation).

<sup>4</sup> See, e.g., Sarah Rodman, *Buckle Up for Wild Ride to the Bottom*, BOSTON GLOBE (July 13, 2012) (describing the opening of the final season of *Breaking Bad* as such a victory); Paul Brownfield, *Jump Back In*, LA TIMES (Apr. 3, 2007) (describing the victories of Tony in *The Sopranos* as Pyrrhic).

<sup>5</sup> See, e.g., WALLACE THURMAN, *THE BLACKER THE BERRY* (1929).

<sup>6</sup> PLUTARCH, *supra* note 1, at 483.

<sup>7</sup> *Id.* at 486.

<sup>8</sup> Plutarch gives some credit both to Roman sacrificial auguries and the retreat of the elephants of Pyrrhus at the subsequent battle of Beneventum. *Id.*

from a loss that they certainly did not greet with joy: like Voltaire's Zadig,<sup>9</sup> they had no idea at the time how beneficial the loss would become.

Similarly, the United States appears to have suffered a number of legal defeats in the effort to conduct trials by military commission. Like the Romans at Asculum, though, those very defeats may actually have benefitted the very government that lost them.

Since the attacks of September 11, 2001, the U.S. Government has faced a series of difficult legal choices about how to detain, and possibly punish, members of the forces opposing it. One early decision resurrected the system of military commissions not seen in American law since the aftermath of the Second World War.<sup>10</sup> An accompanying decision transformed the U.S. Naval Base at Guantanamo Bay, Cuba, into a detention center for foreign citizens who came into the custody of U.S. forces.<sup>11</sup> A third decision linked these two choices, establishing Guantanamo as the venue for any trials by military commission that the War on Terror brought forth.<sup>12</sup> Each of these choices has generated huge scholarly output,<sup>13</sup>

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<sup>9</sup> The titular protagonist of Voltaire's story is a Babylonian philosopher who is instructed by an angel disguised as a hermit. The angel teaches Zadig that deeds that appear to be bad may turn out later to be good, and vice versa. VOLTAIRE, *CANDIDE & SELECTED STORIES* 169 (Donald M. Frame, trans., The New American Library 1961) ("Men,' said the angel Jesrad, 'pass judgment on everything without knowing anything.'").

<sup>10</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 16, 2001).

<sup>11</sup> Janet Cooper Alexander, *The Law-Free Zone and Back Again*, 2013 U. ILL. L. REV. 551, 557 (2013).

<sup>12</sup> Janet Cooper Alexander, *Military Commissions: A Place Outside the Law's Reach*, 56 ST. LOUIS U. L. J. 1115, 1118 (2012).

<sup>13</sup> See, e.g., Gerald Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1459 (2014); David Glazier, *Destined for an Epic Fail: The Problematic Guantanamo Military Commissions*, 75 OHIO ST. L. J. 903, 915 (2014). See generally Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L. J. 1415 (2012); Gabor Rona, *Legal Issues in the "War on Terrorism" - Reflecting on the Conversation between Silja N.U. Voneky and John Bellinger*, 9 GERMAN L.J. 711 (2008); David Frakt, *The Practice of Criminal Law in the Guantánamo Military Commissions*, 67 A.F. L. REV. 35 (2011); Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material*

along with many judicial challenges in various fora.<sup>14</sup> Neither the Bush nor Obama Administrations have had consistent winning streaks while defending these decisions. Both suffered rebukes from courts that required them to redesign their legal plans repeatedly by enlisting the help of Congress.<sup>15</sup> Even after congressional assistance, more defeats ensued.

This article reviews some of those defeats, as well as some of the relatively easy victories that accompanied them. Part I considers the possibility that conflating two kinds of crimes in commissions contributed to a recurrence of legal errors that called forth judicial upbraiding. Military commissions have multiple roles, and the United States has historically used them not only as extraordinary venues for prominent leaders accused of war crimes, but also for much more ordinary soldiers and other belligerents.<sup>16</sup> Small but consistent failures have resulted from the government's attempts to resolve cases involving both kinds of accused persons under commissions, resulting in an ever-more labyrinthine view of the appropriate law to apply to modern commissions. Part II examines the handful of cases completed since the beginning of the War on Terror, looking to the differences between those that ended with successful convictions, and those that the defendant successfully appealed. Part III, which looks to the reason for the failures, concludes that the die was cast by the government's insistent reliance on charges of inchoate conspiracy and material support for terrorism. Part III will then compare international and domestic law and suggest that the government's losses occurred because of the conflation of grave breaches and belligerency offenses, and that the

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*Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT'L L.J. 1 (2013); Geoffrey S. Corn & Chris Jenks, *A Military Justice Solution in Search of a Problem: A Response to Vladeck*, 104 GEO. L.J. ONLINE 29 (2015).

<sup>14</sup> See *infra* at Part II.

<sup>15</sup> See, e.g., the Detainee Treatment Act, Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739-44 (2005) [hereinafter D.T.A.], and the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) [hereinafter M.C.A.].

<sup>16</sup> *Compare* Application of Yamashita, 327 U.S. 1, 14 (1946) (wherein the charge alleged the execution of a plan by which "more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed"), *with Ex Parte Quirin*, 317 U.S. 1, 7-8 (1942) (the accused possessed explosives with the intent to "to destroy war industries and war facilities in the United States").

treatment of liability for inchoate offenses is very different between the two. Lastly, Part IV will suggest that these setbacks suffered by the United States have actually been to its benefit. In the short term, the loss of confidence in the military commissions might make possible a federal trial for some of the remaining detainees, such as Khalid Shaikh Mohammed. The nation and the world benefit from a public trial of persons accused of grave breaches, but most of that potential gain can no longer be realized by a U.S. military commission. In the long term, a regime of international law that provided expanded liability for belligerency offenses would greatly harm U.S. strategic interests. Had the United States gotten what it wanted, it would have regretted it in both the near and long term future. Instead, the United States, like Rome before it, has benefitted from a series of Asculum defeats.

I. BY ANY OTHER NAME: CONFLATING THE CRIMES TRIED BY COMMISSIONS

A. *Overview of Commissions*

The Supreme Court has recognized three distinct types of military commissions.<sup>17</sup> Two of them, martial law and military government commissions, function in place of ordinary criminal law courts when those are not available.<sup>18</sup> The third, law of war commissions, are defined not by their location but by their jurisdiction.<sup>19</sup> Martial law commissions occur domestically when a breakdown in order or threat of invasion has led to a declaration of martial law.<sup>20</sup> Military government commissions happen on foreign soil, when occupation by the United States requires the use of commissions to keep law and order in the absence of a local government.<sup>21</sup> Martial law was never at issue in the U.S. war against

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<sup>17</sup> Hamdan v. Rumsfeld, 548 U.S. 557, 595-97 (2006) (plurality opinion).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> The Supreme Court has established limits on such commissions. *Id.* at 595; see Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) (holding that a statute authorizing martial law does not "authorize the supplanting of courts by military tribunals").

<sup>21</sup> Hamdan, 548 U.S. at 595-96.

Al Qaeda.<sup>22</sup> The attacks of September 11, 2001, though horrific, were not accompanied by a legitimate fear of invasion by enemy forces.<sup>23</sup>

Likewise, the United States does not appear to have seriously considered using military commissions as an arm of military governance. This reluctance may stem from the United States obligation to maintain local courts, even as an occupying force.<sup>24</sup> Using military commissions to enforce ordinary criminal laws against larceny of private property, or even murder,<sup>25</sup> was once a commonplace of international conduct.<sup>26</sup> Although the precedents have not been formally displaced, the development of a large body of law governing occupations has largely discouraged such methods.<sup>27</sup> Further, a global rejection of the very concept of occupation has fostered a desire among many countries to create local autonomy

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<sup>22</sup> Glazier, *supra* note 13, at 912.

<sup>23</sup> Duncan, 327 U.S. at 324 (court's holding in Duncan only allows military commissions where civilian courts do not function, they were never an option after Al Qaeda's attack).

<sup>24</sup> See YORAM DINSTEIN, *THE INTERNATIONAL LAW OF BELLIGERENT OCCUPATION*, 132 (2009).

<sup>25</sup> See, e.g., *Madsen v. Kinsella*, 343 U.S. 341 (1952) (holding that a U.S. military commissions in post-World War II Germany had jurisdiction to try for murder the civilian wife of an American military officer because the commission was "designed especially to meet the needs of law enforcement in that occupied territory in relation to civilians and to nonmilitary offenses").

<sup>26</sup> See Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 *ARMY LAW* 41, 41-42 (2002) (the earliest uses of military tribunals tended to be for what we would now characterize as law of war offenses, such as those convened by King Gustavus Adolphus during the Thirty Years War and nations have used them for hundreds of years for general matters of governance). See Anil Kalhan, et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 *COLUM. J. ASIAN L.* 93, 126 (2006) (noting that an act of 1861 granted the Governor-General authorization to convene "special tribunals" to preserve law and order); PETER JUDSON RICHARDS, *EXTRAORDINARY JUSTICE: MILITARY TRIBUNALS IN HISTORICAL AND INTERNATIONAL CONTEXT*, 18-19 (2007) (noting that Winfield Scott's General Order creating such military commissions primarily "identified criminal offenses normally cognizable by civil courts in time of peace"); *id.* at 73-74 (noting that French principles of republicanism limited the use of such tribunals, *les conseils de guerre*, to "the state of siege").

<sup>27</sup> See, e.g., Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, Switz., Aug. 12, 1949 (Feb. 2, 1956) 6 U.S.T. 3516.



over such matters,<sup>28</sup> even before a formal transfer of authority to the host nation which may be more formal than real.

Thus, although the current commissions have been of the law of war variety,<sup>29</sup> the existence of precedents of all three kinds has led to confusion about their jurisdiction.<sup>30</sup> That confusion was evident in the recent argument among federal judges about the nature of the commissions that tried those accused of conspiring in the plot to kill President Lincoln and other senior government officials in April 1865.<sup>31</sup> Whether conspiracy was actually triable by military commissions divided a panel of the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit").<sup>32</sup> Part of the reason for the split was a disagreement over whether the Lincoln commissions furnished valid precedent as a law of war commission, or whether their value must be discounted because they were mixed commissions, functioning in both the law of war and martial law realms.<sup>33</sup>

### B. *Distinguishing Conduct in War*

Confusion has resulted in the area of subject-matter jurisdiction. The terms "war crime" or "violation of the law of armed conflict" have been used interchangeably to describe two very

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<sup>28</sup> "After WWII - possibly due to the odium attached to belligerent occupation by the appalling Nazi and Japanese record - there has been a considerable reluctance by States to admit that they were Occupying Powers." DINSTEIN, *supra* note 24, at 10. There are also sound practical reasons that promote a devolution of power, "the military government of an occupied territory would be eager to avail itself of the continued service of some low-level officials....The reason is prosaic: it is a matter of expediency and conservation of resources." *Id.* at 57.

<sup>29</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006) ("Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available.").

<sup>30</sup> See, e.g., *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015).

<sup>31</sup> WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 145 (Nancy Spears & Patricia Hass eds., 1<sup>st</sup> ed. 1998).

<sup>32</sup> See generally *Al Bahlul v. United States*, 792 F.3d 1 (D.C. Cir. 2015).

<sup>33</sup> Compare *Al Bahlul*, 792 F.3d at 12 ("Winthrop noted that the Lincoln assassins' tribunal was a mixed martial law and law of war military commission"), with *id.* at 60 (Henderson, J., dissenting) ("because the military cannot exercise martial law jurisdiction unless civilian courts are closed (citation omitted), the Lincoln conspirators' military court necessarily was purely a military commission with law-of-war (including conspiracy) jurisdiction").

different types of offenses against international order: grave breaches and belligerency offenses.<sup>34</sup> International and domestic law of war commissions have tried both of these two species of crime.<sup>35</sup> Therefore, the precedents have a surface similarity. Unfortunately, because of their fundamentally different natures, these two varieties of crime have completely separate rules regarding liability for inchoate offenses such as conspiracy.<sup>36</sup> Because courts have often merged these two strands similarly, they have at times erred by applying the conclusions from one area of law to the other.<sup>37</sup> What this article will call “belligerency offenses” are those acts that represent the ordinary duties of military forces, when committed by those who are not part of a legitimate military force. Soldiers and sailors function by destroying the fighting capacity of their enemy: in short, by harming people and things. The primary mission of an armed force, the reduction of opposing military forces, by definition requires the killing and wounding of humans and the destruction of

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<sup>34</sup> Compare *Ex parte Quirin*, 317 U.S. 1, 14 n.12 (1942) (“Authorities on International Law have regarded as war criminals such persons who pass through the lines for the purpose of (a) destroying bridges, war materials, communication facilities etc.”), with DINSTEN, *supra* note 24, at 95 (“It is for the Occupying Power to determine—through legislation—what specific acts...constitute punishable acts of sabotage when committed in occupied territory. International law, as such, does not penalize these acts”).

<sup>35</sup> Some scholars use the phrase “direct participation in hostilities” for the same species of offense. See, e.g., David Frakt, *Direct Participation in Hostilities as a War Crime: America’s Failed Efforts to Change the Law of War*, 46 VAL. U.L. REV. 729, 752 (2012). Because it is difficult to characterize many of the acts the United States has attempted to punish at the military commissions as “direct participation,” I have opted for the more general “belligerency offenses.”

<sup>36</sup> See, e.g., Allison Marson Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CAL. L. REV. 75, 118 (2005) (noting the differences between joint criminal enterprise under international law and the common law doctrine of conspiracy).

<sup>37</sup> This was the source of the dispute between the majority and dissent in the al Bahlul case: if the tribunal that tried the Lincoln conspirators were of the same type as the commission faced by al Bahlul, it stood as precedent for the use of conspiracy. If it was a different type, it could not do so. See *Al Bahlul*, 792 F.3d at 12.

property.<sup>38</sup> Such acts, outside of the context of war, are generally the subject of criminal sanction.<sup>39</sup>

This concept of “combatant immunity” arose from an ancient recognition that punishing an enemy soldier for those ordinary military acts would significantly decrease the willingness of enemies to surrender or otherwise cease fighting.<sup>40</sup> A desire to avoid a perpetual state of war required battlefield forces to accept that their surrender was not a death sentence. Because of this very realistic assessment of human nature, the notion that enemy soldiers had not committed murder is one of the oldest principles of the law of war.<sup>41</sup> Only those countries and regimes that deliberately sought to escalate conflicts into existential struggles violated it.<sup>42</sup>

Because this immunity meant that the military was treated differently in terms of criminal liability, it became important to determine who qualified for this different treatment. An area of

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<sup>38</sup> This is so central a concept that the classical legal documents governing armed conflict treated it as the most basic underlying assumption. See Hague Convention No. IV Respecting the Laws and Customs of War on Land, 36 Stat. 2259, Art. 22 (1907) (“The right of belligerents to adopt means of injuring the enemy is not unlimited”).

<sup>39</sup> Glazier, *supra* note 13, at 915 (“All societies criminalize deliberate killing and destruction of property, the very acts that governments require their militaries to perform during war”).

<sup>40</sup> This idea is an old one indeed, and is suggested even by ancient China's great military philosopher. See SUN TZU, *THE ART OF WAR* 76 (Samuel B. Griffith, trans., Oxford University Press, 1963) (“Treat the captives well, and care for them...This is called ‘winning a battle and becoming stronger’”).

<sup>41</sup> Thus, punishing them as if they had committed murder is itself wrong. In his otherwise hagiographic play about Henry V, Shakespeare allows a Welsh officer to criticize King Henry V for ordering the killing of prisoners of war. WILLIAM SHAKESPEARE, *THE LIFE OF HENRY THE FIFTH* act 4, sc. 7 (“Kill the poys and the luggage! 'tis expressly against the law of arms: 'tis as arrant a piece of knavery, mark you now, as can be offer't, in your conscience, now, is it not?”).

<sup>42</sup> Richard J. Galvin, *The Case for a Japanese Truth Commission Covering World War II Era Japanese War Crimes*, 11 *TUL. J. INT'L & COMP. L.* 59, 69 (2003) (describing the Imperial conviction that prisoners of war were essentially military supplies to be used as needed and observing that “Japanese administrative personnel in the Burma-Thailand camps further conveyed their philosophy through arm bands, which stated: ‘One captured in battle is to be beheaded and castrated at the will of the Emperor’”).

great development over the last two centuries has concerned this very issue.<sup>43</sup> Some people and nations sought to expand the definition of combatant immunity, and others sought to maintain a narrow definition.<sup>44</sup> Belligerency offenses, then, are those acts that would not be criminal if committed by those who possessed this immunity.<sup>45</sup> Otherwise conforming to the law of war, such acts would be the ordinary duties of an ordinary soldier. Only if a civilian committed them, someone who did not qualify as a soldier, would they become punishable.<sup>46</sup>

This article will use the term “grave breaches,” on the other hand, for those offenses that violate such fundamental tenets of international law that it does not matter if the individuals who committed them were soldiers or civilians.<sup>47</sup> The globalization and mechanization of warfare in the 20th century led to an increasing reliance on national behavior that shocked and frightened much of humanity.<sup>48</sup> World War II in particular saw massive attacks on

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<sup>43</sup> Because there had been centuries of custom in the development of the law of war, the earliest work at setting the rules down in conventions acknowledged, in the famous Maartens clause, that such customs provided a basis for the protection of both soldiers and civilians. Rona, *supra* note 13, at 714.

<sup>44</sup> A series of revolutions against colonial governance were largely responsible for the extraordinary transition of this area in three decades, from the carefully detailed list of qualifications for combatant status of 1949, to the much broader approach taken by the 1977 Protocol. See Geneva Convention Relative to the Treatment of Prisoners of War, art. 4, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 44, June 8, 1977, 1125 U.N.T.S. 3 (allowing combatants to maintain their status providing only that they carry arms openly while fighting, and while “visible to the adversary while he is engaged in a military deployment preceding the launching of an attack . . .”).

<sup>45</sup> See Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT’L L. J. 367, 436-38 (2004).

<sup>46</sup> See *id.*

<sup>47</sup> GARY D. SOLIS, *THE LAW OF ARMED CONFLICT: INTERNATIONAL HUMANITARIAN LAW IN WAR*, 309-10 (2010) (citing the post-World War II trial of the manufacturers of the poison gas used in Nazi death camps).

<sup>48</sup> See, e.g., ARCHER JONES, *THE ART OF WAR IN THE WESTERN WORLD* 579 (2001) (describing a primary facet of strategic bombing in World War II as “compelling the enemy to end the war through the terror of the raids”).

civilian populations, both within and outside the jurisdiction of occupying powers.<sup>49</sup>

The sense of “never again”<sup>50</sup> that led to the convening of the International Military Tribunal at Nuremberg<sup>51</sup> inspired the gathering in Geneva to rewrite and reform humanitarian law.<sup>52</sup> The four Conventions produced there, and now agreed to by every nation on the earth,<sup>53</sup> set forth a series of “grave breaches,” offenses so terrible that subscribing parties to the conventions have an affirmative duty to prevent and punish them.<sup>54</sup> The commission of these offenses may lead to criminal penalties regardless of the actor’s status.<sup>55</sup> Legitimate military service is simply not relevant in a determination of guilt: being a soldier will not prevent a conviction, nor will being a civilian.<sup>56</sup> Although the list of grave breaches in the Geneva Conventions seems quite limited, this article will use the

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<sup>49</sup> See THEODORE ROPP, *WAR IN THE MODERN WORLD* 380 (1959) (noting the hundreds of thousands killed by the atomic bombs dropped on Japan at the end of World War II, and quoting U.S. General H. H. Arnold as observing that “[d]estruction is too cheap, too easy”).

<sup>50</sup> The earliest use of this phrase as a reference to the horrors of World War II may have been in the documentary film “Mein Kampf,” originally “Den Blodiga Tiden,” by German filmmaker Erwin Leiser. *THE YALE BOOK OF QUOTATIONS* 451 (Fred. R. Shapiro, ed., 2006).

<sup>51</sup> Francis Biddle, *The Nurnberg Trial*, 33 *VA. L. REV.* 679 (1947).

<sup>52</sup> Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, 75 *U.N.T.S.* 31 [hereinafter G.C. (I)]; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of Aug. 12, 1949, 6 *U.S.T.* 3217 [hereinafter G.C. (II)]; Geneva Convention (III) Relative to the Treatment of Prisoners of War of Aug. 12, 1949, 6 *U.S.T.* 3316 [hereinafter G.C. (III)]; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of Aug. 12, 1949, 6 *U.S.T.* 3516 [hereinafter G.C. (IV)].

<sup>53</sup> The newest independent nation, South Sudan, ratified all four of the 1949 conventions on Jan. 25, 2013. *Treaties, States Parties and Commentaries: South Sudan*, *INT’L COMM. OF THE RED CROSS* (last visited May 22, 2016), [https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp\\_countrySelected=SS&nv=4](https://www.icrc.org/applic/ihl/ihl.nsf/vwTreatiesByCountrySelected.xsp?xp_countrySelected=SS&nv=4).

<sup>54</sup> See G.C. (I), *supra* note 52, at art. 50; G.C. (II), *supra* note 52, at art. 51; G.C. (III), *supra* note 52, at art. 130; G.C. (IV), *supra* note 52, at art. 147.

<sup>55</sup> G.C. (I), *supra* note 52, at art. 49.

<sup>56</sup> Thus, both civilians and military officers stood trial at the International Military Tribunal at Nuremberg. TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 89-90 (1992).

term for any offense for which the identity of the perpetrator is irrelevant, and hence for which combatant immunity is not a defense, as all of the non-belligerency offenses chargeable in military commissions can be analogized to one or more of Geneva's grave breaches.<sup>57</sup>

Unfortunately, the nature of the two types of crimes, and the fact that they were often tried in the same military tribunals, have led to mistakes about the way liability is treated between them. Because courts and commentators have not always recognized the difference between the two species of crimes at issue, there is sometimes confusion as to whether or not the law of armed conflict permits or forbids conviction for conspiring to commit a crime.<sup>58</sup>

For a variety of reasons, not least among them ease of prosecution, the current commissions have focused on belligerency offenses.<sup>59</sup> Unfortunately, the United States has attempted to establish liability for inchoate offenses in trials by military commission. Courts have generally rebuffed these efforts, which have resulted in Asculum defeats for two successive administrations. Had the prosecution won more of these battles, the future would be a much bleaker place for American interests as well as the international order.

## II. ALL OUR YESTERDAYS: A COLLECTION OF PROSECUTION VICTORIES AND DEFEATS

### A. *Seemingly Easy Wins*

During the initial phase of the military commissions, their irrelevance appeared to be their most consistent feature.<sup>60</sup> After the

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<sup>57</sup> G.C. (IV), *supra* note 52, at art. 147.

<sup>58</sup> *Compare* Al Bahlul v. United States, 792 F.3d 1, 10 (D.C. Cir. 2015) ("[t]he government concedes that conspiracy is not a violation of the international law of war.") *with id.* at 49 (Henderson, J. dissenting) ("the Congress has taken a preexisting international law-of-war offense—conspiracy to commit war crimes—and eliminated one element.").

<sup>59</sup> See *infra* Part II.

<sup>60</sup> Alexander, *supra* note 12, at 1119 ("Within two months of the executive order decreeing that suspected terrorists should be tried exclusively in military

initial presidential order of November 2001 announcing the use of military commissions,<sup>61</sup> scholars and commentators watched eagerly to see what procedures would develop and who would be subject to them.<sup>62</sup> The first set of potential procedures, issued in March 2002,<sup>63</sup> were met with a barrage of commentary, much of it critical.<sup>64</sup> Over time, both internal and external challenges to the commissions caused the rules to be issued, amended, reissued,<sup>65</sup> and ultimately made the subject of formal legislation.<sup>66</sup> By the time Congress stepped into the fray in December 2006, there had still not been a single trial on the merits during the more than five years of the military commission effort. Likely feeling uneasy about having

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commissions, three high-profile criminal prosecutions of alleged al Qaeda or Taliban members were brought in federal court.”).

<sup>61</sup> Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, 66 Fed. Reg. 57833 (Nov. 13, 2001).

<sup>62</sup> See, e.g., Michael J. Kelly, *Understanding September 11-An International Legal Perspective on the War in Afghanistan*, 35 CREIGHTON L. REV. 283, 283-93 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259-1310 (2002); Harold Hongju Koh, *The Spirit of the Laws*, 43 HARV. INT'L L. J. 23, 23-40 (2002); Ronald C. Smith, *The First Thing We Do, Let's Kill All the Terrorists*, 16 CRIM. JUST. 1, 1 (2002); Charles V. Pena, *Blowback: The Unintended Consequences of Military Tribunals*, 16 NOTRE DAME J. L. ETHICS & PUB. POL'Y 119, 119-32 (2002).

<sup>63</sup> Dep't of Def., Military Comm'n Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism (21 Mar. 2002).

<sup>64</sup> See, e.g., Gerard J. Clark, *Military Tribunals and the Separation of Powers*, 63 U. PITT. L. REV. 837, 837 (2002); Robert John Araujo, S.J., *A Judicial Response to Terrorism: the Status of Military Commissions under Domestic and International Law*, 11 TUL. J. INT'L & COMP. L. 117, 118 (2003); Kathleen M. McCarroll, *With Liberty and Justice for All: the November 13, 2001 Military Order Allowing the Use of Military Tribunals to Try Those Suspected of Aiding Terrorists Violates the Rights Guaranteed to Noncitizen United States Residents under the Constitution*, 80 U. DET. MERCY L. REV. 231, 232 (2003); Curtis A. Bradley and Jack L. Goldsmith, *Congressional Authorization And The War On Terrorism*, 118 HARV. L. REV. 2047, 2049 (2005); Srividhya Ragavan and Michael S. Mireles, Jr., *The Status of Detainees from the Iraq and Afghanistan Conflicts*, 2005 UTAH L. REV. 619, 619-76 (2005).

<sup>65</sup> David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 150-51 (2008) (recounting the issuance of various rules and orders over a two-year period).

<sup>66</sup> After the Supreme Court rejected the executive branch procedures in *Hamdan v. Rumsfeld*, Congress enacted the Military Commissions Act. See M.C.A., *supra* note 15; see also *infra* notes 111-14 and accompanying text.

created a system that did not seem to have any ability to function, the government was in sore need of an easy win.

### 1. The Easiest Case: The Story of David Hicks

The first conviction exemplified such a win. David Matthew Hicks,<sup>67</sup> born in Australia, had converted to Islam in 1999, traveled to Albania,<sup>68</sup> and later to Afghanistan, to study the Quran and train with Al Qaeda.<sup>69</sup> After courses in surveillance and urban warfare, he briefly went to Pakistan to visit a friend, where he saw televised coverage of Al Qaeda's attack on the United States.<sup>70</sup> Shortly after the September 11 attacks he sought to return to Afghanistan to join Al Qaeda there.<sup>71</sup> By mid-December he had been captured by the Northern Alliance while attempting to flee in a taxicab he had paid for by selling his weapon.<sup>72</sup>

Over the course of the next several years, the battles over the fate of David Hicks shifted from some of the most brutal military conflicts of the early 21st century to legally and politically charged conflicts on two continents.<sup>73</sup> In Australia, the government of Prime Minister John Howard had no interest in withdrawing Hicks from American custody, or preventing his trial by military commission.<sup>74</sup>

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<sup>67</sup> See *United States v. Hicks*, No. 0002 (Office of Military Comm'ns, Guantanamo Bay, Cuba, March 26 & 30, 2007) [hereinafter Hicks ROT].

<sup>68</sup> *Id.* at 200.

<sup>69</sup> *Id.* at 102.

<sup>70</sup> *Id.* at 108.

<sup>71</sup> *Id.* at 109.

<sup>72</sup> *Id.* at 116.

<sup>73</sup> Or three; because his mother was a citizen of the United Kingdom, attorneys for David Hicks fought to have him awarded British citizenship. Although the courts ordered the government to grant him citizenship, British Home Secretary John Reid did so only to revoke it hours later, using his power to find that Hicks posed "a threat to the national security of the United Kingdom." Vikram Dodd, *Reid Revoked Citizenship of Guantánamo Detainee*, THE GUARDIAN (Jan. 11, 2007).

<sup>74</sup> LEX LASRY, THE UNITED STATES V. DAVID MATTHEW HICKS: FINAL REPORT OF THE INDEPENDENT OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA, GUANTANAMO BAY, CUBA 15-16 (2007) (Austl.) (noting the government position that Hicks had committed no crime under Australian law, but desiring that he be tried nevertheless, and characterizing his return before a U.S. trial as causing his freedom on "a technicality or loophole").



In the United States, a variety of parties attempted, in the name of all the detainees, to end the possibility of trials by such commissions.<sup>75</sup>

By March 2007, at the very time that the defense was raising a series of pretrial motions in the military commission, David Hicks was apparently ready to give in.<sup>76</sup> He offered a pretrial agreement with the government, which the convening authority of the military commissions accepted.<sup>77</sup> Under the terms of the agreement, Hicks would plead guilty to a single specification of material support for terrorism<sup>78</sup> and, among other conditions, refrain from discussing matters with the press for at least one year.<sup>79</sup> In return, the convening authority would dismiss the other charges and limit his sentence to no more than seven years,<sup>80</sup> no more than nine months of which would be unsuspended.<sup>81</sup>

The military panel that heard the sentencing evidence and arguments returned with a sentence of seven years,<sup>82</sup> and the convening authority approved it, suspending all but the initial nine months.<sup>83</sup> Within six weeks, David Hicks flew back to Australia to serve his unsuspended sentence in a maximum-security facility.<sup>84</sup> By

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<sup>75</sup> See *Coalition of Clergy, Lawyers, and Professors v. Bush*, 310 F.3d 1153, 1153 (9th Cir. 2002) (holding that this group of citizens did not have standing to challenge the detention at Guantanamo Bay).

<sup>76</sup> LASRY, *supra* note 74, at 27 (including a motion to disqualify the military judge. After the guilty plea, the Australian observer characterized the motions hearing as "a contrived affair," and said it was designed "for public and media consumption").

<sup>77</sup> Hicks ROT, *supra* note 67, at 124. In military commissions, as in courts-martial, a pre-trial agreement is between the accused and the convening authority. In return for pleading guilty to some or all of the charged offenses, the accused receives the benefit of having the convening authority approve no more of the adjudged sentence than that set forth in the sentence limitation portion of the agreement. *See id.*

<sup>78</sup> *Id.* at 126.

<sup>79</sup> *Id.* at 129.

<sup>80</sup> *Id.* at 145.

<sup>81</sup> *Id.* at 146. As seven years of confinement was the maximum punishment for the specification to which Hicks pled guilty, the suspension was the core of the agreement. *See id.* at 147.

<sup>82</sup> Hicks ROT, *supra* note 67, at 245.

<sup>83</sup> *Id.* at 247 (suspension mandated by the convening authority during a post-trial action, May 1, 2007).

<sup>84</sup> Barbara McMahon, *Guantánamo Detainee Flies Back to Jail in Australia*, THE GUARDIAN (May 21, 2007).

the end of 2007, he had been released.<sup>85</sup> His release ended the formal confinement of the first person convicted by a U.S. military commission since the post-World War II period.<sup>86</sup>

## 2. The Slightly Less Easy Case of Omar Khadr

Omar Khadr's commission trial, like that of David Hicks, ultimately featured a guilty plea.<sup>87</sup> Unlike the Hicks proceedings, Khadr's involved a more sympathetic accused.<sup>88</sup> Hicks was characterized as a bad actor, a dispirited youth who had dropped out of his own society seeking to assist known terrorists in the accomplishment of their military objectives.<sup>89</sup> Omar Khadr, on the other hand, was merely a child when he first became involved with the U.S. War on Terror.<sup>90</sup> Although he was a Canadian citizen, born in Toronto, Khadr's parents moved the family back and forth between Canada and their home country of Pakistan during the first few years of his life.<sup>91</sup> By 1996, then nine-year-old Khadr and his family had moved to Afghanistan.<sup>92</sup> They were there during the U.S. fight against the Taliban, and a conflict between a U.S. military reconnaissance party and Khadr's father and uncle led to Khadr's wounding and capture in 2002.<sup>93</sup>

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<sup>85</sup> Barbara McMahon, *Australia Frees its Guantanamo Terror Inmate*, THE GUARDIAN (Dec. 28, 2007).

<sup>86</sup> William Colepaugh, an American citizen convicted by military tribunal at the end of the war, was paroled in 1960, PIERCE O'DONNELL, IN TIME OF WAR 285 (2005).

<sup>87</sup> United States v. Khadr, No. 0766, at 4673 (Office of Military Comm'ns, Guantanamo Bay, Cuba Aug. 9-12, 2007, Oct. 25-31, 2010) [hereinafter Khadr ROT].

<sup>88</sup> Frakt, *supra* note 35, at 752-53.

<sup>89</sup> Hicks ROT, *supra* note 67, at 204 (prosecution sentencing argument that Hicks "freely chose to walk away from those freedoms [election, religion, and association] to assist Al Qaeda).

<sup>90</sup> Khadr ROT, *supra* note 87, at 4838.

<sup>91</sup> United States v. Khadr, Stipulation of Fact, Prosecution Ex. 12, 13 (Oct. 2010) p. 3.

<sup>92</sup> *Id.* at 4 (noting that Khadr met "senior al Qaeda leaders" between the ages of 9 and 14).

<sup>93</sup> See United States v. Khadr, No. 13-005, at 7-8 (USMCR Stipulation of Fact, Guantanamo Bay, Cuba, Oct. 13, 2010). One interrogator at Bagram Air Base, who described himself as being known as "Monster," reported that Khadr's chest wound was "so large that one could fit a can of Copenhagen inside his chest," and that the

American forces took 16-year-old Khadr to Guantanamo Bay, where in a trial by military commission the prosecution noted that he had used weapons to attack and kill American soldiers,<sup>94</sup> even though he was not a member of a proper armed force.<sup>95</sup> Because he was a minor, much criticism focused on the United States' decision to treat him the same way that it treated adults. Most of the scholarly discussion of the Khadr case concerned this aspect of the prosecution. Many commentators found something unseemly, if not illegal, about the prosecution of a child soldier.<sup>96</sup> Less common, but perhaps more significant, was the critique that Khadr had been in a group of family members returning an attack by combatant forces.<sup>97</sup>

In October 2010, Khadr mimicked Hicks in pleading guilty in return for a limit on his sentence, which would be followed by a return to Canada.<sup>98</sup> The commission sentenced him to confinement for 40 years,<sup>99</sup> but the agreement limited the amount that the convening authority could approve to 8 years.<sup>100</sup> In September 2012,

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interrogators called Khadr "Buckshot Bob" because his face "looked like he'd been blasted with a shotgun," Defendant's Exhibit K at 1, *United States v. Khadr*, No. 13-005 (USCMCR 2008).

<sup>94</sup> Khadr ROT, *supra* note 87, at 4830 (prosecution opened its closing argument by calling Khadr "a terrorist and a murderer").

<sup>95</sup> Frakt, *supra* note 35, at 752 (calling Khadr "the clearest example of a detainee being prosecuted and convicted for direct participation in hostilities.>").

<sup>96</sup> See, e.g., Christopher L. Dore, *What to do with Omar Khadr? Putting a Child Soldier on Trial: Questions of International Law, Juvenile Justice, and Moral Culpability*, 41 J. MARSHALL L. REV. 1281, 1320 (2008) ("Omar cannot shoulder the blame of his actions alone. At fifteen, he was a product of his environment, and lacked the resources, the moral motivation, and the developmental capabilities to escape the circumstances that placed him on a battlefield in the Afghan countryside.>").

<sup>97</sup> Glazier, *supra* note 65, at 186 ("Khadr would have the legal status of a deer during hunting season – fair game for coalition forces to kill at will yet possessing no right to fight back.>").

<sup>98</sup> Frakt, *supra* note 13, at 51 (crediting the work by Khadr's lawyers litigating and lobbying in Canada for the ultimate acceptance by the U.S. of the plea deal).

<sup>99</sup> Khadr ROT, *supra* note 87, at 4890.

<sup>100</sup> See *United States v. Khadr*, No. 13-005, at 6 (USMCR Offer for Pre-trial Agreement, Guantanamo Bay, Cuba, Oct. 13, 2010).

he returned to Canada.<sup>101</sup> A Canadian court ordered his release on bail in May 2015.<sup>102</sup>

In the cases of both David Hicks and Omar Khadr, the guilty pleas by defendants seeking to end what must have seemed like possibly perpetual pre-trial confinement avoided troubling legal issues. Military practice, like its civilian counterpart, includes a robust doctrine of waiver. A guilty plea makes most legal errors unreviewable by appellate courts.<sup>103</sup> Unfortunately for the stability of the military commissions' prosecution effort, some accused were to be convicted only after a full trial. That would allow them to continue to litigate the legal bases of their guilt, bases on which the guilt of David Hicks and Omar Khadr was also founded. Courts would eventually turn even these simple tactical victories into strategic defeats.<sup>104</sup> Unbeknownst to those prosecutors, however, these were Asculum defeats, temporary setbacks preventing far worse future outcomes.

### B. *Seemingly Tougher Losses*

In light of their respective appellate proceedings, neither Hicks nor Khadr truly presented easy cases. At the time, however,

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<sup>101</sup> *Omar Khadr Returns to Canada*, CBC NEWS (Sept. 29, 2012, 6:43 AM), <http://www.cbc.ca/news/canada/omar-khadr-returns-to-canada-1.937754>.

<sup>102</sup> The Canadian government appealed the decision, and lost in July, 2015. *Khadr's Release on Bail 'Disappointing,' Says Public Safety Minister*, CBC NEWS (May 7, 2015, 9:59 AM), <http://www.cbc.ca/news/canada/edmonton/omar-khadr-s-release-on-bail-disappointing-says-public-safety-minister-1.3064945>.

<sup>103</sup> DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 14-3(B)(3) at 779 (8th ed. 2012) ("A plea of guilty will, as a general rule, waive all objections or issues that are not jurisdictional or deprive an accused of due process.").

<sup>104</sup> In 2015, the Court of Military Commission Review set aside the findings of guilt and sentence of David Hicks. *Hicks v. United States*, 94 F. Supp. 3d 1241, 1247-48 (C.M.C.R. 2015). The pretrial agreement had required Hicks to waive not only pretrial motions but also post-trial appellate review. Unfortunately for the United States, the Rule for Military Commissions provision at issue, 950c, required any such waiver to occur not less than ten days after the Convening Authority took action. Because Hicks's only waiver came during the trial, and thus before action, the Court set aside his waiver. *Id.* at 1243. Having done so, they quickly disposed of the case because of the intervening holding of the al Bahlul court that material support to terrorism in these commissions violated the ex post facto clause. *Id.* at 1247-48.

they seemed to be almost absurdly uncomplicated, as each involved a voluntary guilty plea by a citizen of an allied nation eager to return to his homeland. The other cases, some of which also involved guilty pleas, were significantly more complicated. Because the detainees in the next two prominent cases were convicted notwithstanding their pleas, they were able to litigate their legal objections to the military commissions. That litigation subsequently led to Asculum defeats for the prosecution.

### 1. *Hamdan*, the Supreme Court, and a Second Chance

The first of these, and the military commission case that has reached the highest level of judicial resolution, involved the former driver and bodyguard of Osama Bin Laden, Salim Hamdan.<sup>105</sup> After Hicks, Hamdan was the second accused to face trial by commission. Unlike Hicks, he pled not guilty, but was ultimately convicted of five specifications of material support for terrorism.<sup>106</sup> Before the conviction, however, he managed to change the face of American law.<sup>107</sup> While the initial set of charges, which were preferred under the rules established by the Department of Defense in 2002,<sup>108</sup> were pending, he sought the intervention of federal courts.<sup>109</sup> He argued that the military commissions had no jurisdiction over conspiracy under either U.S. statutory or international law, and that the procedures for the current commission violated both international and domestic law. Hamdan took his case as far as the U.S. Supreme Court,<sup>110</sup> where a majority agreed that congressional limitations and the Geneva Conventions of 1949 prevented his trial in the tribunal as it was then constituted.<sup>111</sup>

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<sup>105</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>106</sup> *Hamdan v. United States*, 696 F.3d 1238, 1244 (D.C. Cir. 2012).

<sup>107</sup> *Hamdan*, 548 U.S. at 678 (Thomas, J., dissenting) (arguing that the Court “openly flouts our well-established duty to respect the Executive’s judgment in matters of military operations and foreign affairs”).

<sup>108</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 154 (D.D.C. 2004).

<sup>109</sup> *Hamdan*, 548 U.S. at 567 (majority opinion).

<sup>110</sup> *Id.* at 557.

<sup>111</sup> *Id.* at 567. Four justices would also have held that conspiracy was not a crime under the international law of armed conflict. *Id.* at 610 (plurality opinion). Because the extant support for the military commissions was limited to those

Within six months of that decision, Congress responded by passing the Military Commissions Act (“MCA”),<sup>112</sup> which addressed the defects noted by the Court.<sup>113</sup> New charges were preferred under the new law,<sup>114</sup> and it was these that ultimately led to Hamdan’s convictions.<sup>115</sup> Of great interest at the time was the perceived leniency of the sentence imposed by the commission: the decision to grant credit for time served before trial meant that Hamdan would be eligible for release before President Bush even left office.<sup>116</sup> And although there remained the possibility that the United States would continue to detain Hamdan as a combatant after he served his punishment, the United States ultimately transferred Hamdan to Yemen in November 2008.<sup>117</sup>

After his release, however, Hamdan did not stop fighting. He continued to seek post-conviction relief,<sup>118</sup> arguing that even the new charges were unsound as a matter of domestic and international

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offenses triable by statute or by the law of war, and no statute then authorized trials by military commissions for conspiracy, these justices would have held conspiracy to be beyond the reach of military commissions. Two other justices joined Justice Thomas’ dissent on this point. *Id.* at 697-98. Justice Kennedy would not have decided this question. *Id.* at 655 (noting that “Congress may choose to provide further guidance in this area”). Chief Justice Roberts, having been a member of the Court of Appeals for the D.C. Circuit that decided the case below, did not participate.

<sup>112</sup> 10 U.S.C. §§ 948a-950w (2006).

<sup>113</sup> Responding, perhaps, to Justice Kennedy, the Military Commissions Act provided for the trial of conspiracy as a criminal offense. 10 U.S.C. § 950 t(29).

<sup>114</sup> Hamdan v. United States, 696 F.3d 1238, 1243-44 (D.C. Cir. 2012).

<sup>115</sup> *Id.* at 1240-41 (stating that he was sentenced to sixty-six months of confinement, with credit for time served).

<sup>116</sup> Military Judge Ruling on Motion for Reconsideration and Re-Sentencing, P-009 (Oct. 29, 2008). It seems to have been the decision to grant pretrial confinement credit that most troubled the government, who appealed this point and lost. *Id.*

<sup>117</sup> Robert F. Worth, *Bin Laden Driver to Be Sent to Yemen*, N.Y. TIMES (Nov. 25, 2008). According to Prof. Charles Schmitz, an expert in Yemen who assisted his legal team, reports that Hamdan is still living in Yemen as of the time of this writing, “struggling like the rest of Yemen to make ends meet during the war.” E-mail from Charles Schmitz, Professor, Towson University, to author (Aug. 19, 2015) (on file with the author).

<sup>118</sup> *Hamdan*, 696 F.3d at 1241.

law.<sup>119</sup> Using the appellate right granted by the MCA,<sup>120</sup> he asked the D.C. Circuit Court to overturn of his conviction.<sup>121</sup> That Court agreed with him that the offenses with which he had been charged did not, in fact, violate the law governing armed conflict.<sup>122</sup>

The D.C. Circuit Court, in Hamdan's second trip through the federal courts ("Hamdan II"), concluded that Congress had not intended to authorize punishment by military commissions for acts that preceded the enactment of the MCA, if those acts were not already criminalized under the international law of war.<sup>123</sup> Determining that material support for terrorism was in fact a new offense, the Court reversed Hamdan's conviction and sentence.<sup>124</sup> As a legal matter, the most celebrated military commission victory quietly became another defeat for the government.

## 2. The Many Cases of al Bahlul

Ironically, Hamdan's victory may ultimately be limited to him personally. The most recent round of battles involved Ali Hamza Ahmad Suliman al Bahlul.<sup>125</sup> Like Hamdan, he had been close personally to Osama bin Laden. Unlike Hamdan, who was primarily a driver,<sup>126</sup> Bahlul was a more senior official in Al Qaeda, serving as a media producer for the organization.<sup>127</sup> After the destroyer USS *Cole* was attacked in 2000, Bahlul prepared a video based on the attack for recruiting other potential jihadists for Al

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<sup>119</sup> *Id.* at 1244 (explaining that the military commissions had acquitted Hamdan of the sole specification of conspiracy, but convicted him of five specifications of the charge of material support for terrorism).

<sup>120</sup> 10 U.S.C. § 950g (2012). The statute grants to that court "exclusive jurisdiction to determine the validity of a final judgment rendered by a military commission (as approved by the convening authority and, where applicable, as affirmed or set aside as incorrect in law by the United States Court of Military Commission Review)." *Id.*

<sup>121</sup> *Hamdan*, 696 F.3d at 1241.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 1247 (stating that "[c]ongress believed that the Act codified no new crimes and thus posed no ex post facto problem").

<sup>124</sup> *Id.* at 1250 (explaining that "the issue here is whether material support for terrorism is an international-law war crime. The answer is no.").

<sup>125</sup> See *Al Bahlul v. United States*, 792 F.3d 1, 3 (D.C. Cir. 2015).

<sup>126</sup> *Hamdan*, 696 F.3d at 1242.

<sup>127</sup> *Al Bahlul v. United States*, 767 F.3d 1, 5 (D.C. Cir. 2014).

Qaeda.<sup>128</sup> Bin Laden was sufficiently impressed that Bahlul became the primary public relations officer for the organization, and he prepared the “martyrs’ wills” for two of the September 11 hijackers, Mohammed Atta and Ziad al Jarrah.<sup>129</sup>

By December 2001, Pakistani officials had captured Bahlul and turned him over to the United States.<sup>130</sup> In 2004, the United States charged him in a military commission with conspiracy to commit war crimes,<sup>131</sup> but the trial was delayed pending the resolution of Hamdan’s case through the federal court system.<sup>132</sup>

After the *Hamdan* decision in the Supreme Court, and subsequent passage of the MCA, the government preferred charges corresponding to some of the offenses in the statute: conspiracy and solicitation to commit war crimes, and the provision of material support to a terrorist organization.<sup>133</sup>

Significantly, the conspiracy and solicitation offenses included specifications that fit both categories of law of war violations. On the one hand, the charges included grave breaches such as murder of protected persons.<sup>134</sup> On the other hand, the charge sheet made reference to belligerent acts: Bahlul’s conspiracy to commit “murder in violation of the law of war” and “destruction

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<sup>128</sup> *Id.* at 5-6.

<sup>129</sup> *Id.* at 6.

<sup>130</sup> *Id.*

<sup>131</sup> In the first set of proceedings, under the presidential order, al Bahlul was charged only with conspiracy. See Review of Charge and Recommendation at 4-7, United States v. Al Bahlul (June 28, 2004). That charge, though, included specific references to grave breaches such as “attacking civilians” and “attacking civilian objects,” as well as belligerency offenses such as “murder by an unprivileged belligerent” and “destruction of property by an unprivileged belligerent.” *Id.* at 5-6.

<sup>132</sup> *Al Bahlul*, 767 F.3d at 6.

<sup>133</sup> *Id.* at 6-7.

<sup>134</sup> Appellate Ex. 059 at 1-2, United States v. Al Bahlul [hereinafter *Flyer*]. A “flyer” is the document provided by prosecutors to military panels in courts-martial and commission proceedings that provides the final form of the charges against the accused without the other information contained on the charge sheet. See Danielle Tarin, *Rules and Law Governing Flyers, Cleansed Charge Sheets, and Flimsies*, ARMY LAW., June 2013 at 25, 27.



of property in violation of the law of war.”<sup>135</sup> Although the title of these offenses suggests that they may not be mere belligerency offenses, the text of the statute makes clear that they are.<sup>136</sup>

Bahlul pleaded not guilty, asserting that the military commission had no authority to try him.<sup>137</sup> He nonetheless freely admitted to the factual basis of the charges.<sup>138</sup> The commission, unsurprisingly, convicted him of all three charges and sentenced him to confinement for life.<sup>139</sup> For the government, the story of Bahlul seemed to have ended well. But the story had only begun.

Only Hamdan has had a more complex judicial journey than al Bahlul.<sup>140</sup> As noted, a panel of the D.C. Circuit had already decided in Hamdan II that material support for terrorism was not a crime under international law, and hence was not triable for events that occurred before the passage of the MCA.<sup>141</sup> Because Bahlul's conviction included two other offenses, this decision did not end his story as it had Hamdan's. A panel of the D.C. Circuit first determined that all three of the offenses fell because of the logic of the Hamdan II opinion, as the existence of none of the three predated the MCA.<sup>142</sup>

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<sup>135</sup> Flyer, *supra* note 134, at 1.

<sup>136</sup> For example, the statute defines the former as “[a]ny person subject to this chapter who intentionally kills one or more persons, *including privileged belligerents*, in violation of the law of war . . .” 10 U.S.C. § 950t (15) (2009) (emphasis added). The only reason for the inclusion of the italicized language is to ensure that the military commissions will consider the attack on a legitimate target, when done by an unprivileged person, to be a crime.

<sup>137</sup> *Al Bahlul*, 767 F.3d at 7.

<sup>138</sup> *Id.* His trial was never a model of a professional justice system: he attempted to fire his lawyers and proceed pro se, but then absented himself from the proceedings on several occasions by refusing to leave his cell; he made neither opening statement nor closing argument, never objected to any prosecution evidence, and presented no defense. *Id.*

<sup>139</sup> *Id.* at 7-8.

<sup>140</sup> At the time of writing, al Bahlul's legal journey is not yet complete.

<sup>141</sup> *Al Bahlul*, 767 F.3d at 8.

<sup>142</sup> *Id.*

The full court then took up the case en banc.<sup>143</sup> It agreed that neither solicitation<sup>144</sup> nor material support were a part of the international law of armed conflict, although it expressly purported to overturn Hamdan II in doing so.<sup>145</sup> The Court found that Congress had, in fact, expressly intended to criminalize conduct that occurred before passage of the MCA, but in doing so had violated the Ex Post Facto Clause. It found that by importing material support for terrorism and solicitation into the jurisdiction of the military commissions, Congress had violated that clause of the Constitution because these offenses had historically not been “triable by military commissions” under the law of armed conflict. Hence, those two offenses only became triable upon the enactment of the MCA. It was thus plain error to convict Bahlul of offenses that only became offenses when Congress acted in 2006, five years after the United States took him into custody.<sup>146</sup>

The full court disagreed about conspiracy, however, finding that the conspiracy charge avoided an Ex Post Facto problem because other U.S. criminal laws already prohibited the conduct at issue.<sup>147</sup> It also concluded that conspiracy was triable as an offense under the law of war, or at least that it was not plain error that it was not triable.<sup>148</sup> This result thus disposed of two of the charges against Bahlul, but in upholding the other, it did so against only one challenge, the argument that its promulgation in the MCA was an Ex Post Facto violation. The *en banc* court then remanded the case to

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<sup>143</sup> *Id.*

<sup>144</sup> *Al Bahlul*, 767 F.3d at 30.

<sup>145</sup> *Id.* at 29.

<sup>146</sup> *Id.* at 31.

<sup>147</sup> *Id.* at 18 (citing 18 U.S.C. §2332b (2015); the court noted that military commissions cannot try violations of this statute, but held that the *Ex Post Facto* Clause does not limit procedural changes like forum).

<sup>148</sup> *Id.* at 10 (The court used the “plain error” standard because it found al Bahlul to have waived any objection based on the *Ex Post Facto* Clause. Although he objected to the characterization of his acts as crimes, the Court of Appeals found that this was not a question of law but “because they were inspired by religious fervor.” This was despite the fact that the pro se litigant had objected to “the meaningless American laws” as an attempt to rewrite divine laws.).

the original panel to consider Bahlul's other challenges against the surviving conspiracy charge.<sup>149</sup>

The other shoe dropped for the government during that remand. A divided panel held that conspiracy was also a flawed charge.<sup>150</sup> The majority held that there was insufficient historical practice supporting the trial of offenses such as conspiracy before military commissions.<sup>151</sup> Lacking evidence of such practice, Congress was not free to assign the judicial power of this trial to a purely executive organization such as a military commission.<sup>152</sup> The court struck down the sole remaining charge, and with that, Bahlul's conviction by military commission went the way of those of David Hicks and Salim Hamdan.

### III. THE ENEMY WITHIN: WHY THE PROSECUTION KEEPS LOSING

A somewhat surprising theme running throughout these cases is that many of these defeats have been handed to the military commission prosecutors by federal appellate judges.<sup>153</sup> Perhaps emboldened by the Supreme Court's pronouncements in *Hamdan*<sup>154</sup>

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<sup>149</sup> *Al Bahlul*, 767 F.3d at 31 (he argued that Congress had exceeded its authority by defining crimes that were not recognized by the law of armed conflict, that the MCA violated Article III of the Constitution by allowing these same offenses to be tried, that his conviction violated the First Amendment, and that subjecting only aliens to the jurisdiction of the military commissions violated the Equal Protection clause.).

<sup>150</sup> *Al-Bahlul v. United States*, 792 F.3d 1, 37 (D.C. Cir. 2015).

<sup>151</sup> *Id.* at 36.

<sup>152</sup> *Id.* (Because such an assignment of judicial power to the executive branch violated the structural requirements of Article III, the court concluded, it was not subject to waiver, which had led the en banc court to reject the challenge to the conspiracy charge. Here the court applied a de novo review, which caused one of the judges who joined the opinion rejecting the Ex Post Facto challenge in 2014 to also join the opinion vacating the conspiracy conviction in 2015. (Tatel, J., concurring)).

<sup>153</sup> But federal appellate judges have not handed all of the defeats out. Earlier in the proceedings it was *military* judges who were finding that the procedures did not comport with the law. See *United States v. Khadr*, CMCR 07-001 (2007) (reversing decision by the military commission judge dismissing all charges *sua sponte* based on lack of personal jurisdiction, because the Combatant Status Review Tribunal had only found Khadr to be an alien enemy combatant, but not an alien unlawful enemy combatant).

<sup>154</sup> See generally *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

and *Boumediene*,<sup>155</sup> a series of panels have been fairly consistent in rejecting the government's view of the law of armed conflict.<sup>156</sup> This is unusual, both because courts tend to be more deferential to the executive in areas of military and international operations,<sup>157</sup> and because a large number of well-respected commentators and scholars have advanced the government's position.<sup>158</sup> These defeats clustered around what seem to be two separate legal arguments, one over material support to terrorist organizations and the other over conspiracy as an offense in international law. These two strands are actually part of the divide between belligerency offenses and grave breaches, and that the unwillingness of the courts to countenance the stubbornly advanced government view in this area provided a series of defeats that ultimately rebounded to the benefit of the United States.

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<sup>155</sup> *Boumediene v. Bush*, 553 U.S. 723 (2008) (recognizing a right of habeas corpus for detainees and holding that the Military Commissions Act was an unconstitutional suspension of that right).

<sup>156</sup> Frakt, *supra* note 35, at 762.

<sup>157</sup> See, e.g., *Munaf v. Geren*, 553 U.S. 674, 700 (2008) ("it is for the political branches, not the Judiciary, to assess practices in foreign countries and to determine national policy in light of those assessments"); *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953) ("Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters").

<sup>158</sup> The latest round of litigation in the case of al Bahlul saw the filing of amici briefs supporting the government by, inter alia, Professors Peter Margulies, Geoff Corn, Chris Jenks, and Eric Talbot Jensen, as well as former military judge advocates from the Army, Navy, and Air Force: retired Major Generals John D. Altenburg, Michael J. Marchand, Michael J. Nardotti, Jr., Rear Admiral Steven B. Kantrowitz, and Brigadier General Thomas L. Hemingway. Brief of Amici Curiae Former Government Officials, Former Military Lawyers, and Scholars of National Security Law in Support of Respondent as Amici Curiae Supporting Respondents, *Al Bahlul v. United States*, 412 U.S. App. D.C. 372 (No. 11-1324); Brief of John D. Altenburg, Maj. Gen., U.S. Army (Ret.), Steven B. Kantrowitz, Rear Adm., JAGC, U.S. Navy (Ret.), Michael J. Marchand, Maj. Gen., U.S. Army (Ret.), Michael J. Nardotti, Jr., Maj. Gen., U.S. Army (Ret.), Thomas L. Hemingway, Brig. Gen., U.S. Air Force (Ret.), Washington Legal Foundation, and Allied Educational Foundation as Amici Curiae in Support of Respondent, Supporting Affirmance as Amici Curiae Supporting Respondents, *Al Bahlul v. United States*, 412 U.S. App. D.C. 372 (No. 11-1324).

A. *The Rejection of Material Support*

As hinted at in the handful of cases that travelled the pipeline through the military commissions, the battle over whether a charge of material support is triable by such a commission was a significant reason that the effort proceeded at such a glacial pace. This offense, codified in 18 U.S.C. 2339A,<sup>159</sup> allows prosecutors to incapacitate participants in potential terrorist schemes of foreign organizations.<sup>160</sup> Although it has a solid foundation in the American criminal law context,<sup>161</sup> its inclusion in the initial list of punishable offenses published by the Secretary of Defense was odd. Certainly military commissions had never used a charge like material support for terrorism before. The inclusion of a wholly new crime, one based so completely on U.S. domestic law, seemed to violate the notion that military commissions existed to try offenses against the law of armed conflict.<sup>162</sup> Many commentators were puzzled, or even outraged, and the legal community never suggested that it welcomed this development.<sup>163</sup>

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<sup>159</sup> 18 U.S.C. 2339A (2009). The parallel offense was made punishable by the Military Commissions Act, 10 U.S.C. §950t (25) (2009). The companion civilian offenses, including the frequently used Providing Material Support or Resources to Designated Foreign Terrorist Organizations, were not included in the MCA. 18 U.S.C. § 2339B (2015).

<sup>160</sup> See Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. ON LEGIS. 1, 13-15 (2005) (discussing the passage of the initial version of the law after the first attack on the World Trade Center, and its expansion to criminalize more activities by supporters of terrorist organizations).

<sup>161</sup> See, e.g., *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7 (2010) (upholding the companion §2339B against a challenge based on the First Amendment).

<sup>162</sup> Margulies, *supra* note 13, at 67-68 (rejecting the view advanced by the government in the al Bahlul appeals that a separate "domestic" law of armed conflict allowed the U.S. to import into military commissions domestic offenses not recognized in the international law of armed conflict).

<sup>163</sup> See, e.g., Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterrorism Operations*, 101 AM. J. INT'L L. 56, 56-57 (2007); David J. R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 S. ILL. U. L.J. 551, 596-97 (2013); Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681 (2014); David Weissbrodt and Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 400 (2008).

Material support as a charge was novel, but it was also easy to understand, and perhaps even easier to plead to.<sup>164</sup> Perhaps because it required no specific malevolent act by the accused,<sup>165</sup> it was the charge selected by Hicks and Khadr as the basis for the guilty pleas that would ultimately return them to their home countries.<sup>166</sup> The military commissions, like the courts-martial system, require the judge to inquire into the providence, the voluntariness and factual basis, of a guilty plea.<sup>167</sup>

Additionally, because the key players drafting the rules for the military commissions were military lawyers, they transferred to the military commissions the court-martial practice of allowing<sup>168</sup> the accused to agree with the prosecution on a confessional stipulation of fact.<sup>169</sup> The stipulation and the providence inquiry by the judge

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Even active military officers were less than supportive of the decision to include this offense. See Maj. Dana M. Hollywood, *Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Material Support for Terrorism*, 36 HASTINGS INT'L & COMP. L. REV. 1, 3 (2013).

<sup>164</sup> For an offense before a law of war tribunal, the elements for this offense are as anydyne as can be. Although one variant on the offense of providing material support for terrorism requires that the accused knew or intended that the provided resources would be used for carrying out an act of terrorism, the other requires the government to show only that the accused knew that the organization to which he provided resources had engaged in terrorism at some time. MANUAL FOR MILITARY COMMISSIONS, pt. IV ¶ 20 (2012) [hereinafter MMC].

<sup>165</sup> Holder v. Humanitarian Law Project, 561 U.S. 1, 16-17 (2010).

<sup>166</sup> See *Omar Khadr Returns to Canada*, CBC NEWS (Sept. 29, 2012, 6:43 AM), <http://www.cbc.ca/news/canada/omar-khadr-returns-to-canada-1.937754>; Barbara McMahon, *Guantanamo Detainee Flies Back to Jail in Australia*, THE GUARDIAN (May 21, 2007, 6:57 PM), <http://www.theguardian.com/world/2007/may/21/australia.guantanamo>.

<sup>167</sup> Although the very extensive inquiry into a court-martial guilty plea before the judge will accept it mandated by *United States v. Care*, 40 C.M.R. 247 (C.M.A. 1969), it is labeled "impracticable" by the governing regulation. See MMC, *supra* note 164, at pt. II, 910(e). Compare the requirements set forth by that rule with the corresponding rule for courts-martial, MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 910 (2012) [hereinafter MCM], and its implementation in the fifteen-page script for courts-martial, U.S. Dep't of Army, Pam. 27-9, MILITARY JUDGES' BENCHBOOK ¶¶ 2-2-1 to 2-2-8 (10 Sep. 2014) [hereinafter DA Pam. 27-9].

<sup>168</sup> In practice, "allowing" could be read as "requiring," as agreement to submit such a stipulation is generally a non-negotiable position of the United States in the pretrial negotiations. See, e.g., Hicks ROT, *supra* note 67, at 124-26.

<sup>169</sup> MCM, *supra* note 167, pt. II, 705(b)(1).

might have been very difficult for an accused if he was asked to confess that he had committed genocide or some other grave breach of international law. It was undoubtedly much easier to admit, as Hicks did, that he “guarded a Taliban tank” and that “every day received food, drink, and updates on what was happening from the fat Al Qaeda leader in charge who was on a bicycle.”<sup>170</sup> Khadr found it possible to admit that he was not a member of a militia or other armed force, that he trained to support Al Qaeda, that he planted Improvised Explosive Devices, and that he participated in a firefight in which he killed an American soldier and was himself wounded.<sup>171</sup> Such stipulations and pleas could later be explained in polite society, and would not necessarily brand the confessant as a bad person, in contrast to someone who signed a stipulation confessing to a grave breach of international humanitarian law.

The appellate process changed the nature of all of that precedent. Hamdan’s conviction was solely for material support. Thus, his appellate challenge concerned only the legitimacy of material support for terrorism as a charge in military commissions. Because the D.C. Circuit held that it was not, the foundation stone for this entire run of prosecutions was jeopardized.<sup>172</sup> That decision was overturned by the *en banc* D.C. Circuit, but only by substituting an even more firm prohibition on the use of material support charges in military commissions.<sup>173</sup> As the battle shifted to an argument over conspiracy, the United States may have allowed the exclusion of material support from military commissions.<sup>174</sup>

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<sup>170</sup> Stipulation of Fact at 5, *United States v. Hicks* (Mar. 29, 2007). Hicks also admitted to receiving training and spending two hours on the frontline near Konduz, Afghanistan, before it collapsed in the face of an armored assault by the Northern Alliance. Nothing in the stipulation even hints at responsibility by Hicks for any acts that this article would label grave breaches. *Id.*

<sup>171</sup> *United States v. Khadr*, Stipulation of Fact, Prosecution Ex. 12, 13 (Oct. 2010) p. 1, 5, 8.

<sup>172</sup> *Hamdan v. United States*, 696 F.3d 1238, 1241 (D.C. Cir. 2012).

<sup>173</sup> *Al Bahlul v. United States*, 767 F.3d 1, 29 (D.C. Cir. 2014).

<sup>174</sup> *See, e.g.*, Hicks, CMCR 13-004 at 2 (the government’s position in the most recent Hicks litigation that if it lost the argument that Hicks had waived his right to appellate review, the Court of Military Commission Review “should decline to affirm the findings and sentence.”) *But c.f.* Corn and Jenks, *supra* note 13, at 41-42

## B. The Government's Odd Choice Regarding Conspiracy

### 1. The Recent Confusion about Conspiracy

When Hamdan challenged his ongoing military commissions,<sup>175</sup> the nature of his liability for the crimes charged was among the objections he raised.<sup>176</sup> When his case reached the Supreme Court,<sup>177</sup> the opinion's conclusion that the system procedurally violated the military commission statutes that Congress had long before passed<sup>178</sup> meant that the Court did not need to resolve the inchoate crimes issue.<sup>179</sup> Nonetheless, a four justice plurality (of eight, as Chief Justice Roberts had sat on the D.C. Circuit panel that had heard the case below)<sup>180</sup> would have held that conspiracy was not a crime under the law of armed conflict—and conspiracy was a much more defensible charge than material support.<sup>181</sup> The *Hamdan* opinion did not ultimately address the availability of material support, but because the opinion necessitated Congressional action, it did not matter. Congress acted that fall, and by December 2006, President Bush was able to sign the MCA.<sup>182</sup> This act not only resolved the objections of the *Hamdan* majority, it also attempted to insulate both detention and military commissions from future judicial review through habeas corpus,<sup>183</sup> and specifically

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(acknowledging the limitations imposed upon material support charges in these cases by the Ex Post Facto clause but arguing that "when Congress legislates prospectively in this exigent area, deference and historic practice should usually trump the Article III concerns").

<sup>175</sup> *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 156 (D.D.C. 2004).

<sup>176</sup> *Id.*

<sup>177</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

<sup>178</sup> References to military commissions had been made in Article 15 of the 1920 Articles of War, and were carried forward into its successor, the 1951 Uniform Code of Military Justice. See 10 U.S.C. § 821 (2006).

<sup>179</sup> *Hamdan*, 548 U.S. at 613.

<sup>180</sup> *Hamdan v. Rumsfeld*, 415 F.3d 33 (D.C. Cir. 2005).

<sup>181</sup> *Hamdan*, 548 U.S. at 610.

<sup>182</sup> M.C.A., *supra* note 15.

<sup>183</sup> Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT'L L. 322, 330 (2007). This was the provision struck down in *Boumediene v. Bush*, 553 U.S. 723 (2008).



included both conspiracy<sup>184</sup> and material support for terrorist organizations<sup>185</sup> as punishable offenses.

While the rejection by federal judges of material support for terrorism as an appropriate feature of law of war military commissions has been swift and consistent, conspiracy has been more complicated. Two historical examples have exacerbated the confusion: the Lincoln and Nuremberg trials. At each of these tribunals, conspiracy was a featured offense, and each was, at least arguably, a law of war military commission.

The Lincoln trials were built entirely on the charge of conspiracy.<sup>186</sup> Despite criticism for other reasons, they remain a precedent of outsized influence. Notably, in the dispute over the nature of conspiracy, judges of the D.C. Circuit sparred over their meaning. In the Bahlul case's 2014 trek to *en banc* review,<sup>187</sup> Judge Henderson, for the Court, observed that the Lincoln conspirator trial occurred well before the passage of the statute that allowed military commissions to try cases arising under the law of war.<sup>188</sup> This demonstrated that Congress "was no doubt familiar with at least one high-profile example of a conspiracy charge tried by a military commission."<sup>189</sup> Thus the Court concluded that convicting Bahlul of conspiracy did not violate the Ex Post Facto Clause.<sup>190</sup> Judge Kavanaugh agreed: just as Dr. Samuel Mudd<sup>191</sup> could be convicted of

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<sup>184</sup> 10 U.S.C. § 950t (29) (2006).

<sup>185</sup> 10 U.S.C. § 950t (25) (2006).

<sup>186</sup> *Al Bahlul v. United States*, 767 F.3d 1, 24 (D.C. Cir. 2014).

<sup>187</sup> A panel of the circuit having vacated the convictions by the military commission based on the circuit's holding in Hamdan's 2012 case that such convictions violated the Ex Post Facto clause. *Al Bahlul*, 767 F.3d at 8.

<sup>188</sup> 10 U.S.C. § 821 (2006).

<sup>189</sup> *Al Bahlul*, 767 F.3d at 25.

<sup>190</sup> *Id.* at 18. Because the Court found that he had forfeited this challenge to the commissions, it only applied a plain error standard in concluding that it was not plain that conspiracy was not triable by a law of war military commission. *Id.*

<sup>191</sup> See *Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001) (a challenge by Dr. Mudd's descendants seeking a correction of the military record that would require the Secretary of the Army to clear the doctor's record of conviction. The Court found that Dr. Mudd was triable as one who was an accessory after the fact by aiding and abetting John Wilkes Booth); *aff'd* on other grounds, *Mudd v. White*, 309 F.3d 819 (D.C. Cir. 2002).

conspiracy to commit a war crime, so too could Bahlul.<sup>192</sup> Dissenting on this point, Judge Rogers responded that the Lincoln trials added nothing to the government's position; the conspirators were not charged with *inchoate* conspiracy, as the single charge noted that they had not only conspired but also completed the "offense of maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln."<sup>193</sup>

The following year, the panel weighing Bahlul's separation of power challenge against the surviving conspiracy charge again found need to consult the Lincoln precedent.<sup>194</sup> This time, the Court split over the question whether that tribunal was properly considered a pure law of war commission, or one that also had a martial law source of jurisdiction, which would allow it to consider purely domestic crimes, such as conspiracy. With a century and a half of hindsight, the court might also have noted that there is arguably a limited amount of precedential value that should be drawn from a hastily convened trial designed to ensure the conviction of those believed responsible for the loss of the beloved leader who had just suppressed an insurrection threatening the very existence of the nation. As Justice Jackson noted in a similarly tense time, albeit in a wildly different context, military actions do not always "conform to conventional tests of constitutionality."<sup>195</sup>

## 2. The Lincoln Trial's Use of Conspiracy

Judge Rogers is correct that the trial of the Lincoln conspirators can only be fairly read to allow conspiracy as a form of liability for an offense that is completed.<sup>196</sup> What is more, the

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<sup>192</sup> *Al Bahlul*, 767 F.3d at 69 (Kavanaugh, J., concurring in part and dissenting in part) ("The Lincoln conspirators were expressly charged with and convicted of *conspiracy*") (emphasis in original).

<sup>193</sup> *Id.* at 44 (Rogers, J., concurring in part and dissenting in part).

<sup>194</sup> See *supra* note 33 and accompanying text.

<sup>195</sup> *Korematsu v. United States*, 323 U.S. 214, 244 (1944) (Jackson, J., dissenting). At issue in that instance was the exclusion order during World War II that punished American citizens of Japanese descent that formed the basis of the conviction of Toyosaburo (Fred) Korematsu.

<sup>196</sup> *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (rejecting Dr. Mudd's habeas petition after presuming guilt of the "charge on which they were convicted -- of a

conspiracy charged was not only of a completed offense, but an offense that would today be characterized as a grave breach. The killing of the president, in a civilian theater behind the lines of battle and after the surrender of virtually every major force in the field,<sup>197</sup> was a violation of the rules of war.<sup>198</sup> The Lincoln conspiracy hearings stand out for their unique nature, but do not establish a broader principle that inchoate conspiracy, especially as to belligerency offenses, is triable by military commissions. This is especially so in the absence of evidence of trials by military commission of any member of the Confederate government for recruiting, supporting, or deploying any of the irregular forces who were themselves potentially subject to trial.

### 3. The Limitations of Conspiracy at Nuremburg

The International Military Tribunal at Nuremberg for the Trial of Major War Criminals provides the clearest view of the reaction of the global community to the use of conspiracy for law of armed conflict violations. During the planning for the tribunal, the American lawyers included conspiracy as an offense.<sup>199</sup> The hope

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conspiracy to commit the military crime *which one of their number did commit*") (emphasis added).

<sup>197</sup> HERMAN HATTAWAY & ARCHER JONES, *HOW THE NORTH WON: A MILITARY HISTORY OF THE CIVIL WAR* 676 (1983). Although Joseph Johnston's force vainly attempting to slow Sherman's trek through North Carolina did not surrender until two days after the assassination, the collapsing Confederate government had already ordered that they do so. *Id.*

<sup>198</sup> Attorney General Speed, in his opinion on the propriety of a military tribunal for the conspirators, does not suggest otherwise. Although it is true that he expounded at length on the nature of "secret participants in the hostilities," what this article has been characterizing as those who commit belligerency offenses, it was only to show that such persons were triable even when the civil courts were open. For the offense, he turned to Vattel, who he quoted for the proposition that assassination was "an offense against the laws of war, and a great crime." "Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President," 11 Op. Att'y Gen. 297 (1865). Of course, as the title suggests, and Judge Henderson conceded, the Speed opinion was written after the fact, and might be read as rationalization of actions already taken. *Al Bahlul v. United States*, 767 F.3d 1, 25 (D.C. Cir. 2014).

<sup>199</sup> Elizabeth Borgwardt, *Re-Examining Nuremberg as a New Deal Institution: Politics, Culture and the Limits of Law in Generating Human Rights Norms*, 23 BERKELEY J. INT'L L. 401, 433 (2005).

and expectation was that the first group of trials could establish the liability, as conspirators, of both the major leaders of Germany and of several organizations. Subsequent trials of rank-and-file members could then follow, with the prosecution's responsibilities limited to showing membership by the accused in one of these organizations that had been pronounced a criminal conspiracy.<sup>200</sup>

As several onlookers attested, the inclusion of conspiracy caused consternation among the allies. The French in particular were disturbed by the possible extension of criminal liability through a doctrine that threatened to make small players in the system liable for the deeds of the great.<sup>201</sup> Nonetheless, the trial proceeded with conspiracy as an independent count alongside those for crimes against peace, war crimes, and crimes against humanity.<sup>202</sup>

When the verdict was read, it appeared that the judges had severely limited the role of conspiracy.<sup>203</sup> The judgment consolidated the first two counts, those of conspiracy and crimes against peace, and limited its consideration to "whether a concrete plan to wage war existed, and determin[ing] the participants in that concrete plan."<sup>204</sup> In so doing, they overtly rejected the argument by the prosecution that conspiracy extended liability to everyone who had participated significantly in the Nazi Party or German government.<sup>205</sup> Furthermore, although the prosecution argued that the concept of conspiracy extended to the other counts of the indictment, war

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<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 437.

<sup>202</sup> *Indictment, in I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, 27-68 (1947).*

<sup>203</sup> A plurality of the U.S. Supreme Court characterized the tribunal's treatment of conspiracy by noting that it "pointedly refused" to recognize conspiracy to commit war crimes as a violation of the law of armed conflict, despite the prosecution asking it to do so. *Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006).

<sup>204</sup> *Two Hundred and Seventeenth Day, Monday, 30 September 1946, Afternoon Session: The Law as to Common Plan or Conspiracy, in XXII TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 - 1 OCTOBER 1946, 467-68 (1947) [hereinafter *The Law as to Common Plan or Conspiracy*].*

<sup>205</sup> *Id.* at 467.

crimes and crimes against humanity,<sup>206</sup> the tribunal rejected this notion as beyond the scope of the Charter.<sup>207</sup>

One way to distinguish the charge of waging aggressive war from the charges of war crimes, or crimes against humanity, is that small players can play no serious role in the waging of an aggressive war. To be a part of the “concrete plan” to initiate a war of aggression requires that one be a significant player in the governmental control of the nation. To kill or torture a prisoner, or to participate in genocide, requires no particular amount of power within the nation. By limiting conspiratorial liability in this way, the Nuremberg Tribunal prevented the creation of a regime in which mere membership in the National Socialist Party would establish criminal liability. Thus, the Nuremberg Tribunal approved of conspiracy as a violation of international law, but only in so restricted a form that the plan of massive subsequent trials simply did not occur.<sup>208</sup> After the trial, it became a commonplace understanding of international criminal law that conspiracy, as understood by the United States, had no role in international law.<sup>209</sup>

#### 4. Conspiracy-Like Liability

Yet it is also true that some international trials have featured forms of criminal liability that look something like conspiracy. Both command responsibility and joint criminal enterprise bear some resemblance to the conspiracy, and both have solid footing in international law. Ultimately, however each requires that offenses be completed, is limited to use only in the area of grave breaches, and neither has ever played a role in a belligerency offense.

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<sup>206</sup> Borgwardt, *supra* note 199, at 440.

<sup>207</sup> *The Law as to Common Plan or Conspiracy*, *supra* note 204, at 469.

<sup>208</sup> *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1208 (2009) (noting that in the first major consideration of the issue in the subsequent proceedings to the Trial of the Major War Criminals, the court dismissed the conspiracy charges after argument by counsel but without a written opinion).

<sup>209</sup> *Id.* at 1100 (noting that the statute governing the International Criminal Court does not include conspiracy “largely at the insistence of lawyers from civil law countries, whose domestic traditions generally do not include criminal or civil liability for conspiracy”).

a. *Command Responsibility*

Command responsibility is the requirement of the law of war that commanders bear actual liability for the wrongdoing of their subordinates.<sup>210</sup> The classic statement of such criminality is that commanders are responsible for the deeds of their subordinates if they order them before the fact or ratify them after.<sup>211</sup> This type of liability is common, and is seen not only in areas such as the international law of war, but even the rules of responsibility for attorneys in the United States.<sup>212</sup> Law of armed conflict command responsibility goes far, however, by also encompassing to those who know of wrongdoing by subordinates and fail to prevent it,<sup>213</sup> or, in one particularly strong version, those who merely should know of the wrongdoing, even if they do not.<sup>214</sup> Whichever version of command

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<sup>210</sup> Danner & Martinez, *supra* note 36, at 120.

<sup>211</sup> So, for example, the International Criminal Court uses a standard of liability that makes criminally responsible any person who "Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted." Rome Statute of the International Criminal Court art. 25(3)(b), July 17, 1998, 2187 U.N.T.S. 3 [hereinafter Rome Statute].

<sup>212</sup> MODEL RULES OF PROF'L CONDUCT r. 5.1(c) (AM. BAR ASS'N 2016) (declaring responsibility for a lawyer for the actions of another if the former lawyer "orders, or with knowledge of the specific conduct, ratifies the conduct involved").

<sup>213</sup> See, e.g., Rome Statute, *supra* note 211, at art. 28

(a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and

(ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

<sup>214</sup> The very strong version perhaps received affirmation in Yamashita. Many scholars have read the finding of guilt in that case to stand for the proposition that General Yamashita was legitimately punished for the sins of his troops even though he might not have known of them. See, e.g., Major Bruce D. Landrum, *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293, 297 (1995) (noting that some had described Yamashita as "a victim, an

responsibility one uses, however, it extends no liability to drivers, foot soldiers, or even propagandists for crimes committed by others. It thus offers no aid to the government in trials like those of Hamdan, Khadr, and Bahlul.

*b. Joint Criminal Enterprise Liability*

Joint Criminal Enterprise (“JCE”), on the other hand, does hold liable those who are not major players in their military force.<sup>215</sup> It resembles conspiracy in applying to all participants in the criminal activity.<sup>216</sup> It does that so thoroughly that the dissenting judge in the most recent decision in the Bahlul case argued that conspiracy *was* an international law of armed conflict offense, merely passing under the name JCE.<sup>217</sup> This is incorrect, however: while conspirators are, under the common law, liable for any offense committed by any member of the conspiracy at any time, provided only that the offense fits within the design of the conspiracy,<sup>218</sup> JCE is much narrower. It is never a stand-alone form of liability.<sup>219</sup> Additionally, even the most wide-ranging form of JCE announced by international

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'honourable Japanese general' tried and executed on 'trumped-up charges,' the subject of a 'legalized lynching.'" (citations omitted)). On the other hand, it is difficult to say with certainty what Yamashita meant in the minds of those who decided the case: the panel functioned as a jury in that case, and issued an opinion that, as one scholar of the law of war noted, is subject to at least four interpretations, but none truly announced strict liability for commanders. Major William H. Parks, *Command Responsibility For War Crimes*, 62 MIL. L. REV. 1, 30-31 (1973).

<sup>215</sup> Danner & Martinez, *supra* note 36, at 104 (describing Tadic, the person on trial before the International Criminal Tribunal for the former Yugoslavia in whose case the doctrine was expounded, as "an enthusiastic but relatively low-level participant in the crimes that occurred in Bosnia in the early 1990s").

<sup>216</sup> *Id.* at 103.

<sup>217</sup> *Al Bahlul v. United States*, 792 F.3d 1, 48 (D.C. Cir. 2015) (Henderson, J., dissenting).

<sup>218</sup> *Pinkerton v. United States*, 328 U.S. 640, 647 (1946) (rejecting the argument that evidence of direct participation by a conspirator was necessary for that conspirator's conviction of a substantive offense committed by the conspiracy because "Each conspirator instigated the commission of the crime. The unlawful agreement contemplated precisely what was done. It was formed for the purpose. The act done was in execution of the enterprise.").

<sup>219</sup> Danner & Martinez, *supra* note 36, at 118.

tribunals limits liability of accused to those acts that are a “natural and foreseeable consequence” of the common purpose.<sup>220</sup>

It is true that the lack of formally outlined doctrinal limits might well allow future international tribunals to expand the net of this form of liability to match the remarkable scope of Anglo-American conspiracy law; it is also true that no international tribunal has done so.<sup>221</sup> Instead, the actual use of JCE has paralleled the way it was used by the Allies after World War II: in a series of cases trying persons for abuse of prisoners, there was clear evidence that a small group of defendants had committed a series of a bad acts, but no way to identify which individual committed which act.<sup>222</sup>

Although both command responsibility and JCE share features with conspiracy, they do so only with conspiracy as a form of liability for completed offenses. There is no precedent in the international law of armed conflict for conspiracy as a form of liability for an offense that is only in the planning stages. The successful domestic prosecutions of terrorists such as Ramzi Yousef, convicted and sentenced to life for a plot to destroy a passenger aircraft crossing the Pacific Ocean, would not have been possible in a military commission.<sup>223</sup> Furthermore, although the words used by

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<sup>220</sup> *Id.* at 106 (quoting the Tadic case from the International Criminal Tribunal for the former Yugoslavia).

<sup>221</sup> *Id.* at 150 (noting that an expansion of JCE to hold liable a small player “for all the crimes visited upon Bosnian Muslims in the early 1990s would seem patently unjust” but that “no convictions representing such a gross extension of liability have yet been entered”).

<sup>222</sup> *Id.* at 111. Professors Danner and Martinez, wary of a possible expansion of JCE, acknowledged that this sufficiently paralleled the Tadic case that announced JCE to justify that conviction, but warned that the language of the court was so broad that it might be misused to the detriment of the legitimacy of the international legal system. *Id.* at 167 (Liability theories that distort the contribution of individual defendants to the crimes that ultimately occurred run the risk, over time, of producing a record of a violent period that fails to capture how and why the crimes occurred”).

<sup>223</sup> *United States v. Yousef*, 327 F.3d 56, 79 (2d Cir. 2003) (describing Yousef’s conviction for conspiracy in a plot to destroy twelve U.S.-flagged aircraft with time bombs after they left Asia). This act of terror did not occur because Yousef and a co-conspirator inadvertently started a fire in their apartment, and responding authorities discovered both the laptop containing the plan and many of the chemicals needed to carry it out.



international tribunals would conceivably support an extension of liability to minor members for every crime committed by any member of their organization, those same international tribunals have consistently rejected the notion that the liability they were imposing paralleled conspiracy or membership in a criminal organization.<sup>224</sup>

##### 5. The Limits of Conspiracy-Like Liability in Military Commissions

These two forms of liability apply only to grave breaches. This is powerfully illustrated by the use of the doctrine of command responsibility at Nuremberg and in the years since. It was utterly uncontroversial to hold leaders of the Nazi regime liable for offenses committed by those under their control.<sup>225</sup> Indeed, although some of the accused on trial after World War II argued that they were only subordinates, and that criminal liability did not apply to those who were “just following orders,” the defense did not save its major proponents.<sup>226</sup> There does not seem to have been a defense of “just giving orders” proffered by the accused at the Trial of Major War Criminals or the subsequent proceedings. Command responsibility for grave breaches may have been one of the most consistently accepted features of the Nuremberg trials.

Yet there also does not seem to have been an attempt by the victorious Allies to punish any of those who ran the machinery responsible for recruiting, training, and deploying those individuals who were themselves convicted of belligerency offenses. Although several of the leaders of the Abwehr, the German intelligence service that operated the spy and saboteur programs, fell into Allied hands at the end of the war, they were not tried as the masters of prison camp

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<sup>224</sup> Danner & Martinez, *supra* note 36, at 118.

<sup>225</sup> Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 116, 135 (Michael Howard et. al. ed., 1994) (This notes that although conviction of individuals based on wartime acts was controversial in many ways, it was not so in regard to grave breaches involving the treatment of prisoners and civilians because it “cannot have been wrong to punish these clear violations of the most elementary principles of decency.”).

<sup>226</sup> SOLIS, *supra* note 47, at 357.

guards and executioners had been.<sup>227</sup> The international community has simply never found conspiracy or either of the arguably conspiracy-like forms of liability to be appropriate in trials for crimes for which guilt is dependent on the identity of the accused as an unprivileged combatant.<sup>228</sup> Yet the U.S. military commissions in the war against Al Qaeda have focused on that exact circumstance. And it is exactly that circumstance that has been rejected time and again by appellate courts, both military and civilian.

#### IV. METAMORPHOSIS: WHEN LOSING IS WINNING

To characterize these prosecutorial setbacks as Asculum defeats requires recognizing them as strategic victories. That can only be true if they prepared the legal battlefield for future victories by the government, or at least helped it to avoid more serious defeats. It is possible that the consistent rejection of expanded liability for belligerency offenses has done both: in the case of the highest-profile detainee, Khalid Shaikh Muhammed (“KSM”), the self-professed mastermind of the September 11 attacks,<sup>229</sup> a reluctance to conduct a trial by military commission might prove a strategic victory for the government. Further, in the imaginable world of future conflicts, a recognition of conspiracy liability for belligerency offenses might well prove disastrous for U.S. interests.

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<sup>227</sup> Indeed, General Erwin von Lahousen, who headed the organization, testified as a witness against former colleagues at Nuremberg. See PIERCE O’DONNELL, *IN TIME OF WAR: HITLER’S TERRORIST ATTACK ON AMERICA* 288 (2005).

<sup>228</sup> Of course, as every modern power has operated spy services and other clandestine agencies, there were any number of available targets for such prosecutions, had any nation so desired.

<sup>229</sup> Tung Yin, *Ending the War on Terrorism One Terrorist at a Time: A Noncriminal Detention Model for Holding and Releasing Guantanamo Bay Detainees*, 29 HARV. J. L. & PUB. POL’Y 149, 175 (2005) (noting that he developed the idea of hijacking airplanes to make them weapons, while Osama bin Laden had focused on blowing them up).

A. *Tomorrow: The Puzzle of Khalid Shaikh Muhammed*

1. A Military Commission Trial of KSM?

KSM came into U.S. custody in 2003, when the Pakistani Inter-Services Intelligence, possibly assisted by the U.S. Central Intelligence Agency, captured him.<sup>230</sup> In 2006, he was transferred to the Guantanamo Bay Naval Facility, and President Bush announced that he would face trial by military commission.<sup>231</sup> He was charged, and a motions battle began that would prevent any meaningful progress in this most important test of the military commissions system.<sup>232</sup> Because of the stops and starts that occurred in the much less weighty cases of people like Hamdan and Khadr, KSM's case had not even had a panel seated before the end of the Bush presidency.<sup>233</sup>

A trial by military commission of KSM is well within the historical use of such a commission. It would be a legitimate legal proceeding. The previous reconsidering of the functions of military commissions, however, suggests that it would not be a wise legal proceeding.

As noted earlier, there are three separate types of military commissions.<sup>234</sup> These three types, however, can be reorganized into two groups, based on their strategic function. Some of these commissions are necessary; others are merely useful. Both martial law and military government courts are necessary. Human society cannot long function at an advanced level without a means for determining liability when crimes occur. Martial law is a long-recognized temporary necessity in response to a breakdown in the

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<sup>230</sup> Gregory S. McNeal, *A Cup of Coffee After the Waterboard: Seemingly Voluntary Post-Abuse Statements*, 59 DEPAUL L. REV. 943, 947 (2010).

<sup>231</sup> Dana Carver Boehm, *Guantanamo Bay and the Conflict of Ethical Lawyering*, 117 PA. ST. L. REV. 283, 292 (2012).

<sup>232</sup> Charges were not *preferred*, or formally initiated, until April 15, 2008, and referred to the military commission for trial by the convening authority on May 9, 2008. *United States v. Khalid Shaikh Mohammed*, Charge Sheet (May 2008).

<sup>233</sup> As of the date of publication, there has still been no panel seated, and no evidence offered. See Gordon Mehler & Philip Hilder, *It's High Time the 9/11 Five Were Brought to Trial*, NEWSWEEK (Sept. 8, 2015).

<sup>234</sup> See *supra* Section I.A.

civil government's ability to maintain ordered liberty.<sup>235</sup> Likewise, an occupation cannot be legitimate or successful if the occupier has no way to protect society from the predations of crime. In every area in which the military is the only authority, the military must take on this role, however ill-suited it may be to it.<sup>236</sup>

On the other hand, law of war commissions are never necessary.<sup>237</sup> Those accused of violating the law of armed conflict may be dealt with in many ways, from trial in ordinary domestic courts,<sup>238</sup> to military detention with release at (or after) the end of the hostilities,<sup>239</sup> to, in the view of some, summary execution.<sup>240</sup> When nations individually<sup>241</sup> or collectively<sup>242</sup> opt to establish such commissions, they do so due to their usefulness and not necessity.

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<sup>235</sup> DINSTEIN, *supra* note 24, at 92 (“The framers of the Hague Regulations were afraid that the Occupying Power might tolerate pervasive turmoil and turbulence, not lifting a finger to prevent rampant anarchy from paralyzing the whole life of the civilian population.”).

<sup>236</sup> *Ex parte Milligan*, 71 U.S. 2, 127 (1866) (“On the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society, and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.”).

<sup>237</sup> Perhaps because there is always another option for such fora, they are not without limits. See Gerald Neuman, *Extraterritoriality and the Interest of the United States in Regulating Its Own*, 99 CORNELL L. REV. 1441, 1459 (2014) (noting that the *Boumediene* case rejected the extreme view suggested by *Verdugo-Urquidez* that foreign nationals involuntarily in U.S. territory have no constitutional protections).

<sup>238</sup> Alexander, *supra* note 11, at 1118 (“All of the acts that have been charged as military commission offenses are crimes under the U.S. Code and could be prosecuted as such.”).

<sup>239</sup> *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004) (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’”) (quoting *Ex parte Quinn*, 317 U.S. 1, 30 (1942)).

<sup>240</sup> TAYLOR, *supra* note 56, at 29 (1992) (describing the original British desire at the close of World War II that the senior leaders of the Nazi regime be “punished by a joint decision of the Governments of the Allies”).

<sup>241</sup> Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2560 n.91 (1991) (noting Israel’s reliance on universal jurisdiction when prosecuting Adolf Eichmann for Nazi war crimes in a domestic court).

The primary purpose of law of war military commissions is education.<sup>243</sup> The existence of a trial, even in an unfamiliar military format, has showcased the offenses of the accused in an attempt to prevent others from imitating, or even admiring, the alleged wrongdoer.<sup>244</sup> That was arguably the primary accomplishment of the most-lauded set of military commissions, those that heard the cases of prominent Nazis at Nuremberg after World War II.<sup>245</sup> Some have argued that the same is true of the trial of the Nazi saboteurs during World War II, although there the purpose was at least in part the concealment of certain information.<sup>246</sup> It was reasonable for the United States to fear that the Third Reich would repeat its attempts with a more loyal group of saboteurs<sup>247</sup> had they known that the failure was largely due to a betrayal by one of the saboteurs upon his arrival by mini-submarine.<sup>248</sup> By conducting the trial in the closed setting of a secretive military commission, the Roosevelt administration was able to convey the incredible effectiveness of the Federal Bureau of Investigation to internal and external observers.<sup>249</sup>

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<sup>242</sup> TAYLOR, *supra* note 56, at 25 (noting the initiation of the Inter-Allied Commission on the Punishment of War Crimes at the beginning of 1942).

<sup>243</sup> Regarding trying the Nazi leadership, Lt. Col. Bernays of the U.S. War Department wrote his wife that “[n]ot to try these beasts would be to miss the educational and therapeutic opportunity of our generation.” Borgwardt, *supra* note 199, at 408-09.

<sup>244</sup> This is a role of tribunals in any situation in which a significant change of government leaves people seeking justice for past wrongs, an area referred to as transitional justice. Danner & Martinez, *supra* note 36, at 90 (citing the retrospective use of the term “transitional justice” regarding the Nuremberg trials).

<sup>245</sup> Rpt. from Robert H. Jackson, Sup. Ct. Justice, to Harry S. Truman, President of the U.S., *International Conference on Military Trials* (Oct. 7, 1946) (noting that the military commissions “...documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future...”).

<sup>246</sup> O’DONNELL, *supra* note 86, at 121 (“What [Attorney General] Biddle did not tell the secretary of war, however, was that he did not want the press and public to know that both German teams had found it so easy to penetrate America’s defenses.”).

<sup>247</sup> *Id.* at 125.

<sup>248</sup> See LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERROR* 94 (2005).

<sup>249</sup> O’DONNELL, *supra* note 86, at 105. The German High Command named the attempt by the saboteurs of the Quirin case for Franz Pastorius, the poet who led the first German immigrant community in America, in 1683. *Id.* at 21. See generally *Ex parte Quirin*, 317 U.S. 1 (1942).

Although many have criticized the decision to try the saboteurs by military commission, Adolf Hitler made no significant further attempts to infiltrate the United States following the Quirin Group's failure.<sup>250</sup>

Bringing global attention to the cruelty of Al Qaeda, and the merciless way in which it chooses its victims, might go a long way toward reducing the ability of it and groups like it to recruit to their cause.<sup>251</sup> The pain of victims, splashed across the internet for all to see, is a powerful counter-recruiting tool. Indeed, one of the specific goals of the post-World War II trials was the ability to allow both sides to offer their best arguments for their behavior, counting on humanity to discern between them.<sup>252</sup> As Justice Robert Jackson noted in his closing argument, "[t]he future will never have to ask, with misgiving, what could the Nazis have said in their favor. History will know that whatever could be said, they were allowed to say."<sup>253</sup> Unfortunately, the convoluted legal proceedings of the current military commissions, and their use of trials for belligerency offenses, have undermined their ability to teach. While the Nuremberg trials were and continue to be viewed as role models for the expression of international outrage,<sup>254</sup> the U.S. War on Terror military commissions have caused massive criticism.<sup>255</sup> What might once have been a powerful forum for the denunciation of an evil breach of the gravest responsibilities of an interdependent world has

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<sup>250</sup> O'DONNELL, *supra* note 86, at 284 (noting that the German Navy was reluctant to risk a U-Boat for another futile sabotage mission).

<sup>251</sup> Biddle, *supra* note 51, at 680 (quoting diplomat and author Harold Nicolson as noting that at the International Military Tribunal "the inhuman is being confronted with the humane, ruthlessness with equity, lawlessness with patient justice, and barbarism with civilization").

<sup>252</sup> As it is of other "transitional" trials, marking the ends of oppressive or evil regimes. See Allison Danner & Martinez, *supra* note 36, at 91.

<sup>253</sup> 19 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 399 (1948).

<sup>254</sup> TAYLOR, *supra* note 56, at 634-35 (1992); Theodor Meron, *Reflections on the Prosecution of War Crimes by International Tribunals*, 100 AM. J. INT'L L. 551, 552 (2006) ("The Nuremberg experiment in particular proved to be, as Justice Jackson had hoped, a triumph of reason.").

<sup>255</sup> Even by those who should logically be, or once were, supporters of the military commissions. Glazier, *supra* note 65, at 184 (2008) (describing the sudden departure from the commissions of Colonel Morris Davis).

now degenerated into an extraordinary court dismissed by many as a secretive cure for tortured confessions, and a means of imposing liability on hapless people who had the temerity to oppose the United States in its muscular overseas behavior. Lessons taught by a military commission in the case of KSM will simply not be learned.<sup>256</sup>

## 2. A Federal Trial of KSM?

One of the early announcements of President Obama's first Attorney General, Eric Holder, was that KSM would be transferred to New York City, where he would stand trial for the attacks in a federal court, not a military commission.<sup>257</sup>

This announcement led to outrage.<sup>258</sup> Within a year, a bipartisan group in Congress passed an appropriations bill that forbade the spending of federal dollars to transport any detained person from Guantanamo Bay to the United States, for trial or otherwise.<sup>259</sup> Although part of the rationale for this statute was the preservation of Guantanamo Bay as a detention center, part of the discussion focused on KSM himself.<sup>260</sup> Possibly with a sense of resignation, the Administration restarted military commission proceedings against KSM.<sup>261</sup>

The rejection of a federal trial for KSM was a disturbing development for two reasons. Due to the nature of the offenses KSM is accused of, his trial, similar to the trials of other high-profile

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<sup>256</sup> Morris D. Davis, *Guantanamo's Charade of Justice*, N.Y. TIMES, Mar. 27, 2015, at A21 ("Guantanamo has come to symbolize torture and indefinite detention, and its court system has been discredited as an opaque and dysfunctional process."). Morris Davis is a retired Air Force Colonel who served as the third Chief Prosecutor of the Military Commissions.

<sup>257</sup> Alexander, *supra* note 11, at 572.

<sup>258</sup> Charles J. Dunlap, Jr., *Responses to the Ten Questions*, 37 WM. MITCHELL L. REV. 5150, 5166 (2011) (calling the opposition to a trial in the U.S. "a storm of political opposition").

<sup>259</sup> Alexander, *supra* note 11, at 588-89.

<sup>260</sup> 155 CONG. REC. H12993-01 (2009) (statement of Rep. Gohmert) ("He says, 'We ask to be near to God'-this Khalid Sheikh Mohammed, who our President is inviting to come to New York City. We fight you and destroy you and terrorize you.' Khalid Sheikh Mohammed said this in his pleading.").

<sup>261</sup> United States v. Khalid Shaikh Mohammed, Charge Sheet (May 2011).

detainees, would be qualitatively different from previous military commissions. KSM was accused of—and has announced responsibility for, on several occasions—the intentional targeting of non-combatants on a vast scale.<sup>262</sup> No one has the legal authority to do that. No combatant immunity exists that protects anyone from culpability if they commit a grave breach of the law of armed conflict. And there is no doubt that the hijacking of civilian aircraft to fly into civilian skyscrapers is a grave breach of international law.<sup>263</sup>

KSM's trial, therefore, would focus on what he did, not who he was. Unlike Hicks, Hamdan, Khadr, and the rest, KSM's charges relate to behavior that would be punishable by military commissions whether committed by civilians or military personnel.<sup>264</sup> It would, in that regard, resemble the trials of major war criminals in both Europe and the Pacific following World War II. There was no question that military officers like General Yamashita were proper combatants.<sup>265</sup> They could not have been punished for their efforts leading military operations against the Allies.<sup>266</sup> indeed, punishing proper combatants for their legitimate wartime activities is itself a

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<sup>262</sup> See, e.g., Verbatim Transcript of Combatant Status Review Tribunal for ISN 10024, at 18. *But cf.*, McNeal, *supra* note 230, at 951 (“The legitimacy of KSM's confessions is in question because many of his statements are the product of torture or abusive treatment.”).

<sup>263</sup> *But cf.* Glazier, *supra* note 13, at 961 (noting that the World Trade Center was arguably a lawful target as an object “with a significant economic value”).

<sup>264</sup> TAYLOR, *supra* note 56, at 628 (1992) (“It is true that, until Nuremberg, most of the trials based on the laws of war . . . were trials of military defendants. But I know of nothing in the laws of war that excludes unarmed civilians who violate the laws of war from criminal liability.”).

<sup>265</sup> *In re Yamashita*, 327 U.S. 1 (1946).

<sup>266</sup> So, for example, Göring, the Reichsminister of Aviation, was indicted for war crimes, including murder and ill treatment of civilians, killing of hostages, and collective punishment of civilians, but nothing that resembled liability for any of the belligerency offenses committed against the Allies. The same was true of the other officers on trial, including Keitel and Jodl. I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 14 NOVEMBER 1945 – 1 OCTOBER 1946, at 27-68. (1947).



violation of the law of armed conflict, one that the United States and its allies have punished in the past.<sup>267</sup>

A federal trial could allow for the denunciation of an evil breach of the gravest responsibility that a commission will not.<sup>268</sup> The federal court system, though not perfect, is unquestionably viewed domestically and abroad as both more fair and more open than a military commission. A trial in such a court, using existing rules of evidence and procedure, could not fail to both be and seem more just than a special court hobbled together for the purpose, particularly one that has already experienced so much chaos.

Ironically, the particular judicial defeats the United States has most recently suffered would not, by themselves, bar a trial of KSM. The attacks of September 11 constitute a grave breach, and KSM could be charged with liability for those offenses under the internationally accepted doctrine of command responsibility, even if the Bahlul opinion continues to prevent conspiracy trials as a violation of the constitutional separation of powers. It remains to be seen, of course, whether the U.S. Supreme Court will reverse the judgment of the D.C. Circuit that the Constitution limits military commission trials to offenses recognized by the international law of armed conflict. Even if the Court let that decision stand, however, there is little ground for the argument that the leader of the September 11 attacks, in deliberately targeting defenseless civilians, did not commit a violation of the law of war. Putting him on trial would not be a novel development.

The trial of General Yamashita at the close of World War II brings the point into stark relief.<sup>269</sup> His military commission trial was a litany of horror, as witness after witness recounted monstrous acts committed against a civilian population by Imperial Japanese

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<sup>267</sup> The War Crimes Charge at Nuremberg included the allegation that "Frenchmen fighting with the Soviet Army who were captured were handed over to the Vichy Government for 'proceedings.'" *Id.* at 54 (Charge 3(c)).

<sup>268</sup> *But, cf.* Huq, *supra* note 13, at 1497 (arguing that the redundancy of having both military commissions and federal courts available is important to reduce the risk of inaccurate acquittals, or "false negatives").

<sup>269</sup> *See generally In re Yamashita*, 327 U.S. 1 (1946).

soldiers under his command.<sup>270</sup> No evidence showed that he directly participated.<sup>271</sup> The government did not even have evidence of a direct order for the atrocities.<sup>272</sup> Nonetheless, a panel convicted General Yamashita of liability as a commander for these grave breaches, as they presumably found it impossible to believe that he had not known or could not stop the behavior of his troops.<sup>273</sup>

In much the same way, a trial of KSM could focus on his responsibility for the September 11 attacks despite the fact that he was far away from these breaches. Evidence that he bore responsibility would fit logically under the command responsibility prong of liability. Even an international lawyer who rejected the

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<sup>270</sup> *Id.* at 5 (noting that the commission heard two hundred and eighty-six witnesses). See also Danner & Martinez, *supra* note 36, at 123-24.

<sup>271</sup> A FRANK REEL, THE CASE OF GENERAL YAMASHITA 174 (1971) ("there was no finding of any order, any knowledge, any condonation on General Yamashita's part").

<sup>272</sup> During closing arguments, the prosecution appealed instead to a fire at a circus in Connecticut, after which employees were found guilty of manslaughter because they failed to prevent the loss of life. *Id.* at 165-66.

<sup>273</sup> *Yamashita*, 327 U.S. at 16 ("There is no contention that the present charge, thus read, is without the support of evidence, or that the commission held petitioner responsible for failing to take measures which were beyond his control or inappropriate for a commanding officer to take in the circumstances.") This treatment of command responsibility was the focus of the criticism of Justice Murphy, who argued that, in light of the lack of evidence of direct involvement by General Yamashita and the difficulties of maintaining control in the face of an Allied attack, the charges could be translated to:

We, the victorious American forces, have done everything possible to destroy and disorganize your lines of communication, your effective control of your personnel, your ability to wage war. In those respects, we have succeeded. We have defeated and crushed your forces. And now, we charge and condemn you for having been inefficient in maintaining control of your troops during the period when we were so effectively besieging and eliminating your forces and blocking your ability to maintain effective control. Many terrible atrocities were committed by your disorganized troops. Because these atrocities were so widespread, we will not bother to charge or prove that you committed, ordered, or condoned any of them. We will assume that they must have resulted from your inefficiency and negligence as a commander. In short, we charge you with the crime of inefficiency in controlling your troops. We will judge the discharge of your duties by the disorganization which we ourselves created in large part. Our standards of judgment are whatever we wish to make them.

*Id.* at 34-35.

term “conspiracy” would nonetheless recognize this as command responsibility for the underlying offense.<sup>274</sup> She might well characterize it, in the language of the International Criminal Court, as ordering the commission of a crime which in fact occurred. But she would not reject a finding of liability for orchestrating the September 11 attacks as a peculiarity of the Anglo-American system.

Thus, defeats on the material support and conspiracy battlefields have, in truth, done nothing to harm the chance of an effective prosecution of KSM as an individual for his individual offenses. Those defeats, however, exist in the understanding of the public. Critics may use them as evidence of the flaws in the system. They have done significant damage to a military commission system already laboring under the burden of being perceived an extraordinary and unfair tribunal. A trial of KSM in a military commission could “succeed,” if that term is taken to mean only that there would be a finding of guilt with an accompanying lengthy or even capital sentence.

If, however, success includes the educational function of a useful law of war military commission, failure in a KSM trial is foreordained. In 2003, such a military commission was possible.<sup>275</sup> More than a dozen years later, an ideological victory in such a forum is an impossibility. The only chance for global public education as a result of a trial of KSM exists in a federal court. If the defeats suffered by the government at the hands of federal courts in the cases of Hamdan and Bahlul lead the United States to trying KSM in a federal court, they will have been Asculum defeats indeed.

*B. The Day After Tomorrow: Military Operations in an Alternate Universe*

Whatever may happen with KSM, the United States has already won one victory by losing a series of cases. In military

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<sup>274</sup> See *supra* Section II.B4(a).

<sup>275</sup> There would still have been opposition and objection, of course. See *e.g.*, Katyal & Tribe, *supra* note 62. That was nonetheless a very different world from the current one, in which a former Chief Prosecutor can write an editorial decrying the entire process. See Davis, *supra* note 256.

commissions as well as in the federal courts, the government has consistently failed to convince judicial authorities that belligerency offenses were properly subject to either a material support or conspiracy charge when tried by military commission. This position has frustrated some members of the government, several commentators, and a few dissenting judges. Their frustration over the short-term loss unfortunately causes them to miss the true significance of the catastrophic harm to U.S. interests that would have come with a victory.

Their displeasure is understandable. For centuries, military commissions have tried cases involving belligerency offenses that were nonetheless labeled violations of the law of war. In those cases, however, there was never a sense that liability extended beyond the individual. When General Washington convened a board of officers to try British Major John Andre, captured in civilian clothes after receiving the plans for West Point from Benedict Arnold, he was confident that it was legitimate to punish Andre for this behavior.<sup>276</sup> Like the Nazi saboteurs, it was the choice to remove his uniform that doomed John Andre. His protestations that he was a lawful member of His Majesty's Army were unavailing, because he was disguised as a noncombatant when he committed the acts in question.

Significantly, there was no sense—in 1780, or in 1942—that the liability for the offenses extended beyond the individual participants. Neither General Washington nor any member of his staff suggested that the British government had in some way violated international law.<sup>277</sup> The same was true of the German special operations branch that sent the saboteurs to the United States. They trained, armed, equipped, and transported the eight men to New York and Florida.<sup>278</sup> Yet, although six of the eight were themselves executed for their acts, no member of the German military hierarchy

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<sup>276</sup> WILLIAM STERNE RANDALL, *BENEDICT ARNOLD: PATRIOT AND TRAITOR* 565-66 (1990).

<sup>277</sup> Indeed, General Washington himself employed spies. NATHAN MILLER, *SPYING FOR AMERICA: THE HIDDEN HISTORY OF U.S. INTELLIGENCE* 6 (1989) (noting that Washington “personally recruited agents, issued them instructions, and analyzed and acted upon their reports”).

<sup>278</sup> O'DONNELL, *supra* note 86, at 21.

ever faced trial for the Quirin Group's sabotage attempt.<sup>279</sup> There was significantly more evidence against the leadership of the German high command, in this regard, than there was against General Yamashita.<sup>280</sup> The lack of a single trial evidences the broad consensus that committing a belligerency offense was an individual responsibility only.

This comparison of General Yamashita and the architects of the Quirin Group sabotage plans brings into stark relief the underlying distinction between grave breaches and belligerency offenses. In the category of grave breaches are those acts that individual states in the international community wish to see outlawed. Each nation is content that no nation should commit them, and each is thus willing to forgo any short-term advantage that might be gained through their commission. Such acts are so roundly condemned that jurisdiction exists everywhere and forever.<sup>281</sup>

If there is an international agreement on belligerency offenses, it is the opposite one. Each nation wishes to maintain the ability to punish individuals who seek to harm it, and reserves the right to try those who do not possess proper combatant immunity. On the other hand, virtually all nations wish to preserve the freedom to operate in such ways by themselves. Most nations around the globe maintain official spy agencies, despite exemplars like John Andre. The fact that individual members of such agencies are subject to punishment, even capital punishment, does not deter nations from training and deploying such people.

Likewise, many governments wish to continue supporting unlawful combatants in missions of belligerency beyond mere spying. From Iran's support of Hezbollah<sup>282</sup> to the United States'

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<sup>279</sup> *Id.*

<sup>280</sup> Reel, *supra* note 271, at 160-61 (recounting the defense argument that the destruction of communications in the Philippines made it impossible for General Yamashita even to know that atrocities had occurred).

<sup>281</sup> Kenneth C. Randal, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 810-15 (1988) (discussing the trial by Israel of Adolf Eichmann).

<sup>282</sup> *Jenco v. Islamic Republic of Iran*, 154 F. Supp. 2d 27, 31 (D.D.C. 2001) ("the Court also finds that The Islamic Republic of Iran and the Iranian MOIS [Ministry

support for the Contras in the Central American wars of the 1980s,<sup>283</sup> nations frequently find it in their interests to arm, train, and assist civilians who undertake violent activities without the legal shield of combatant immunity.

Indeed, the United States, despite pressing vigorously at military commission trials for responsibility for belligerency offenses, maintains an interest in promoting a robust series of such behaviors. An entire unified command, the United States Special Operations Command, exists to train and operate non-conventional forces.<sup>284</sup> Although many of the units of this command comply with all of the ordinary rules of uniform wear during armed conflict, many others do not.<sup>285</sup> Soldiers and sailors in civilian clothes operate as if they were part of a civilian noncombatant population. Those men and women are well aware that they are individually subject to prosecution for belligerency offenses, as Hicks and Hamdan were.<sup>286</sup> There is no expectation, though, that their trainers and supervisors at the Pentagon, or the White House, are subject to liability for employing them in pursuit of national objectives.<sup>287</sup>

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of Information and Security] provided support, guidance, and resources to Hizbollah").

<sup>283</sup> John Norton Moore, *The Secret War in Central America and the Future of World Order*, 80 AM. J. INT'L L. 43, 72 (1986).

<sup>284</sup> 10 U.S.C. § 167 (2014).

<sup>285</sup> W. Hays Parks, *Special Forces' Wear of Non-Standard Uniforms*, 4 CHI. J. INT'L L. 493, 498-99 (2003) (noting that in the Afghanistan conflict the "Commanding General made the uniform decision, favoring civilian clothing over DCU [Desert Camouflage Uniforms]. His rationale was based on two factors: (a) the ability of soldiers to perform humanitarian assistance operations; and (b) the safety of Civil Affairs personnel--that is, force protection.").

<sup>286</sup> SOLIS, *supra* note 47, at 224 (describing examples of the practice of fighting in civilian clothes from the First World War to the U.S. war in Afghanistan and concluding that "Commanders will continue to order subordinate combatants behind enemy lines to fight without uniform or distinctive sign and, knowing the risk, subordinate combatants will willingly comply).

<sup>287</sup> Indeed, some commentators have argued that not all wear of civilian clothes by combatants even violates the law of armed conflict. See, e.g., Parks, *supra* note 285, at 523 ("State tolerance of Special Forces' fighting in civilian clothing is limited to special circumstances, such as support for partisans, which is consistent with humanitarian tolerance for captured guerrillas."). Even if Col. Parks is correct,

Yet there would be such liability had the United States succeeded in the rewriting of the law of armed conflict so vigorously pursued by the prosecutors of the military commission. If such a tribunal, adjudicating violations of international law, has jurisdiction to pronounce sentence on those who conspired with unlawful belligerents—or worse, those who “materially supported” organizations opposed to the adjudicating nation—then a whole new form of liability would develop. A type of behavior participated in by many nations, including virtually all of the great powers, would suddenly be the subject of criminal prosecutions.

The idea of high ranking American military officers, or even senior political officials, on trial for deploying special operations forces is one grotesquely at odds with a broadly held consensus, at least among government officials, on what behavior the United States should participate in.<sup>288</sup> Yet the only argument that could be deployed against such trials is the notion that something special about the United States elevates it above the rules that bind the rest of the international community. If that is the meaning ascribed to the term “American exceptionalism,” it will only result in increasing global hostility and a desire by other nations to frustrate American objectives. If a criminal system outlaws behavior not on the basis of what is done, but on who does it, the system will be untenable unless supported by a ruthless hegemony.<sup>289</sup> The United States does not exercise that kind of hegemony in the world, nor should she, nor should any nation.

V. RETURN TO TOMORROW: HOW THESE LOSSES HELP THE  
GOVERNMENT

At the beginning of the 21st century, the United States found itself in a troublingly novel position. Global events and quickly-

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though, it is notable that even the cases of wear of civilian clothes that he would consider perfidious have not created liability for inchoate crimes.

<sup>288</sup> See Frakt, *supra* note 35, at 751 (noting the explanation by Harold Koh, Legal Advisor to the State Department, that criminalizing all civilian participation in hostilities could not be reconciled to the CIA’s drone program).

<sup>289</sup> TAYLOR, *supra* note 56, at 641 (“There is no moral or legal basis for immunizing victorious nations from scrutiny”).

made decisions left the United States holding a large number of foreign citizens with little precedent to guide in the ways in which they should be handled. The rhetoric of endless war and their own great evil—they were, in the words of the Secretary of Defense, “the worst of the worst”<sup>290</sup>—blocked the logical step of treating them as if they were among the many ordinary prisoners of war and temporarily detained civilians that the military had experience in dealing with.<sup>291</sup> An answer of sorts was found in the quirky, malleable history of the military commissions.

Unfortunately, most of those held by the United States were utterly unsuited for a role in a useful, educational military commission. With only a handful of exceptions, the detainees were much more analogous to ordinary foot soldiers performing ordinary acts of combat. It may be that combatant immunity did not protect them from the legal consequences of firing weapons at invading soldiers, but it was unlikely that the world community would develop any sense of outrage about their behavior.<sup>292</sup>

Eventually, most of the detainees were simply released. Most of those releases were accomplished with no fanfare, and little public attention. This may be part of the reason that a significant percentage of the American people continue to wish the detention

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<sup>290</sup> Randall T. Coyne, *A Law Professor's Reflections on Representing Guantánamo Detainees*, 1 NE. U. L.J. 97, 98 (2009).

<sup>291</sup> In addition to the millions of prisoners of war whom the U.S. has detained throughout its history, the military had recent experience in conducting the tribunals mandated by Article 5 of the Third Geneva Convention to determine whether a particular person was entitled to prisoner of war status, and hence protection from prosecution for belligerency offenses. See Robert M. Chesney, *Iraq and the Military Detention Debate: Firsthand Perspectives from the Other War, 2003-2010*, 51 VA. J. INT'L. L. 549, 562 (2011) (noting that United States conducted almost twelve hundred such tribunals during the Gulf War in 1991).

<sup>292</sup> Consider, for example, the Canadian response to Omar Khadr: he has now not only been released on parole, but a judge ordered the removal of his electronic monitoring ankle device, apparently accepting his argument that it “was embarrassing and interfered with activities such as biking, swimming and playing soccer.” *Judge Eases Omar Khadr's Bail Conditions, No Monitoring Bracelet*, THE GLOBE AND MAIL (Sept. 18, 2015).



facility at Guantanamo Bay to remain open.<sup>293</sup> A few detainees, like the Louisiana-born Yasir Esam Hamdi, became the subject of media focus, which created a certain dissonance between the language of the government and the ultimate conclusion of the detention story.<sup>294</sup>

A few detainees, however, were men of substance, men who had played significant roles in the grave breaches committed in the name of Al Qaeda. For these men, a prompt and open military commission might have taken on the role of Nuremberg, educating the world about the logical and horrible end result of that ideology. Such military commissions never happened; the government chose instead to start with small players, to test the system in a series of trials of belligerency offences. In almost all of those cases, even the ones that seemed to be government victories at the time, the United States effort to conduct trials by military commissions have ultimately ended in defeat.

In order to get convictions in those cases, the government attempted a dramatic revision of the law of armed conflict. In the only real paradigm case, that of the Nazi saboteurs, the prosecution was aided by an informant within and a large amount of easily handled physical evidence. In cases like those of Hicks and Hamdan, the government felt sufficiently ill-at-ease about the result that they resorted to novel twists. The introduction of material support as a charge was one such twist, and it resulted in a quick and severe Asculum defeat.

The use of conspiracy for belligerency offenses was defeated in a similar fashion, and the ramifications of that loss will redound to

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<sup>293</sup> PEW RESEARCH CTR., *Obama Job Rating Ticks Higher, Views of Nation's Economy Turn More Positive* (Jan. 14, 2015) ("More Americans think closing the prison in the next few years is a bad idea (49%) than say it is a good idea (42%).").

<sup>294</sup> *Compare, e.g.*, Brief for Respondent at 4-5, *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (No. 03-6696) (noting that only detainees with "a high potential intelligence value or pose a particular threat" would be transferred to Guantanamo Bay, and that Hamdi was one of those transferred) *with* Press Release, Mark Corallo, Dir. of Pub. Affairs, U.S. Dep't of Justice, Regarding Yaser Hamdi (Sept. 22, 2004) (announcing the release of Hamdi to Saudi Arabia after the Supreme Court ruling in his favor with the observation that "the United States has no interest in detaining enemy combatants beyond the point that they pose a threat to the U.S. and our allies").

the benefit of the United States for years. Initially, if the collapse of military commissions as a reliable way of adjudicating guilt reduces congressional opposition, it might allow a federal trial of KSM. A trial of KSM in a forum recognized internationally for both legitimacy and dignity presents the best remaining option for a useful, educational airing of the extent of Al Qaeda's horror. A trial of KSM in a military commission in 2003 might well have had a similar result, but that forum is now so damaged that any sentence from one would be tainted with illegitimacy and might well merely foster recruitment for Al Qaeda and other extremist groups.

The spectacle of American leaders being called to answer for the new "crime" of training and deployment of spies and irregular forces would be a strategic defeat. It, too, is made less likely by the smaller setbacks of the early military commission trials. A world in which the community of nations has agreed to outlaw participation in irregular warfare, as it has agreed to outlaw the torture of prisoners of war, is not necessarily a bad one. The nations of the world have not consciously considered and discussed the creation of such a world. The short-term thinking of one great power should not seek to bring it into existence.

#### VI. CONCLUSION

The desire to convict every battlefield opponent of the United States of a belligerency offense was misguided. The plan to use the military commissions for that purpose was ill-conceived. The series of small defeats that arose from a misunderstanding of the history and nature of military commissions, however, prevented a far greater strategic defeat for the long-term interests of the United States. There remains the possibility that a public trial of those involved in the commission of grave breaches will improve the standing of the United States in the world community, and prove to be a rallying point for the use of law to combat terror. If that happens, little credit will probably be given to the course of failures that made eventual success possible. When we look back at the story of King Pyrrhus, the drama of his situation causes us to focus on the victory that offered him little solace. For Hicks, and Hamdan, and Khadr, victory does not erase the years spent in difficult situations as

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a detainee. Those who think of Pyrrhus' eponymous victory, however, should give a thought to Rome's rise to power. Without their defeats, the Romans could not have conquered. Without the military commission losses, the United States would be in a far worse position, both today and tomorrow. Indeed, one "victory" at such a proceeding might have utterly undone the nation.

