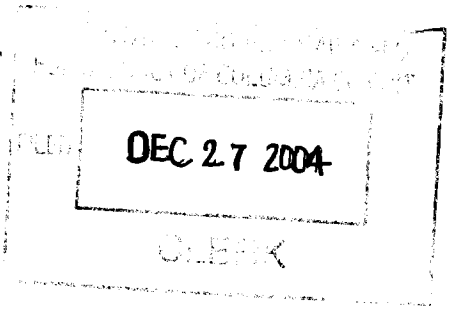
ORAL ARGUMENT SCHEDULED FOR MARCH 8, 2005

No. 04-5393

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT



SALIM AHMED HAMDAN,

Petitioner-Appellee,

- V. -

DONALD H. RUMSFELD, U.S. SECRETARY OF DEFENSE, ET AL.,

Respondent-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE PROFESSORS ALLISON MARSTON DANNER AND JENNY S. MARTINEZ IN SUPPORT OF PETITIONER-APPELLEE SALIM AHMED HAMDAN AND AFFIRMANCE OF THE DECISION OF THE DISTRICT COURT

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULES 26.1, 28 & 29

Pursuant to Rules 26.1 and 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties And *Amici*

All parties, intervenors, and amici appearing in this Court are listed in the Brief for Salim Ahmed Hamdan. Pursuant to Circuit Rule 26.1, amici certify that none of the entities filing this brief are corporate entities.

B. Rulings Under Review

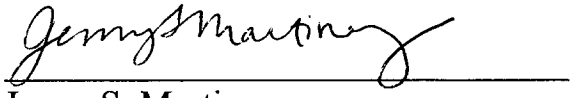
References to the rulings at issue appear in the brief for Appellees.

C. Related Cases

Counsel is unaware of any cases related to this appeal, except for those listed in the brief for Appellants.

Pursuant to Circuit Rule 29, the undersigned counsel of record certifies as follows:

It is not practicable for us to join all other amici in this case in a single brief. We do not claim expertise in the other issues addressed by amici and believe it would be inappropriate to address matters upon which we do not have particular expertise.



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December 27, 2004

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GLOSSARY

ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, July 17, 1998
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East
London Charter	Charter of the International Military Tribunal at Nuremberg
Nuremberg Principles	Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal (1950)
Third Geneva Convention	Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949

INTEREST OF AMICI CURIAE AND CONSENT TO FILE

Amici Curiae are professors of international law who write and teach primarily in international criminal law and the laws of war.

Allison Marston Danner is an Associate Professor of Law at Vanderbilt University Law School. Professor Danner has written extensively in international criminal law, including its origins in the laws of war. Her most recent article, co-authored with Professor Martinez, focuses on liability theories in international criminal law, including conspiracy, joint criminal enterprise, and organizational liability.

Jenny S. Martinez is an Assistant Professor of Law at Stanford Law School. Professor Martinez worked as an Associate Legal Officer at the United Nations International Criminal Tribunal for the former Yugoslavia in the Hague in 1999 and 2000, where she was assigned to assist Judge Patricia Wald of the United States. In the Hague, Professor Martinez worked on trials from Bosnia involving violations of the laws and customs of war, grave breaches of the 1949 Geneva Conventions, crimes against humanity, and genocide. Professor Martinez currently teaches courses on international law and human rights, including the laws of war. She has written extensively about international criminal law and works as a consultant to a non-governmental organization that monitors the work of international criminal tribunals and national war crimes trials in post-conflict societies.

Pursuant to Federal Rule of Appellate Procedure 29(a), both parties to this case, namely Jonathan L. Marcus, Attorney for Respondents-Appellants Donald H. Rumsfeld, U.S. Secretary of Defense, et al., and Prof. Neal Katyal, Attorney for Petitioner-Appellee Salim Hamdan, have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The indictment filed against Mr. Hamdan in the military commission at issue in this case charges him with a single count of conspiracy. From activities in connection with his alleged services as a bodyguard and driver for Usama bin Laden, Mr. Hamdan is charged with conspiracy to commit, *inter alia,* attacks on civilians, murder by an unprivileged belligerent, and terrorism. (Indictment ¶¶ 11-12.) Because Congress has failed to incorporate conspiracy by statute into the jurisdiction of military commissions and because conspiracy does not form part of the law of war, the military commission lacks jurisdiction over the only crime of which Mr. Hamdan has been accused.

Pursuant to the Uniform Code of Military Justice, military commissions have jurisdiction only over offenses established by statute or by the "law of war." 10 U.S.C. § 821 (1998). Congress has not by statute established conspiracy as an offense triable by military commission. The phrase the "law of war" (also known as international humanitarian law or the law of armed conflict)[1] refers to that body of international law that governs armed conflicts. With the limited exceptions of conspiracy to commit genocide and conspiracy to commit crimes against peace (aggression), conspiracy is not a crime under international law.

[1] The terms "law of war," "law of armed conflict," and "international humanitarian law," are synonymous and are used interchangeably throughout this brief.

Because Congress has not specifically authorized prosecution of conspiracy by military commission and because international law does not recognize conspiracy to commit any crime other than aggression or genocide, the only charge at issue in this case cannot be tried before a military commission. This lack of jurisdiction provides an independent basis upon which this court should affirm the judgment below.

ARGUMENT

I. THE JURISDICTION OF THE MILITARY COMMISSION AT ISSUE IN THIS CASE EXTENDS ONLY TO OFFENSES THAT ARE SPECIFIED EITHER BY CONGRESS OR BY THE INTERNATIONAL LAW OF WAR

Section 821 of the Uniform Code of Military Justice establishes the jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. Congress has statutorily established only that military commissions may try individuals for aiding the enemy (§ 904) and spying (§ 906). At most, any *other* offense triable by military commission must, pursuant to the plain terms of § 821, derive from the law of war.

The Supreme Court has made clear that the phrase the "law of war," as used in § 821, refers to international law. Construing the predecessor of § 821[2] in *Ex Parte Quirin*, the Court said that

> Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.

Ex parte Quirin, 317 U.S. 1, 28 (1942). This passage clarifies the Court's understanding of the law of war as a subset of international law. In other parts of the opinion the Court further indicated that it viewed the phrase "law of war" as a reference to international law. For example, the Court rejected petitioners' objection that "Congress in providing for the trial of such offenses has not itself undertaken to codify that branch of international law or to mark its precise boundaries." *Id.* at 29. The Court recognized that some offenses criminalized by customary international law might not be subject to trial in military commissions in the United States because of limitations imposed by the U.S. Constitution. *Id.* Nowhere in *Quirin* did the Court suggest, however, that the Articles of War

[2] Specifically, the Court examined Article 15 of the Articles of War, which at that time provided that "the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions." *Quirin*, 317 U.S. at 27.

provided for prosecution of offenses not found either in statutes enacted by Congress or in that part of customary international law governing armed conflict.

In order for the military commission to have jurisdiction over Hamdan's case, therefore, the government must establish that *conspiracy* to commit attacks on civilians, murder by an unprivileged belligerent, and terrorism is a crime under the international law of war. As the remainder of the brief explains, conspiracy to commit these acts is not recognized as a distinct crime under international law. The military commissions are simply without jurisdiction, in the absence of more specific congressional legislation, to entertain this conspiracy charge.

II. THE INTERNATIONAL LAW OF WAR DOES NOT INCLUDE THE CRIME OF CONSPIRACY AS CHARGED IN HAMDAN'S INDICTMENT

Although the crime of conspiracy is an unremarkable feature of the legal landscape in the United States, it does not exist in the criminal codes of many countries. Edward M. Wise, *RICO and Its Analogues: Some Comparative Considerations*, 27 Syracuse J. Int'l L. & Com. 303, 312 (2000). To the extent conspiracy is a crime at all under international law, its scope is much narrower than under American law. Neither treaties nor international customary law recognize "conspiracy" to commit the offenses alleged in the Hamdan indictment as a distinct crime under international law.

The law of war derives from two sources: treaties and customary international law. Customary international law consists of rules derived from the actual practice of nations developed gradually over time that are followed from a sense of legal obligation. *The Paquete Habana*, 175 U.S. 677, 711 (1900). Like the common law, customary international law is not consolidated in any authoritative source but instead is found in many sources, such as judicial decisions interpreting international law, statements by government officials, and scholarly books and articles on international law. *Id.* at 700-01. The distinction between the law of armed conflict that derives from treaties and that which forms part of customary law is not clear-cut. Some treaties setting out the law of war largely represent codifications of pre-existing international customary rules, and sometimes treaty rules over time take on the status of customary international law. When the Supreme Court construed "long-standing law-of-war principles" in *Hamdi v. Rumsfeld*, for example, it relied primarily on provisions from the Hague and Geneva Conventions. *See, e.g., Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2641-42 (2004) (plurality opinion). Neither treaties nor international customary law support the conspiracy charge in the Hamdan indictment.

A. None of the Treaties Governing the Law of War, International Criminal Law, or Terrorism Includes the Crime of Conspiracy

The treaties governing the law of war are significant to determining conspiracy's status in the law of war either because they apply directly to Mr. Hamdan's case, or because many of the principles articulated by them constitute customary international law. None of the major treaties on the laws of war, including any of the Geneva or Hague Conventions, makes any reference to conspiracy.

The failure of the 1949 Geneva Conventions to reference conspiracy is particularly significant, since these treaties contemplate that individual nation-states will enforce the most important provisions of the treaties (the so-called "grave breaches") through domestic criminal proceedings. *See, e.g.*, Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention] (stating that each "High Contracting Party" must "undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention" and must "bring such persons, regardless of their nationality, before its own courts"). The grave breaches under the Third Geneva Convention, for example, are willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, compelling a prisoner of

war to serve in the forces of the hostile Power, or willfully depriving a prisoner of war of the rights of fair and regular trial. *Id.* at art. 130.

There is no mention of conspiring to commit such crimes in the treaties, even though the Geneva Conventions are careful to extend liability beyond those who actually perpetrate such crimes to those who "order" such crimes to be committed. *Id.* at art. 129. The U.S. War Crimes Act of 1996, 18 U.S.C. § 2441 (2000), which fulfills the U.S. obligation under the Geneva Conventions to incorporate the grave breach provisions into our criminal code, also makes no mention of conspiracy. This failure to mention conspiracy is especially significant in light of the inclusion of specific conspiracy provisions in other crimes in Title 18, including torture (§ 2340A(c)), terrorism (§ 2332(b)), and sedition (§ 2384).

The statutes and treaties establishing the major courts adjudicating international criminal law, namely the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), also provide evidence of the status of conspiracy as a matter of the customary law of war, since the jurisdiction of these courts includes violations of the law of war. *See* Statute of the International Criminal Tribunal for the former Yugoslavia, May 25, 1993, art. 1, 32 I.L.M. 1192 ("The International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in

the territory of the former Yugoslavia since 1991"); Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, art. 1, 33 I.L.M. 1598 ("The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994"); Rome Statute of the International Criminal Court, July 17, 1998, art. 8, 37 I.L.M. 999 [hereinafter ICC Statute] ("The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.").

When the United Nations Security Council, with the support of the United States, established the ICTY and ICTR, it declined to include conspiracy within the jurisdiction of these courts, with the limited exception of conspiracy to commit genocide. 1 Virginia Morris & Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the former Yugoslavia* 96 (1995). Similarly, the ICC statute does not criminalize conspiracy, although it does include other inchoate crimes such as attempt and solicitation. ICC Statute, art. 25.

Likewise, the major treaties on terrorism, although they do not form part of the law of war, do not mention conspiracy at all. *See* International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, art. 2, S. Treaty Doc.

No. 106-49, 39 I.L.M. 270 (describing liability under the Convention); International Convention for the Suppression of Terrorist Bombings, Jan. 12, 1998, S. Treaty Doc. No. 106-6, 37 I.L.M. 249 (same); International Convention against the Taking of Hostages, Dec. 17, 1979, art. 2, T.I.A.S. No. 11081, 1035 U.N.T.S. 167 (same); Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, Dec. 14, 1973, art. 2, 28 U.S.T. 1975, 1035 U.N.T.S. 167 (same).[3] These treaties provide no support for the conspiracy charge in Hamdan's indictment.

B. The Genocide Convention Does Not Establish a Freestanding Crime of Conspiracy

The government may assert that conspiracy is a crime under international law, because it is included in the Genocide Convention. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3, 102 Stat. 3045, 78 U.N.T.S. 277. The provisions on genocide in the statutes of the ICTY and ICTR reproduce verbatim portions of the Genocide Convention,

[3] As discussed in Parts III and IV below, although these treaties and statutes do not include conspiracy, they do include liability provisions that contemplate group criminality. The ICC Statute, for example, states that an individual may be liable for the commission of a crime "by a group of persons acting with a common purpose." ICC Statute, art. 25. This provision, which is not a substantive crime but instead a form of liability like aiding and abetting, is based on a similar provision in the International Convention for the Suppression of Terrorist Bombings. Kai Ambos, *Individual Criminal Responsibility, in Commentary on the Rome Statute of the International Criminal Court* 475, 483 (Otto Triffterer ed., 1999). The ICTY and ICTR employ a similar doctrine, called joint criminal enterprise, which we discuss further

including the criminalization of conspiracy. William A. Schabas, *Genocide, in Commentary on the Rome Statute of the International Criminal Court* 107, 115 (Otto Triffterer ed., 1999).

The inclusion of conspiracy in the Genocide Convention, and its incorporation on that basis into the ICTY and ICTR statutes, however, is hardly sufficient grounds to assert that conspiracy to commit any other crime forms part of the law of war. Indeed, the absence of the crime of conspiracy in the statutes of the ICTR and the ICTY, except for that part of their statutes that reproduces the Genocide Convention, indicates a conscious rejection of an expansion of conspiracy beyond its limited use in the genocide context.[4]

The ICC treaty provides even stronger evidence of the narrow use of conspiracy in international law. Although the drafters of the statute of the International Criminal Court included genocide within the jurisdiction of the ICC, they did not provide for the crime of conspiracy to commit genocide. Antonio Cassese, *Genocide, in* 1 *The Rome Statute of the International Criminal Court: A*

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below. While these liability doctrines allow for prosecution of individuals acting in concert to commit crimes, they are modes of liability only and do not create independent crimes.

[4] As a practical matter, we are aware of no convictions for conspiracy to commit genocide in cases where the defendant was not also convicted of the crime of genocide. *Prosecutor v. Nahimana*, Case No. ICTR-99-52-T, Judgement and Sentence (Int'l Crim. Trib. for Rwanda Trial Chamber I Dec. 3, 2003) (finding defendants guilty of conspiracy to commit genocide, genocide, direct and public incitement to genocide, and crimes against humanity); *Prosecutor v. Niyitegeka*, Case No. ICTR-96-15-T, Judgement and Sentence (Int'l Crim. Trib. for Rwanda Trial Chamber I May 16, 2003) (finding Niyitegeka guilty of

Commentary 335, 347 (Cassese, Gaeta & Jones eds., 2002). The narrow references in the Genocide Convention and ICTY and ICTR statutes to conspiracy to commit genocide do not support the existence of conspiracy as a crime that is generally applicable to any other violation of the law of war. Indeed, as explained in the following section, the historical use of conspiracy in law of war prosecutions demonstrates a firm rejection of the potential application of conspiracy to war crimes.

C. The Judgments of the International Military Tribunals at Nuremberg and Tokyo Do Not Support the Conspiracy Charge in this Case

Although contemporary international criminal courts uniformly reject the freestanding crime of conspiracy, conspiracy did play a role in the prosecution of Nazi leaders at the International Military Tribunal at Nuremberg (IMT) and Japanese leaders at the International Military Tribunal for the Far East (IMTFE). Nevertheless, for the reasons explained below, the judgments of the post-World War II courts do not support the conspiracy charge alleged against Hamdan.

The London Charter, which governed the proceedings at Nuremberg, stated that there "shall be individual responsibility" for crimes against peace (aggression), war crimes, and crimes against humanity. Charter of the International Military

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genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, and crimes against humanity). No defendant at the ICTY has been convicted of conspiracy to commit genocide.

Tribunal, art. 6, *in* 1 *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946* 10, 11 (1947) [hereinafter London Charter]. It further stated that "[l]eaders, organizers, instigators, and accomplices participating in the formulation or execution of a Common Plan or Conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such a plan." *Id.*

Pursuant to this language, Count One of the Nuremberg Indictment charged that

> during a period of years preceding 8 May 1945, [the defendants] participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit . . . Crimes against Peace, War Crimes, and Crimes against Humanity . . . and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy.

International Military Tribunal, Indictment, *in* 1 *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946* 27, 29 (1947).

Despite the broad language of both the London Charter and the prosecution's indictment, the judges of the International Military Tribunal endorsed a restrictive notion of conspiracy. They sharply limited the prosecution's use of conspiracy, both by narrowing the scope of the substantive crime and by restricting its application to those defendants in Hitler's inner circle. In their final

judgment, the IMT judges declared that "the conspiracy must be clearly outlined in its criminal purpose. It must not be too far removed from the time of decision and of action." International Military Tribunal, Judgment, *in* 1 *Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946* 171, 225 (1947) [hereinafter Nuremberg Judgment].

The judges rejected the application of conspiracy to commit any crime other than aggression, despite the language in the London Charter excerpted above that seems to support the application of conspiracy to "any of the foregoing crimes." London Charter, art. 6. They explicitly rejected the application of conspiracy to crimes against humanity and war crimes.[5]

The judges also limited conviction of conspiracy to commit aggressive war to those who numbered among Hitler's senior leadership and who actively participated in the planning of aggression. Stanislaw Pomorski, *Conspiracy and*

[5] The Nuremberg Judgment said of this language:

> In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit War Crimes and Crimes against Humanity, and will consider only the common plan to prepare, initiate, and wage aggressive war.

Nuremberg Judgment at 226.

Criminal Organization, in The Nuremberg Trial and International Law 213, 233-35 (G. Ginsburgs & V.N. Kudriavtsev eds., 1990).

Even Francis Biddle, who served as the U.S. Judge on the IMT, and who had approved the prosecution's conspiracy strategy while serving in his prior position as U.S. attorney general (and in which capacity he served as the chief prosecutor of the Nazi saboteurs in the *Quirin* case),[6] found the all-encompassing conspiracy charge at Nuremberg illegitimate. *Id.* at 230 (noting that, although "the conspiracy charge was from the beginning at the core of the American master plan of which Biddle himself was one of the architects. . . . Biddle turned 180 degrees on the issue of conspiracy"). Assistant Attorney General Herbert Wechsler, who later assisted Judge Biddle as a legal advisor at Nuremberg, had opposed the inclusion of conspiracy in the London Charter because conspiracy was a "peculiarly Anglo-American concept." Bradley Smith, *Reaching Judgment at Nuremberg* 33 (1977).

Telford Taylor, one of the principal prosecutors at Nuremberg, observed that "the indictment before the IMT was drawn on the theory that conspiracy was the broadest of all the charges, but that the IMT treated it as the narrowest." Telford Taylor, *Final Report to the Secretary of the Army on The Nuernberg War Crimes*

[6] Francis Biddle, *In Brief Authority* 331 (1962).

Trials Under Control Council Law No. 10 app. B at 227 (1949) [hereinafter Taylor].

After the close of the International Military Tribunal at Nuremberg, the United States conducted additional prosecutions by military commission under the auspices of Control Council Law No. 10. Matthew Lippman, *The Other Nuremberg: American Prosecutions of Nazi War Criminals in Occupied Germany*, 3 Ind. Int'l & Comp. L. Rev. 1, 9-10 (1992). Several of these prosecutions also included a conspiracy charge. All of the defendants accused of conspiracy in these subsequent U.S. prosecutions were acquitted of conspiracy because they did not fall within the narrow class of people—namely Hitler's most senior leadership—to whom the International Military Tribunal had found that the conspiracy charge properly applied. Taylor, app. B at 227; Matthew Lippman, *War Crimes Trials of German Industrialists: the "Other Schindlers,"* 9 Temp. Int'l & Comp. L.J. 173, 250 (1995). In addition, the judges at these subsequent trials rejected the prosecution's contention that conspiracy to commit war crimes and crimes against humanity fell within their jurisdiction. *Trial of Josef Altstötter & Others*, *in* VI

Law Reports of Trials of War Criminals 1, 109-10 (United Nations War Crimes Commission ed., 1948) ("The Justice Trial").[7]

Significantly, Telford Taylor, the U.S. prosecutor who argued in favor of the jurisdiction of these courts over conspiracy to commit war crimes, did not rely on the existence of conspiracy as a settled crime under the law of armed conflict. Instead, he emphasized conspiracy's existence in English and American criminal law. *Id.* at 106-09 (summarizing the "principal prosecution arguments" on the application of conspiracy). The judges rejected General Taylor's argument, finding that they did not have jurisdiction over conspiracy to commit war crimes or crimes against humanity. *Id.* at 109.[8]

The prosecutors at the International Military Tribunal for the Far East (IMTFE), which tried members of the Japanese Government after World War II, also initially attempted to rely on a broad notion of conspiracy, accusing the

[7] This fifteen-volume set, edited by the United Nations War Crimes Commission, provides summaries of numerous trials conducted by national authorities after World War II. The editors of the set also included legal analysis of general principles of law arising from these cases.

[8] As far as we are aware, the post-World War II war crimes prosecutions by military commissions conducted by other nations also did not include conspiracy as a substantive charge, although several French prosecutions convicted defendants of the crime of *association de malfaiteurs* (membership in a criminal gang). Digest of Laws and Cases, XV *Law Reports of Trials of War Criminals* 90-91 (United Nations War Crimes Commission ed., 1948). *Association de malfaiteurs* is a substantive offense somewhat similar to conspiracy in that it involves groups of wrongdoers. It differs from U.S. conspiracy doctrine, however, in that it does not make members of such a gang liable for other substantive offenses committed by members of the group. Edward M. Wise, *RICO and Its Analogues: Some Comparative Considerations*, 27 Syracuse J. Int'l L. & Com. 303, 312 (2000). Indeed, complicity liability for co-

defendants of conspiracy to commit crimes against peace, crimes against humanity, and war crimes. But, like the judges at Nuremberg, the judges at the IMTFE sharply limited the conspiracy count, holding that "the charter does not confer any jurisdiction in respect of a conspiracy to commit any crime other than a crime against peace." International Military Tribunal, Judgment, *in* 1 *International Military Tribunal for the Far East* 48,413, 48,449-51 (1948). Like the IMT judges, the judges at Tokyo rejected a plausible reading of the Charter governing the Tokyo Tribunal which would have extended conspiracy to crimes against humanity and war crimes.[9] An analysis of conspiracy under international law upon which the IMTFE judges apparently relied during their deliberations stated that the doctrine of conspiracy used in the Tokyo indictment was restricted to Japanese leaders and was "much more limited than that which exists in the Anglo-American law." Brendan F. Brown et al., *The Crime of Conspiracy* 33-35 (Office of the U.S. Attorney General in Washington, D.C., 23 May 1946, unpublished), *quoted in* R. John Pritchard, *The International Military Tribunal for the Far East and the Allied*

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conspirators has not been embraced in any civil law countries. *Id.* In any event, these French prosecutions provide no support for the existence of American-style conspiracy doctrine in *international* law.

9 After stating that the Tokyo Tribunal would have jurisdiction over crimes against peace, crimes against humanity, and war crimes, the Tokyo Charter further stated that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan." Charter of the International Military Tribunal for the Far East, art. 5, *in* 2 *The Tokyo Major War Crimes Trial* 1, 2-3 (R. John Pritchard ed., 1998).

National War Crimes Trials in Asia, in 3 *International Criminal Law* 109, 122 (M. Cherif Bassiouni ed., 2d ed. 1999).

Moreover, the General Assembly resolution known as the Nuremberg Principles, passed by the United Nations General Assembly in 1950 as a statement of customary international law, also limits the application of conspiracy to crimes against peace. Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, U.N. GAOR, 5th Sess., Supp. No. 12, Principle VI, U.N. Doc. A/1316 (1950) [hereinafter Nuremberg Principles]. The Nuremberg Principles do not recognize conspiracy to commit war crimes or crimes against humanity as a crime under international law. They do provide that "[c]omplicity in the commission of a crime against peace, a war crime, or a crime against humanity . . . is a crime under international law," but they make no reference to a similar role for conspiracy. Nuremberg Principles, Principle VII. In short, the jurisprudence of the post-World War II tribunals does not support the conspiracy charge in this case and instead reveals a consistent pattern of limiting conspiracy to the single crime of aggression.

III. THE INTERNATIONAL CRIMINAL DOCTRINE OF "JOINT CRIMINAL ENTERPRISE" IS NOT EQUIVALENT TO THE CRIME OF CONSPIRACY AND, IN ANY EVENT, IS NOT APPLICABLE TO THIS CASE

Despite the strict limitations imposed upon the scope and application of conspiracy at the IMT and IMTFE and the total absence of conspiracy (with the limited exception of conspiracy to commit genocide) at the ICTY and ICTR, various liability doctrines have been developed to cope with the problem of crimes committed by groups. A theory of liability, variously called joint criminal enterprise, common purpose, or common plan liability[10] does find support in World War II-era jurisprudence and in cases from the ICTY. This doctrine, however, is legally distinct from American-style conspiracy and, in any event, is inapplicable to this case.

A. The International Criminal Doctrine of 'Joint Criminal Enterprise' is not Equivalent to the Crime of Conspiracy

The theory of liability known as joint criminal enterprise, common purpose, or common plan liability does not appear explicitly in the statute of the ICTY, but it has been found applicable by the ICTY on the basis of customary international law. The ICTY first applied the doctrine in the *Tadić* case. *Prosecutor v. Tadić*,

[10] These terms are all synonymous and will be used interchangeably in this brief.

Judgement, Case No. IT-94-1-A (Int'l Crim. Trib. for the former Yugoslavia Appeals Chamber July 15, 1999) [hereinafter *Tadić*].

Pursuant to joint criminal enterprise liability, an individual may be held responsible for all crimes committed pursuant to the existence of a common plan or design which involves the commission of a crime provided for in the court's jurisdiction if the defendant participates with others in the common design and intends to effect the crime which is the object of the joint criminal enterprise.[11] *Prosecutor v. Vasiljević*, Judgement, Case No. IT-98-32-A, ¶¶ 94-101 (Int'l Crim. Trib. for the former Yugoslavia Appeals Chamber Feb. 25, 2004) (summarizing joint criminal enterprise jurisprudence). To be found guilty of the crime of murder on a joint criminal enterprise theory, for example, the prosecution must prove that the common plan was to kill the victim, that the defendant voluntarily participated in at least one aspect of this common design, and that the defendant intended to assist in the commission of murder, even if he did not himself perpetrate the killing. *Tadić*, ¶ 196.

[11] The ICTY has subdivided joint criminal enterprise liability into three categories. In the first category, the perpetrators act pursuant to a common design to carry out crimes and share the same criminal intention. *Tadić*, ¶ 196. The second category of joint criminal enterprise relates to "systems of ill-treatment," primarily concentration camps. *Id.* ¶ 202. To convict an individual under this rubric, the prosecution must prove the existence of an organized system of repression; active participation in the enforcement of this system of repression by the accused; knowledge of the nature of the system by the accused; and the accused's intent to further the system of repression. *Id.* ¶ 203. The third category of joint criminal enterprise involves criminal acts that fall outside the common design. The *Tadić* Appeals Chamber concluded that a defendant who intends to participate in a common design may be found guilty

Joint criminal enterprise does bear some similarities to conspiracy; like conspiracy, joint criminal enterprise addresses situations of "collective criminality." *Id.* ¶ 195. Nevertheless, conspiracy and joint criminal enterprise are distinct in important ways. Joint criminal enterprise is not a freestanding criminal offense like conspiracy, but instead is a mode of liability—in the same way, for example, that aiding and abetting is a mode of liability and not a substantive crime. Furthermore, the ICTY has emphasized that joint criminal enterprise liability is not the same as conspiracy, even when the similarities between them have been argued by defense counsel. *Prosecutor v. Milutinović*, Decision on Dragoljub Ojdanić's Motion Challenging Jurisdiction—Joint Criminal Enterprise, Case No. IT-99-37-AR72 ¶ 26 (Int'l Crim. Trib. for the former Yugoslavia Appeals Chamber May 21, 2003) (stating that "[c]riminal liability pursuant to a joint criminal enterprise is not a liability for . . . conspiring to commit crimes").

In any event, Hamdan's indictment charges conspiracy as a free-standing crime. It does not assert that Hamdan is liable for the object offenses of terrorism and murder because of his participation in a joint criminal enterprise. The question in this case is not whether the prosecutor *could* charge Hamdan with some other offense that would be cognizable under the law of war, but rather whether the prosecutor in *this* indictment has charged an offense triable by military

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of acts outside that design if such acts are a "natural and foreseeable consequence of the effecting of that

commission.[12] As a result, joint criminal enterprise doctrine, which has not been charged in this case, is legally irrelevant.

B. Neither Conspiracy nor Joint Criminal Enterprise Has Been Used in Conspiracies of this Scope Against Defendants Who Did Not Hold a Senior Military or Political Position

Since Hamdan is charged with conspiracy and not with any other crimes, joint criminal enterprise cannot provide a basis for finding that conspiracy is a crime under the "law of war," as 10 U.S.C. § 821 demands. Joint criminal enterprise is never used as a substantive crime. Furthermore, the international judges that have developed the doctrine of joint criminal enterprise have specifically stated that joint criminal enterprise is not equivalent to conspiracy.

Nevertheless, even if Hamdan were charged with a substantive crime like murder on a joint criminal enterprise theory of liability, his indictment would be anomalous in international law. Joint criminal enterprise has never been used to impose liability for a broad range of crimes on a defendant whose most serious role in the offense was acting as a driver or bodyguard. Instead, the application of the doctrine has been limited to high-level defendants who orchestrated a broad pattern

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common purpose." *Id.* ¶ 204.

[12] Just as the Military Commission procedures require that a defendant be notified of the charges against him before trial, 32 C.F.R. § 9.5(a), the prosecution at the ICTY must indicate in the indictment if it intends to rely on a theory of joint criminal enterprise liability. *Prosecutor v. Blaškić*, Judgement, Case No. IT-95-14-A ¶ 215 (Int'l Crim. Trib. for the former Yugoslavia Appeals Chamber July 29, 2004).

of crimes, or to low-level defendants who were closely linked in time and space to the actual criminal acts. The World War II-era prosecutions upon which the ICTY relied in the seminal *Tadić* case make this point. In none of these cases was a low-level defendant convicted of common purpose liability for offenses to which he was not personally linked in a direct manner.

The World War II cases relied upon by the *Tadić* Appeals Chamber as proof of the content of customary international law on common purpose (joint criminal enterprise) liability fall into two types. The first involves the unlawful killings of small groups of Allied POWs, either by German soldiers or by German soldiers and German townspeople. In each one of the cases cited in *Tadić*, all of the defendants were present or in the immediate vicinity of the murders, and none of the defendants was charged with participation in some larger plan outside of the unlawful treatment of the prisoners involved.[13] The second group of cases concerns concentration camps.[14] The low-level defendants in these cases were

[13] *See, e.g., Trial of Franz Schonfeld & Nine Others, in* XI *Law Reports of Trials of War Criminals* 64, 68 (United Nations War Crimes Commission ed., 1947) (Tried by British Military Court for the Trial of War Criminals, Held at Essen, 11-26 June 1946); *Trial of Erich Heyer & Six Others, in* I *Law Reports of Trials of War Criminals* 88, 88 (United Nations War Crimes Commission ed., 1947) ("The Essen Lynching Case," Tried by British Military Court for the Trial of War Criminals, Essen, 18-19 Dec. & 21-22 Dec., 1945); *Trial of Otto Sandrock & Three Others, in* I *Law Reports of Trials of War Criminals* 35, 40 (United Nations War Crimes Commission ed., 1947) ("The Almelo Trial," Tried by British Military Court for the Trial of War Criminals, Held at the Court House, Almelo Holland, 24-26 Nov. 1945).

[14] *See, e.g., Trial of Martin Gottfried Weiss & Thirty-Nine Others, in* XI *Law Reports of Trials of War Criminals* 5, 12 (United Nations War Crimes Commission ed., 1947) ("The Dachau Concentration Camp

held liable for crimes committed at the concentration camps in which they were personally employed. In none of these cases were defendants held liable for crimes occurring at other camps, or for the broader Nazi plan of extermination in the "Final Solution."

Although some of the language used by the ICTY in describing the potential scope of joint criminal enterprise doctrine is more expansive that these earlier cases would warrant, in practice the doctrine has not been applied by the ICTY against low-level perpetrators for crimes not committed in their direct physical vicinity. Tadić, in fact, is one of the few low-level perpetrators to whom joint criminal enterprise has been applied in the ICTY. Tadić was convicted on a joint criminal enterprise theory for the murder of five men. The victims were alive when Tadić and a group of men entered the town with the intent of beating the inhabitants and driving them from their homes; the victims were found shot to the death after the group's departure. *Tadić*, ¶ 232. The court in Tadić's case found that, upon these facts, Tadić could be found guilty of murder on a theory of common purpose liability. *Id.*

In addition to Tadić, a few other relatively low-level perpetrators have been convicted of crimes based upon a joint criminal enterprise theory, but only in situations where the scope of the common plan is limited by the defendant's

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Trial," Tried by General Military Government Court of the United States Zone, Dachau, Germany, 15

physical proximity to the crimes committed. The crimes involved in these cases are most often limited to the confines of a single prison camp, where the defendant was present or nearby when the crimes occurred. *See, e.g., Prosecutor v. Kvocka*, Judgement, Case No. IT-98-30/1 ¶¶ 397-98, 419 (Int'l Crim. Trib. for the former Yugoslavia Trial Chamber Nov. 2, 2001) (finding deputy commander of Omarksa prison camp who wielded "considerable influence" at the camp guilty of persecution, murder and torture of prisoners on a joint criminal enterprise theory of liability). Thus, the application of joint criminal enterprise doctrine has been confined in practice to individuals who have a close nexus to the crimes for which they are to be held responsible, thus avoiding the obvious unfairness that would result from holding every foot soldier in an army responsible for all crimes committed by fellow soldiers anywhere, and at anytime, during the war.

Although senior leaders such as Slobodan Milošević have been charged with participating in broad-ranging joint criminal enterprises to ethnically cleanse entire regions, no low-level perpetrator has been convicted by the ICTY under a joint criminal enterprise theory for offenses committed by other individuals in other parts of the country to which he made no direct or substantial contribution. Indeed, even those writers who are most enthusiastic about the potential application of conspiracy to international criminal law note that the rationales supporting the use

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Nov.-13 Dec. 1945).

of conspiracy "are particularly well suited for prosecuting criminal masterminds and heads of conspiracies." Richard P. Barrett & Laura E. Little, *Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals*, 88 Minn. L. Rev. 30, 62 (2003). In short, international case law provides no support for a conspiracy charge that would attribute responsibility for a broad range of crimes spanning many years and continents based on the sort of minor contributions attributed to Hamdan by the indictment.

CONCLUSION

The indictment at issue in this case rests Hamdan's liability for attacking civilians, murder by an unprivileged belligerent, and terrorism to crimes allegedly committed by others in the conspiracy. Because the government apparently has no evidence that Hamdan physically committed any of the substantive offenses triable by this Commission, the Government is forced to rely on a vague charge of conspiracy. This failure of proof is also a failure of law.

Conspiracy to commit these crimes has never been recognized as part of the customary law of war. The conspiracy charge in Hamdan's indictment is not supported by precedent from the statutes or jurisprudence of the International Military Tribunal at Nuremberg, the International Military Tribunal for the Far East, the related post-World War II national prosecutions, the International

Tribunal for the former Yugoslavia, the International Tribunal for Rwanda, or the International Criminal Court. The international law basis for the conspiracy charge demanded by the terms of 10 U.S.C. § 821 is simply nonexistent.

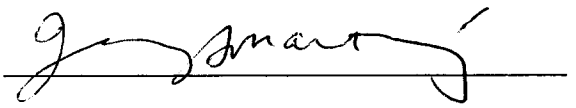
Joint criminal enterprise is not a substantive crime under the customary law of war and cannot provide a basis for the United States' assertion that conspiracy to commit attacks on civilians, murder by an unprivileged belligerent, and terrorism constitutes a violation of the international law of armed conflict or international criminal law.

Even considering those doctrines like joint criminal enterprise that do not create substantive crimes but provide for liability for crimes committed by others, Hamdan's indictment is unprecedented. The crimes specified in the indictment, namely the bombings of the U.S. embassies in Kenya and Tanzania in 1998, the attack against the USS Cole, and the events of September 11, 2001, span a period of years and several continents. We are not aware of any precedent in the law of war (or in the related field of international criminal law) that provides for criminal liability of such territorial and temporal scope in the prosecution of an individual who appears not to have held a position of significant leadership, political, or military responsibility.

For the foregoing reasons, this court should affirm the District Court's grant of Hamdan's petition for habeas corpus.

DATED this 27th day of December, 2004.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, pursuant to Circuit Rule 32(a)(7)(C), that this brief complies with the type-volume limitations set forth in Circuit Rule 32(a)(7)(B).

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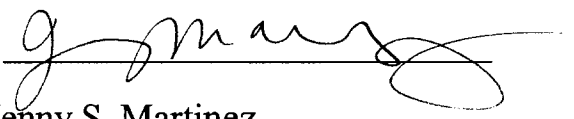

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The undersigned hereby certifies that on this 27th day of December, 2004, I caused a true and accurate copy of the foregoing Brief of *Amici Curiae* Professors Allison Marston Danner and Jenny S. Martinez in Support of Petitioner-Appellee Salim Ahmed Hamdan to be served by U.S. mail, postage prepaid, on:

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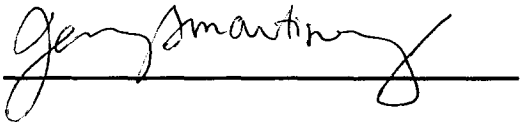

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