	)	IN THE COURT OF MILITARY COMMISSION REVIEW
	)	MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*
	)	Case No. 09-001
UNITED STATES OF AMERICA	)	Tried at Guantanamo Bay, Cuba, on
	)	7 May 2008
	)	15 August 2008
Appellee	)	24 September 2008
	)	27 October – 3 November 2008
	)	Before a Military Commission
v.	)	Convened by Hon. Susan Crawford
	)	Presiding Military Judge
ALI HAMZA AHMAD SULIMAN AL BAHLUL	)	Colonel Peter Brownback, USA (Ret.)
	)	Colonel Ronald Gregory, USAF
Appellant.	)	Date: **15 October 2009**

TO THE HONORABLE JUDGES OF THE COURT OF MILITARY COMMISSIONS REVIEW

The National Institute of Military Justice ("NIMJ"), Human Rights Watch ("HRW"), Professor Stephen I. Vladeck and Professor David S. Weissbrodt respectfully move for leave to file the instant brief as *Amicus Curiae* in the case of United States of America v. Ali Hamza Ahmad Suliman Al Bahlul.

INTEREST OF AMICUS CURIAE

NIMJ is a District of Columbia nonprofit corporation organized in 1991 to advance the fair administration of military justice and improve public understanding of the military law

system. NIMJ has worked and written extensively in the relevant fields and seek now to offer the results of recent and highly relevant research for consideration by this court.

NIMJ's officers and advisory board include law professors, private practitioners, and other experts in the field, none of whom are on active duty in the military, but nearly all of whom have served as military lawyers, several as flag and general officers.

NIMJ appears regularly as an *amicus curiae* before the United States Court of Appeals for the Armed Forces, and has appeared in the United States Supreme Court as an *amicus* in support of the government in *Clinton v. Goldsmith*, 526 U.S. 529 (1999), and in support of the petitioners in *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdan v. Rumsfeld*, No. 05-184 (pending), and in the United States Court of Appeals for the District of Columbia Circuit in *Boumediene v. Bush*, No. 05-5062 (pending).

NIMJ is actively involved in public education through its website, www.nimj.org, and through publications including the Annotated Guide to Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (LexisNexus 2002) and two volumes of Military Commission Instructions Sourcebooks (2003-04). NIMJ has also sought to improve public understanding of military law by seeking release of comments on the rules governing military commissions. *National Institute of Military Justice v. Dep't of Defense*, Civil No. 04-312 (D.D.C.) (pending). NIMJ is independent of the government and relies for its programs exclusively upon private grants and donations.

Human Rights Watch (HRW) is one of the leading independent organizations dedicated to defending and protecting the human rights of people around the world. For over 30 years, HRW has investigated and exposed human rights violations and challenged governments and

international tribunals to end abusive practices, respect human rights, and hold abusers accountable for their actions.

To fulfill its mission, HRW investigates allegations of abuse in the United States and throughout the world by gathering information from governmental and other sources, interviewing witnesses, and issuing detailed reports. Where abuse of human rights has been found, HRW advocates for the victims before governmental officials and in the court of public opinion. For example, recent reports issued by HRW document: the disproportionate infliction of corporal punishment on students with disabilities in the United States; the abusive use of religious counseling, indefinite detention and flawed trials in Saudi Arabia's counterterrorism program; harm to Israeli civilians from rocket attacks launched by Palestinian armed groups in Gaza; dysfunction, abuse and impunity in the police forces of India; institutionalized discrimination against gays and lesbians in Burundi; arbitrary killings by security forces in Nigeria; and the failure to test thousands of rape kits collected from victims of sexual assaults in Los Angeles, California.

Stephen I. Vladeck is a Professor of Law at American University Washington College of Law. He is a nationally recognized expert on the role of the federal courts in the war on terrorism, he was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and has co-authored amicus briefs in a host of other lawsuits challenging the U.S. government's surveillance and detention of terrorism suspects.

David S. Weissbrodt is the Regents Professor of Law and the Fredrikson & Byron Professor of Law at the University of Minnesota. He has published over 200 articles and books on human rights and humanitarian law.

ARGUMENT IN SUPPORT OF MOTION FOR LEAVE

The legal issues encompassed within this brief are novel and necessarily warrant additional explanation. The argument presented herein has not been developed in the pleading of this case or in any related case. The arguments made here bear directly on the outcome appropriately to be reached by this court.

The present brief focuses on material support for terrorism and argues that the limited jurisdiction of an Article I court precludes a military commission from exercising subject-matter jurisdiction over such a charge. The brief further argues that the charge of material support for terrorism is not only in excess of Congress's duty to define and punish, but is dangerously overbroad, as it would transform any participation of a non-state actor in an armed conflict into a crime under international law. There is no legitimate basis for such a consequence in any recognized source of international law or in the jurisprudence relevant thereto.

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UNITED STATES COURT OF MILITARY COMMISSION REVIEW
***before* F. Williams, D. Conn, and C. Thompson**

	BRIEF OF *AMICUS CURIAE* **NATIONAL INSTITUTE OF MILITARY JUSTICE, HUMAN RIGHTS WATCH, PROFESSOR STEPHEN I. VLADECK, AND PROFESSOR DAVID S. WEISSBRODT**
	CMCR CASE NO. 09-001
UNITED STATES, Appellee,	Tried at Guantanamo, Cuba, on 7 May 2008, 15 August 2008, 24 September 2008, 27 October - 3 November 2008
v.	Before a Military Commission convened by Hon. Susan Crawford
ALI HAMZA AHMAD SULIMAN AL BAHLUL, Appellant.	Presiding Military Judge Colonel Peter Brownback, USA (Ret.) Colonel Ronald Gregory, USAF
	DATE: 15 October 2009

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

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SUMMARY OF ARGUMENT

THE MILITARY COMMISSION LACKED SUBJECT MATTER JURISDICTION OVER MR. AL BAHLUL AND, THEREFORE, HIS CONVICTION SHOULD BE REVERSED

I. THE CHARGE OF MATERIAL SUPPORT FOR TERRORISM ("MST") FALLS OUTSIDE THE LIMITED SUBJECT-MATTER JURISDICTION OF A MILITARY COMMISSION

A. Military commissions are tribunals of necessity vested with limited subject-matter jurisdiction derived from Article I and the laws and customs of war.

A fundamental element of any criminal prosecution is jurisdiction. The court or tribunal must have jurisdiction over the offense and over the alleged offender. If the court or tribunal lacks jurisdiction, then it is without legal authority to adjudicate or punish the alleged offender. Jurisdiction is such a fundamental element of any criminal prosecution that it cannot be waived by the accused and lack of jurisdiction is an issue that can be raised by the accused either at trial or for the first time on appeal.

Article III of the United States Constitution vests the judicial power of the United States in the Supreme Court and in such inferior courts as the Congress may from time to time ordain and establish. U.S. CONST. art. III, § 2. Article III courts are courts of broad jurisdiction, and judicial power is extended to all cases arising under the Constitution and the laws of the United States. *Id.* If it can be established that the United States has jurisdiction over Mr. al Bahlul and over the offenses he is alleged to have committed, there is little doubt that his case could have been brought before an Article III court.

While Article III establishes courts of broad jurisdiction, that is not the only source of authority under the Constitution for the creation of courts. Under Article I of the Constitution, Congress has the authority to create special purpose courts of limited jurisdiction. These courts are for the special purpose of implementing Congress's enumerated powers under Article I. *Ex*

parte Bakelite Corporation, 279 U.S. 438, 449 (1929). Accordingly, the Constitution requires the existence of a genuine link between an enumerated power of Article I of the Constitution and the creation of subject-matter jurisdiction in an Article I tribunal for the trial of statutorily defined offenses (for example, the trial of criminal offenses by courts-martial, or the trial of criminal offenses within the jurisdiction of the District of Colombia). Absent such a link, the trial of violations of federal criminal proscriptions must occur in an Article III court.

One example of a special purpose court is military courts. Military courts are established under Article I in order to implement Congress's enumerated power to make rules for the government and regulation of the armed forces. U.S. CONST. art. I § 8, cl. 14; Weiss v. United States, 510 U.S. 163, 166-169 (1994). Because military courts are special courts, they are courts of limited jurisdiction. In order to prosecute an accused in a military court, there must be jurisdiction over the offense and the offender.

Military commissions, like other military courts, are courts of limited jurisdiction. They are Article I courts established pursuant to Congress's enumerated authority to define and punish offenses against the law of nations. U.S. CONST. art. I § 8, cl. 10; *Ex parte* Quirin, 317 U.S. 1, 26-28 (1942). Because they are courts of limited jurisdiction, it must be established that these courts have proper subject-matter jurisdiction. The only purpose of these courts is to define and punish offenses against the law of nations, and their subject-matter jurisdiction is limited to only those offenses which are offenses against the law of nations or war crimes. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 839 (2d ed. 1920). If Congress were to attempt to try cases which are not war crimes by military commission, such an attempt would exceed the limited jurisdiction of these special purpose

courts. The military commission would lack subject-matter jurisdiction over the offense and, thus, be invalid. *See* United States v. Denedo, 129 S. Ct. 2213, 2221 (2009).

This is not a controversial or even a contested proposition. All parties agree that the subject-matter of military commissions is limited to offenses defined by the laws of war. The President, through his duly appointed representative, recently acknowledged before Congress that military commissions are to be used only to prosecute law of war offenses. *See,* Testimony of David Kris, Assistant Attorney General, before Senate Armed Services Committee 3 (July 7, 2009).

Congress also acknowledged this limited jurisdiction of military commissions. Military Commissions Act ("MCA") section 948d(a) states "[a] military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001." 10 U.S.C. § 948d(a) (2006). In addition, section 950p(a) of the MCA states "[t]he provisions of this subchapter [substantive offenses] codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission." 10 U.S.C. § 950p(a) (2006).

Of course, merely stating that a substantive offense codified by the MCA is an offense traditionally triable by military commissions does not make it so. Congress cannot by statute expand the subject-matter jurisdiction of military commissions to include offenses that are not violations of the laws or customs of war. Congress may only provide by statute for the trial and punishment (define and punish) of violations of the laws and customs of war. *Hamdan*, 548 U.S. at 597; *Quirin*, 317 U.S. at 28. If Congress's authority to define and punish was not limited to

law of war offenses, military commissions would cease to be special purpose courts of limited jurisdiction. Such a result would run counter to our constitutional structure.

B. Congress's authority to define and punish offenses in violation of the law of nations is not a grant of plenary authority to define any act or omission as a war crime, but instead permits the incorporation into municipal law of existing international law prohibitions.

The Constitution vests Congress with the power to "define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10. It is undisputed that this provision of Article I grants Congress the authority to provide for the federal prosecution of violations of international law. Indeed, the origins of this constitutional provision lie in the desire to ensure that the United States was perceived by its peers in the community of nations as playing its role in enforcing international law.

This grant of authority is not, however, a license to characterize any act or omission as a violation of international law. Such an outcome would lead to potentially absurd results. Congress could not, through the exercise of this vested authority, simply designate a crime within the exclusive jurisdiction of the states – for example a murder lacking any connection to federal interests – as a violation of international law, thereby justifying an assertion of federal criminal jurisdiction over the offense. Instead, the authority granted by this provision of the Constitution is restricted to placing within the jurisdiction of federal courts offenses that qualify as violations of existing international legal prohibitions. As one scholar has noted,

> This Article demonstrates that the Define and Punish Clause limits Congress's power to criminalize conduct that lacks a U.S. nexus. Two possible interpretations emerge from examining the evidence. At most, Congress can legislate universally only when international law has made punishment of the regulated conduct universally cognizable. In the narrowest interpretation, Congress's universal jurisdiction powers under the clause are restricted solely to piracy. In either case, the restriction comes not from the independent force of international law but from the Constitution itself, which incorporates international law by reference in Clause Ten. This conclusion suggests that at least one important criminal law currently in force and several others pending in Congress exceed Congress's

Article I competence.

Eugene Kontorovich, *The "Define and Punish" Clause and the Limits of Universal Jurisdiction*, 103 Nw. U. L. Rev. 149, 151 (2009).

This limited scope of authority is entirely logical when one considers the nature of charging criminal violations in U.S. courts. A federal prosecutor cannot simply allege a violation of international law in an indictment. Instead, the indictment must provide notice to a defendant of the statutory basis for the offense. Accordingly, in order to prosecute violations of international law, Congress must codify those prohibitions in the form of federal criminal statutes. This is precisely what the Define and Punish clause facilitates.

As the excerpt above indicates, an act of Congress based on the authority of the Define and Punish Clause that criminalizes conduct that is not a violation of international law "exceeds Congress's Article I competence." Kontorovich, *supra* at 151. Accordingly, the Define and Punish Clause may be invoked as a constitutional basis for subjecting an offense to the jurisdiction of a military commission only when the offense is derived from an existing international law prohibition. *Hamdan,* 548 U.S. 597; *Quirin,* 317 U.S. 26-28.

War crimes (violations of the laws and customs of war) satisfy this requirement so long as other jurisdictional requirements are satisfied. (For example, the offense derived from the law applicable to the type of armed conflict in which the alleged acts or omissions occurred.) *Hamdan*, 548 U.S. 597-598; *Quirin*, 317 U.S. 29. This is consistent with several seminal Supreme Court decisions addressing the jurisdiction of military commissions. *Quirin*, 317 U.S. 1; *Hamdan,* 548 U.S. 557. However, by vesting military commissions with jurisdiction over "other" offenses (implicitly acknowledging offenses in this category are not violations of the laws and customs of war), Congress exceeded its competence derived from the Define and

Punish Clause, with no other source of constitutional authority to vest a non-Article III criminal tribunal with jurisdiction over such offenses.

C. MST is not a war crime triable by military commission

The charge of MST is found in section 950v(25) of the MCA, which defines "other" offenses triable by military commission. MST as a crime under domestic law preceded the enumeration of this offense under the MCA. In 1996, Congress created this offense under title 18, section 2339B of the Federal Criminal Code. The law was subsequently expanded by the Patriot Act; however, before its inclusion in the MCA, MST had never been made an offense under the law of war.

By taking this domestic offense of MST and injecting it into the MCA, Congress sought to overlay a law enforcement paradigm into a law of war paradigm. In essence, Congress sought to mix apples and oranges. The fact that MST is an offense under domestic law does not make it an offense under the law of war. If MST is not an offense under the law of war, military commissions have no jurisdiction to try such an offense because, as noted above, military commissions are special purpose Article I courts whose subject-matter jurisdiction is limited to offenses in violation of the law of war.

There is no jurisprudential foundation for characterizing MST as an offense triable by a military commission. While military commissions have long been a fixture of our legal landscape, prior to the MCA and the cases being prosecuted under the MCA, MST had never been alleged or charged in any previous military commission throughout the entire history of our country. In addition, MST has never been alleged as part of any international war crimes tribunal, nor has the offense ever been codified as a crime under the law of war.

The government may contend, as it has in other cases, that the defense cannot cite any example where Congress's codification of a law of war violation has been reversed. Of course, such an argument is misplaced and, in essence, seeks to place the burden on the defense to prove a negative. The relevant inquiry is not whether the defense can cite to an example of Congress's codification being reversed; rather, the relevant question is whether the government can cite any example of MST being codified or charged as a war crime prior to the creation of the MCA. This is the relevant inquiry because, in order for an offense to constitute a violation of the law of war, it must be recognized as an offense against the law of war by "universal agreement and practice both in this country and internationally." *Hamdan*, 548 U.S. at 603 (quoting *Quirin*, 317 U.S. at 30). And here is where the government's argument fails utterly. There is simply no case prior to the creation of the MCA where MST has been charged or codified as a war crime, either domestically or internationally.

There are two primary reasons why MST has not been made a war crime. First and foremost, combating terrorism and terrorist organizations has largely been the responsibility of domestic law enforcement agencies. As such, the laws created to punish terrorists and those who support terrorist activities have been created under this paradigm. It is true that, by declaring a war against terrorism, the United States has sought to address the problem of transnational terrorism using a war fighting paradigm. Nevertheless, this paradigm shift in no way automatically converts violations of domestic law into law of war violations. If this was the case, any distinction between law enforcement and war fighting would be both arbitrary and subject to manipulation.

Second, MST is potentially a very broad charge that could impose criminal liability on a broad range of conduct, including inchoate activities, as well as activities far removed from and

lacking any relationship to conduct on the battlefield. Imposing liability of this scope is not something that the law of war was designed to address. Because MST has never been a charge recognized under the law of war, it is not a charge over which military commissions have any subject matter jurisdiction, and, in this case, that charge must be dismissed.

This is not only the position of the defense and the *amicus* in this case; it is the position of the President, as articulated through his representative. In testimony before the Senate Armed Services Committee on July 7, 2009, Mr. Jeh Johnson, the General Counsel, Department of Defense, stated that, "After careful study, the Administration has concluded that appellate courts may find that 'material support for terrorism' -- an offense that is also found in Title 18 -- is not a traditional violation of the law of war." Testimony of Jeh Johnson, Department of Defense General Counsel, before the Senate Armed Services Committee (July 7, 2009). The Administration's position is that this charge should, therefore, be removed from the list of offenses triable by military commission. If the Executive, as Commander-in Chief of the armed forces and charged with the responsibility of faithfully executing the laws of the United States, expresses the belief that this charge should not be prosecuted as an offense before military commissions, this court should dismiss this charge against Mr. al Bahlul.

II. MST IS BEING USED TO ESSENTIALLY TRANSFORM ANY PARTICIPATION BY A NON-STATE ACTOR IN ARMED CONFLICT INTO AN INTERNATIONAL LAW CRIME WITH NO LEGITIMATE BASIS FOR DOING SO.

A. International law does not criminally proscribe the mere participation by non-state actors in non-international armed conflict.

Subjecting individuals to the criminal jurisdiction of a military commission for providing support to a terrorist group essentially transforms association with such a group into a violation of international law. As a result, this offense is closely connected to the underlying rationale of

the MCA itself: that participation in armed conflict by non-state actors is itself a violation of international law. 10 U.S.C. § 948 et seq. pmbl.

This rationale was manifest in the offense of "Murder by an Unprivileged Belligerent" established for trial before the original military commissions created by President Bush in 2001. Crimes and Elements for Trial by Military Commission, 32 C.F.R. Subt. A, Ch. I, Subch. B, § 11.1 et seq. (2003). That offense designated any killing by an unprivileged belligerent as a violation of the laws and customs of war on the theory that engaging in hostilities without privilege violated international law. This theory is carried forward in the MCA in several provisions. First, the offense of "Murder in Violation of the Laws of War" (10 U.S.C. § 950v(b)(15) (2006)) is based on an identical predicate – that any killing committed by an individual without the "combatant" privilege is a *per se* violation of international law.[1] Although more subtle, subjecting the offense of MST to the criminal jurisdiction of the military commission also reflects this premise. If, as noted above, a military commission may only exercise jurisdiction over offenses qualifying as violations of the laws and customs of war, or offenses that are codifications of existing international law prohibitions, it establishes by implication that supporting a terrorist organization is a *per se* violation of international law. Therefore, any person engaged in such conduct may be subjected to the jurisdiction of a military commission.

[1] Amici realize that the Military Commission has distinguished the offense of Murder in Violation of the Law of War from Murder by an Unprivileged Belligerent by ruling that the former offense requires proof that the killing transgressed a substantive prohibition of the law of war (for example, the prohibition against perfidy, or the prohibition against killing a civilian). This interpretive limitation reflects a rejection of the broad assertion of international illegality reflected in the Manual for Military Commissions. It is the position of the Amici that the offense of providing Material Support to Terrorism suffers from the same impermissible overbreadth that led the Military Commission to adopt an interpretation of Murder in Violation of the Law of War that is more restrictive than the original position of the government. Explaining how this defect is related to the original scope of the Murder in Violation of the Law of War prohibition is, therefore, necessary.

Because the offense of Terrorism as defined in the MCA does not require proof of a law of war violation, supporting the efforts of non-state actors to attack what would normally be defined as lawful military objectives (such as U.S. armed forces or military installations) would ostensibly qualify as MST as defined by the MCA. This absence of a link between the support provided and a substantive violation of the law of war indicates that the scope of this offense includes the provision of support that *if* provided by a state actor would not be considered a violation of international law. It is, therefore, difficult to escape the conclusion that this offense, as defined, is an effort to define as a war crime the provision of support to any non-state belligerent engaging in hostilities in order to influence the policies of a state. While such conduct may violate the municipal law of the state, it is not a war crime.

The only other possible interpretation of the MCA would be that Congress recognized that MST was not a violation of international law, but vested the military commissions with jurisdiction to try this offense, notwithstanding. If this is the proper interpretation of the MCA, then Congress lacks the constitutional authority to vest an Article I court with criminal jurisdiction over this offense that is neither a violation of international law (falling within the Define and Punish power of Congress) or related to the "Government and Regulation of the land and naval Forces." U.S. CONST. art. I.

B. Extending the international law prohibition against acting as an unlawful belligerent in an IAC to NIAC is without justification or jurisprudential foundation.

The MCA is based on a conclusion that the acts and omissions subject to trial by military commission occurred in the context of an armed conflict. According to this statute,

> This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.

10 U.S.C. § 948b(a) (2006). Because of this, MST is, in effect, a characterization applied to the provision of support to a non-state opponent in the context of an armed conflict. This reveals how the offense is subtly, but unquestionably, connected to the premise that mere participation in hostilities by non-state actors is a *per se* violation of international law. In the context of inter-state hostilities, providing material support to a belligerent opponent would not be characterized as a violation of the laws and customs of war, but would, instead, be recognized as a lawful combat or combat service support function by enemy personnel. Thus, because of the armed conflict foundation for the MCA, the only substantive distinction between provision of lawful military support to a state belligerent opponent and the provision of support to a terrorist belligerent opponent is that the terrorist opponent is a non-state actor. (In this regard, it is important to note that MST is a theory of criminal responsibility that extends well beyond accomplice liability for the substantive acts of the terrorist operatives to whom the support is provided.)

Because this is the only rational distinction between providing support to a "lawful belligerent" force and providing support to a "terrorist" belligerent force, it becomes clear that the thread that connects MST to the offense of Murder in Violation of the Laws of War (10 U.S.C. § 950v(b)(15) (2006)) is the underlying legal predicate that any participation in hostilities by a "unlawful" belligerent (one who does not qualify for prisoner of war status under the laws of war) is a violation of international law, *per se* unlawful, and, therefore, subject to the jurisdiction of a military commission. This is reflected in the following explanation for this offense contained in the Manual for Military Commissions ("Manual"), the regulatory implementation of the MCA: "A 'violation of the law of war,' may be established by proof of the status of the accused as an unlawful combatant . . . " U.S. DEP'T OF DEF., MANUAL FOR

MILITARY COMMISSIONS § 6(a)(16)(c) (2007), *available at* http://www.defenselink.mil/pubs/pdfs/The%20 Manual%20for%20Military%20Commissions.pdf. This critical foundation for the prosecution of individuals by military commission is also reflected in this excerpt from the Manual:

> It is generally accepted international practice that unlawful enemy combatants may be prosecuted for offenses associated with armed conflicts, such as murder; such unlawful enemy combatants do not enjoy combatant immunity because they have failed to meet the requirements of lawful combatancy under the law of war.

Id. at §6(a)(13)(d).

The flaw in this theory of international criminal responsibility in the context of a non-international armed conflict is revealed by this excerpt, which is overbroad and imprecise. Contrary to the assertion, there is no such "general acceptance" in the context of non-international armed conflict.[2] Instead, the assertion that operating without privilege renders the belligerent conduct of an individual a violation of *international* law has only been asserted in the context of international armed conflict (this theory is ostensibly derived from the U.S. Supreme Court's *Quirin* decision, which upheld the trial of German saboteurs for the war crime of "unlawful belligerency" during the Second World War). *See* Quirin, 317 U.S. 1. Even in this context, it has never been universally or even widely endorsed. *See* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT (2004). But even assuming, *arguendo*, the legitimacy of this theory of international criminal responsibility in

[2] The conflict between the United States and al Qaeda is a non-international armed conflict. Hamdan v. Rumsfeld, 548 U.S. 557, 630 (2006) (holding Common Article 3 to the Geneva Conventions applicable to the conflict between the United States and al Qaeda because that conflict "does not involve a clash between nations . . . . In context, then, the phrase 'not of an international character' bears its literal meaning.") It has also been the position of the United States since it commenced military operations following the terrorist attacks of September 11, 2001, that it was engaged in a distinct armed conflict with al Qaeda (suggesting this conflict cannot be treated as a sub-component of the armed conflict in Afghanistan). *See* Letter from Jeffrey De Laurentis, Chief of Section, Political and Specialized Agencies of the Permanent Mission of the United States of America to the United Nations Office at Geneva, to the Secretariat of the Commission on Human Rights at 1 (April 14, 2003) [hereinafter U.S. Yemen Response] (describing the Special Rapporteur's letter), available at: http://www.unhchr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/9b67b6687466cfcac1256 d2600514c7f/$FILE/G0313804.pdf.

the context of international armed conflict, there is simply no precedent for extending the theory to non-international armed conflict. Indeed, such an extension produces an anomaly: in the context of an international armed conflict, the offense provides an international sanction for failing to comply with the requirements for gaining the benefit of international law: combatant immunity. However, because a non-state belligerent's actions can never result in "lawful" belligerent status, extending this theory to non-international armed conflict imposes *international* legal sanction without a complementary *international* legal reward. In this regard, the underlying rationale for the Supreme Court's endorsement of this offense – to "incentivize" operating as a lawful belligerent – is nullified when the theory is extended to non-international armed conflicts.

This does not, of course, mean that the Manual was incorrect to suggest that unlawful enemy combatants do not enjoy combatant immunity. By mixing the benefits of status with the consequence of participation in non-international armed conflicts, the Manual reveals a fundamental distortion of the impact of failing to qualify for combatant immunity. Non-state belligerents cannot qualify for this immunity, a privilege reserved for state armed forces engaged in international armed conflicts. But this does not result in the conclusion that acting as a belligerent without qualification for combatant immunity is *ipso facto* a violation of international law. Instead, it simply permits the assertion of domestic criminal jurisdiction over the acts and omissions of the belligerent. In short, the lack of qualification deprives the belligerent of combatant immunity, subjecting him to the criminal jurisdiction of the state in which his conduct occurs. This could include charging the non-qualified individual with the domestic criminal offense of MST. But the key distinction between this outcome and the jurisdiction established by the MCA is that subjecting the same individual to trial by military commission for MST is not

a simple application of domestic criminal jurisdiction. Instead, it is an assertion of jurisdiction derived from the underlying premise that the offense constitutes a violation of international law, thereby triggering the jurisdiction of a military commission either because the offense is a violation of the laws and customs of war, or because it has been properly "defined" by Congress as a violation of international law pursuant to the Define and Punish Clause. It is, therefore, apparent why the fact that MST is *not* a violation of international law is fatal to the subject matter jurisdiction established by the MCA.

In order to qualify as a war crime and/or to fall within the authority vested in Congress by the Define and Punish Clause, the alleged acts or omissions must violate not only applicable domestic law (such as prohibitions against murder, assault, arson, kidnapping, mayhem, etc.), but also *international* law, or more specifically, the law of armed conflict. And here the over-breadth of the MCA is exposed, for there is simply no basis to assert that the mere participation in a non-international armed conflict by a non-state actor violates international law. Instead, those individuals become *internationally* liable for their acts or omissions only when those acts or omissions violate norms of conduct applicable to this type of armed conflict. This is established through the negative implication derived from the fact that no international war crimes tribunal has ever alleged a violation of international law for the mere participation in hostilities by a non-state actor. The statutes established for both the International Criminal Tribunal for the Former Yugoslavia (Statute of the International Criminal Tribunal for the Former Yugoslavia, annexed to Resolution 827, SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/927 (1993)), and the International Criminal Tribunal for Rwanda (Statute of the International Criminal Tribunal for Rwanda, annexed to Resolution 955, SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (1994)), authorized charging non-state actors

with any offenses determined to qualify as violations of the laws and customs of war. Thus, if participation in non-international armed conflict was itself a violation of international law, the prosecutors for these tribunals could have alleged such an offense. This has never occurred. This fact begs the question: why would these tribunals have even bothered to assess which regulatory norms had migrated from international to non-international armed conflict if participation in the conflict by a non-state actor was itself a "war crime?" The answer is clear: operating without the privilege of combatant immunity does not automatically result in international criminal responsibility for belligerent actions.

The Rome Statute of the International Criminal Court reinforces this conclusion. While the offenses established for that permanent war crimes tribunal include substantive violations of the law applicable to non-international armed conflicts, there is no indication that mere participation itself is prohibited by international law. Rome Statute of the International Criminal Court, UN Doc. A/CONF. 183/9; 37 ILM 1002 (1998); 2187 UNTS 90 (1998).

CONCLUSION

MST is not a violation of international law, and is certainly not a violation of the laws and customs of war. Therefore, Appellant's conviction should be reversed.

Respectfully Submitted,

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