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UNITED STATES OF AMERICA )

v. )

DAVID MATTHEW HICKS )

**PROSECUTION RESPONSE TO  
DEFENSE MOTION TO DISMISS  
CHARGE 1 FOR FAILURE TO  
STATE AN OFFENSE TRIABLE  
BY MILITARY COMMISSION**

18 October 2004

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1. Timeliness. This response is filed within the timeline established by the Presiding Officer.
2. Position on Motion. The Defense Motion to Dismiss should be denied.
3. Overview. Military Commission Law, specifically Military Commission Instruction No. 2, is declarative of existing law which recognizes the crime of conspiracy and criminal accountability pursuant to joining an enterprise of persons who shared a common criminal purpose.

There have been prior convictions of the offense of conspiracy to commit war crimes before United States Military Commissions. Conspiracy is recognized under international law as well as liability based upon joining an enterprise of persons who shared a common criminal purpose.

4. Facts.

- a. As the United States Supreme Court succinctly stated in Hamdi v. Rumsfeld:

On September 11, 2001, the al Qaida terrorist network used hijacked commercial airliners to attack prominent targets in the United States. Approximately 3,000 people were killed in those attacks. One week later, in response to these ‘acts of treacherous violence,’ Congress passed a resolution authorizing the President to ‘use all necessary and appropriate force against those nations, organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.’ Authorization for Use of Military Force (‘the AUMF’), 115 Stat 224. Soon thereafter, the President ordered United States Armed Forces to Afghanistan, with a mission to subdue al Qaeda and quell the Taliban regime that was known to support it.

124 S. Ct. 2633 (2004) (plurality opinion)

- b. Subsequent to the AUMF, the President issued his Military Order of November 13, 2001 (“Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”). 66 Fed. Reg. 222 (November 16, 2001) In doing so, the President expressly relied on “the authority

vested in me . . . as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the [AUMF] and sections 821 and 836 of title 10, United States Code.”<sup>1</sup>

c. In his Order, the President found, *inter alia*, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.” *Id.* at Section 1(e). The President ordered, “Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed . . . .” *Id.* at Section 2(a). He directed the Secretary of Defense to “issue such orders and regulations . . . as may be necessary to carry out” this Order. *Id.*

d. Pursuant to this directive by the President, the Secretary of Defense on March 21, 2001, issued Department of Defense Military Commission Order (MCO) No. 1 establishing jurisdiction over persons (those subject to the President’s Military Order and alleged to have committed an offense in a charge that has been referred to the Commission by the Appointing Authority) and over offenses (violations of the laws of war and all other offenses triable by military commission). *Id.*, at para 3(A), 3(B). The Secretary directed the Department of Defense General Counsel to “issue such instructions consistent with the President’s Military Order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions . . . .” *Id.*, at para 8(A).

e. The General Counsel did so, issuing a series of Military Commission Instructions (MCIs), including MCI No. 2: Crimes and Elements for Trial by Military Commission.

f. On 9 June 2004, the Appointing Authority approved charges against the Accused, including Charge 1: Conspiracy to attack civilians; to attack civilian objects; to commit murder by an unprivileged belligerent; to commit the offense of destruction of property by an unprivileged belligerent; and to commit the offense of terrorism. In MCI No. 2, conspiracy is an

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<sup>1</sup> Sections 821 and 836 are, respectively, Articles 21 and 36 of the Uniform Code of Military Justice (“UCMJ”). These sections provide, in relevant part:

**Art. 21. Jurisdiction of courts-martial not exclusive**

The provisions of this chapter conferring jurisdiction upon courts -martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

**Art. 36. President may prescribe rules**

a. Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commission and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

b. All rules and regulations made under this article shall be uniform insofar as practicable.

enumerated form of liability.<sup>2</sup> On June 25, 2004, the Appointing Authority referred the charges to the Military Commission for trial.

#### 5. Legal Authorities Cited:

- a. Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (plurality opinion)
- b. President's Military Order of November 13, 2001 ("Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism")
- c. Military Commission Order No. 1
- d. Military Commission Instruction No. 2
- e. Ex parte Quirin, 317 U.S. 1
- f. Johnson v. Eisentrager, 339 U.S. 763 (1950)
- g. Colepaugh v. Looney, 235 F.2d 429 (10<sup>th</sup> Cir 1956)
- h. Iannelli v. United States, 420 U.S. 770 (1975)
- i. Direct Sales Co. v. United States, 319 U.S. 703 (1943)
- j. Manual for Courts-Martial
- k. United States v. Recio, 537 U.S. 270 (2003)
- l. Callahan v. United States, 364 U.S. 587 (1961)
- m. Pinkerton v. United States, 328 U.S. 640 (1946)
- n. United States v. Rivera-Santiago, 872 F.2d 1073 (1<sup>st</sup> Cir. 1989)
- o. Carlson v. United States, 187 F.2d 366, 370 (10<sup>th</sup> Cir. 1951)
- p. United States v. Hersh, 297 F.3d 1233 (11<sup>th</sup> Cir. 2002)
- q. WAYNE R. LAFAVE, CRIMINAL LAW (4<sup>TH</sup> ED. West Group 2000)
- r. Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996)
- s. U.S Army's Field Manual 27-10, The Law of Land Warfare, (18 July 1956)
- t. Prosecutor v. Tadic, Case no. IT-94-1-A (Appeals Chamber, July 15, 1999)
- u. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279
- v. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 (2003)
- w. International Military Tribunal for the Far East, Apr. 26, 1946
- x. Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et. al for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001)
- y. Statute of the International Tribunal for Yugoslavia
- z. Statute for the International Tribunal of Rwanda
- aa. Convention on the Prevention and Punishment of the Crime of Genocide, Dec 9, 1948
- bb. Prosecutor v. Musema, Case no. ICTR-96-13-T, January 27, 2000
- cc. Presbyterian Church of Sudan v. Talisman Energy, 244 F. Supp. 2d 289 (S.D.N.Y. 2003)

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<sup>2</sup> MCI No.2. at para. 6(C)(6) and (7).

- dd. Prosecutor v. Mulinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise, 21 May 2003
- ee. Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000
- ff. Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001)

## 6. Discussion

### a. Military Commission Instruction No. 2 is a Valid, Binding Instruction

Execution of the war against al Qaida and the Taliban is within the exclusive province of the President of the United States pursuant to his powers as Executive and Commander in Chief under Article II of the United States Constitution. Ex Parte Quirin, 317 U.S. 1, 26 (1942). “The Constitution confers on the President the ‘executive Power’, Art II, cl. 1, and imposes on him the duty to ‘take Care that the Law be faithfully executed.’ Art. II, 3. It makes him the Commander in Chief of the Army and Navy, Art. II, 2, cl. 1, and empowers him to appoint and commission officers of the United States. Art. II, 3, cl. 1.

The Congress, in passing the AUMF of 2001, expressly authorized the President to use “all necessary and appropriate force” against “nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001,” and it is the President’s duty to carry out this war. Public L. No. 107-40, 115 Stat. 224 (2001).

As a plurality of the Supreme Court just months ago held, “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.’” Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2639 (2004) (plurality opinion), citing Ex parte Quirin, 317 U.S., at 28 (emphasis added). See also, Johnson v. Eisentrager, 339 U.S. 763, 771 (1950). Furthermore, Congress, in enacting Articles 21 and 36 of the Uniform Code of Military Justice, expressly recognized the President’s authority to use and to prescribe rules regarding military commissions. Thus, the President’s Military Order is a legitimate, recognized exercise of his Constitutional authority as Commander in Chief.

As commissions are recognized to be the Executive Branch’s prerogative, it has been left to the Executive to determine appropriate guidelines for the conduct of military commissions. “[S]urely since Ex parte Quirin, . . . there can be no doubt of the constitutional and legislative power of the president, as Commander in Chief of the armed forces, to invoke the law of war by appropriate proclamation; to define within constitutional limitations the various offenses against the law of war; and to establish military commissions with jurisdiction to try all persons charged with defined violations.” Colepaugh v. Looney, 235 F.2d 429 (10th Cir. 1956), cert. denied 352 U.S. 1014 (1957).

The Executive has issued his guidance with respect to the present military commissions in his Military Order. The Order directs that individuals subject to trial under the Order shall receive a

“full and fair trial” and delegates the authority to promulgate further orders or regulations necessary to implement military commissions to the Secretary of Defense. PMO, Section 4(c)(2). The Secretary of Defense further delegated the authority to issue regulations and instructions to the Department of Defense General Counsel. Pursuant to DoD MCO No. 1, Section 7, The Appointing Authority shall, subject to approval of the General Counsel of the Department of Defense if the Appointing Authority is not the Secretary of Defense, publish such further regulations consistent with the President’s Military Order and this Order as are necessary or appropriate for the conduct of proceedings by Commissions under the President’s Military Order. The General Counsel shall issue such instructions consistent with the President’s military order and this Order as the General Counsel deems necessary to facilitate the conduct of proceedings by such Commissions, including those governing the establishment of Commission-related offices and performance evaluation and reporting relationships. It is pursuant to this authority that the Department of Defense General Counsel issued, among other instructions, MCI No. 2. This instruction is “declarative of existing law” Para. 3(A), MCI No. 2. and details a number of offenses that “derive from the law of armed conflict.” Id.

One of the charges before this Commission is conspiracy or joining an enterprise of persons who shared a criminal purpose to commit several of the offenses delineated in MCI No. 2. The elements of this offense are delineated in Section 6(C)(6) of MCI No. 2 and as discussed, such elements are declarative of existing law.

The elements of this offense are as follows:

(1) Entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or otherwise joining an enterprise of persons who share a common criminal purpose, that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by Military Commission;

(2) That the Accused knew of the unlawful purpose of the agreement or the common criminal purpose of the enterprise and joined it willfully; and

(3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.

b. The Basics of Conspiracy Law and the “Agreement”

Conspiracy is an inchoate offense, the essence of which is the agreement to commit an unlawful act. Iannelli v. United States, 420 U.S. 770, 777 (1975). The agreement need not be explicit and can be inferred from the facts and circumstances of the case. Direct Sales Co. v. United States, 319 U.S. 703, 711-713 (1943). “The agreement or common criminal purpose in a conspiracy need not be in any particular form or manifested in any formal words.” MCI No. 2 Section 6(C)(6)(b)(1); Manual for Courts-Martial (MCM), United States (2002 Edition), Section 5(c)(2) (sufficient if minds of parties arrive at a common understanding and this may be shown by conduct of the parties). The agreement need not state the means by which the conspiracy is to be accomplished or what part each conspirator is to play. MCM, Section

5(c)(2). A conspiracy conviction will be upheld even if the substantive offense that the conspirators agreed to commit is never completed or attempted. United States v. Recio, 537 U.S. 270-275 (2003) (agreeing to commit crime is sufficient evil warranting punishment whether or not substantive crime ever ensues); Iannelli 420 U.S. at 778. It is well established that when groups or partnerships are formed to commit criminal acts, the dangers are far greater.

[C]ollective criminal agreement – partnership in crime—presents a greater potential threat to the public than individual delicts. Concerted action both increases the likelihood that the criminal object will be successfully attained and decreases the probability that the individuals involved will depart from their path of criminality. Group association for criminal purposes often, if not normally, makes possible the attainment of ends more complex than those which one criminal could accomplish. Nor is the danger of a conspiratorial group limited to the particular end toward which it has embarked. Combination in crime makes more likely the commission of crimes unrelated to the original purpose for which the group was formed. In sum, the danger which a conspiracy generates is not confined to the substantive offense which is the immediate aim of the enterprise.

Callahan v. United States, 364 U.S. 587, 593-94 (1961).

Thus, paragraph 6(C) of MCI No. 2 is consistent with United States’ domestic jurisprudence when it states “regardless of whether the substantive offense was completed, a person may be criminally liable of the separate offense of conspiracy.” Furthermore, the Comment in para. C(6)(b)(8) of MCI No. 2 is firmly established in the law when it states that “conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy.” See Pinkerton v. United States, 328 U.S. 640 (1946).

#### Relationship with Co-Conspirators.

While a conspiracy does require two or more persons to enter into an agreement, the Prosecution is not required to establish that the Accused knew the identity of his co-conspirators and their particular connection with the criminal purpose. MCI No. 2 para 6(C)(6)(b)(1); MCM, Section 5(c)(1).

A conspiracy is a continuum. Once a participant knowingly helps initiate the agreement and set it in motion, he assumes conspirator’s responsibility for the foreseeable actions of his confederates within the scope of the conspiratorial agreement, whether or not he is aware of precisely what steps they plan to take to accomplish the agreed goals.” United States v Rivera-Santiago 872 F.2d 1073, 1079 (1st Cir.1989). Absent some type of withdrawal defense by the accused, all of the overt acts taken by the accused or another co-conspirator, regardless of the date they were undertaken, and regardless of exactly when it may be that jurisdiction attached for the President to *charge* this conspiracy as a crime under the Laws of War, are relevant to show the accused’s participation in the conspiracy. After all, “the overt acts merely manifest that the conspiracy is at work.” Carlson v United States 187 F.2d 366, 370 (10th Cir. 1951).

### Overt Acts.

There are several overt acts alleged on the Accused's charge sheet. While not required, all of these alleged overt acts are arguably tied to the actions of the Accused. See MCI No. 2, Section 6(C)(6)(b)(3) (overt act must be done by one or more of the conspirators, but not necessarily the accused); MCM, Section 5(c)(4)(a) (overt act must be done by one or more of the conspirators, but not necessarily the accused). See also United States v. Hersh, 297 F.3d 1233, 1244-46 (11th Cir. 2002) (requiring only a showing that **one** overt act occurred after the effective date of the criminal statute).

While not required for the resolution of this issue, it is the Prosecution's position that the crux of a conspiracy offense is the agreement. After the agreement, the offense is complete once an overt act is committed that will "effectuate the object of the conspiracy or in furtherance of the common criminal enterprise." MCI No. 2 para 6(C)(6)(b)(3). It is not essential that any substantive offense be committed. Id. at para 6(C)(6)(b)(4). Therefore it is irrelevant whether the ultimate crime is committed or whether a state of armed conflict existed at the time of the overt act. The purpose behind criminalizing conspiracies is to prevent crimes before they occur, while attacking against the dangers of group criminality. See WAYNE R. LAFAVE, CRIMINAL LAW (4th ed. West Group 2000) at 620.

### c. U.S. Military Commissions have Previously Convicted of Conspiracy in Relation to Law of War Violations.

For example, in Ex parte Quirin, several Nazi saboteurs were charged and tried before a military commission created by President Roosevelt in his capacity as President and Commander in Chief. Included in these charges was **conspiracy to commit the offenses of violation of the law of war**, violation of Article 81 of the Articles of War (giving intelligence to the enemy) and Article 82 of the Articles of War (spying). 317 U.S. 1 (1942). The exact wording of the conspiracy specification was:

Specification: In that, during the year 1942, the prisoners, Ernest Peter Burger, George John Dasch, Herbert Haupt, Heinrich Harm Heinck, Edward John Kerling, Hermann Neubauer, Richard Quirin, and Werner Thiel, being enemies of the United States and acting for and on behalf of the German Reich, a belligerent enemy nation, did plot, plan, and conspire with each other, with the German Reich, and with other enemies of the United States, to commit each and every one of the above-enumerated charges and specifications."

Quirin Trial Transcript at 43, 44.

Similarly, in Colepaugh v. Looney, the accused was tried before a military commission and convicted of conspiracy to commit law of war violations. 235 F.2d 429 (10th Cir. 1956). Relying on the Quirin decision, the court stated that there can be no doubt that the President, as Commander in Chief of the armed forces can invoke the law of war by appropriate proclamation

and can define the various offenses against the law of war. *Id.* at 431-432. It is noteworthy that this opinion was issued in 1956 and there was no mention that the enactment of the UCMJ in 1950 would in any way curtail the President's powers in this regard.

While Quirin is one of the most well known military commission cases, war crime conspiracy convictions at military commissions did not commence with the Quirin decision. See Mudd v. Caldera, 134 F. Supp.2d 138 (D.D.C. 2001) (military commission had jurisdiction to try conspirator in the assassination of President Lincoln); Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 Mil. L. Rev. 1, 14-21 (1996) (providing historical context for military commissions and identifying other commission war crime conspiracy convictions from 1865 and 1942).

The Department of the Army formally recognized the offense of conspiracy to commit war crimes in 1956. U.S. Army's Field Manual 27-10, The Law of Land Warfare, Chapter 8, para. 500 (18 July 1956). It clearly and succinctly states that "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." *Id.* Based on this language alone, the *ex post facto* argument alluded to at times by the Defense is nullified.

The Defense, in its motion, attempts to advance an argument that conspiracy law is not a "viable, cognizable theory of criminal liability," in international law. Defense Motion at pg. 2. Their source for this proclamation is the book International Criminal Law by Professor Cassese. See Defense Motion, footnote 4. This source simply does not support this argument. Professor Cassese notes that Nuremburg had a restrictive view of conspiracy, but he does not assert that prosecutors have never charged anyone with conspiracy to commit an inchoate offense against the law of war. *Id.* at 197. In fact, this page in the textbook is part of a section discussing conspiracy to commit genocide. *Id.* In this realm, Cassese acknowledges that the ICTR Trial Chamber has concluded that this prohibition applies to inchoate offenses and that in the Musema case, a conspiracy conviction was determined valid regardless of whether the ultimate substantive offense was ever committed. *Id.* at 198.

d. The Accused can be Tried for Any Act that Constitutes a Crime Under the Law of War or that by Statute can be Tried Before a Military Commission

Article 21 of the Uniform Code of Military Justice (UCMJ) states that military commissions have jurisdiction to try "offenses that by statute or by the law of war may be tried by military commissions." A literal reading of this statute defeats the Defense argument that Commissions can only try the offenses of spying (UCMJ Article 106) and aiding the enemy (UCMJ Article 104). The word "or" clearly shows that this statute permits the prosecution of violations of the law of war **in addition** to the offenses that can be tried based upon offenses defined by statutes elsewhere. Therefore neither of these crimes specifically defined under the UCMJ nor the crimes defined in 18 U.S.C. § 2411 preclude the prosecution of other violations of the law of war.

The UCMJ was enacted in 1950 and replaced its predecessor, the Articles of War. The Modern Article 21, UCMJ was not altered in any way from its predecessor, Article 15 of the

Articles of War. In fact, this statutory language was left unchanged because this language had already been construed and interpreted favorably in Quirin. H.R. Rep No. 81-491 (specifically stating it was left unchanged because of Quirin); S. Rep. No. 81-486 (also confirming left intact because of Quirin). Clearly, Congress did not intend to limit the prosecution of war crimes that were the subject of prosecution in Quirin.

e. Conspiracy under International Law.

The crime of conspiracy was clearly established in the Nuremburg Charter. It defined crimes against peace to include “the planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participations in a **common plan or conspiracy** for the accomplishment of the foregoing” (emphasis added). Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 2, art. 6(a), 82 U.N.T.S. 279, 288, 59 Stat. 1544, 1547; Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 56 (2003) (citing Nuremburg and Tokyo trials as examples where conspiracy to commit crimes against peace were recognized in the charters as separate crimes). The Nuremburg Tribunal stated that Hitler had to have the cooperation of others in carrying out his plan. When these others, with knowledge of his [Hitler’s] aims, gave him their cooperation, they made themselves parties to the plan he had initiated. See Nazi Conspiracy and Aggression, Opinion and Judgment Vol. 1, Office of the United States Chief of Counsel for Prosecution of Axis Criminality at 45.

Conspiracy law was solidified in Articles 5(a) and 5(b) of the International Military Tribunal for the Far East, Apr 26, 1946, 2, 4 Bevan 20, 28, which punished “the planning, preparation, initiation or waging of a . . . war of aggression, or a war in violation of international law, treaties or agreements or assurances, or participation in a **common plan or conspiracy** for the accomplishment of any of the foregoing” and also directly assigned criminal responsibility to conspirators “for all acts performed by any person in the execution of such plan.”

At Nuremburg, seven individuals were in fact convicted of conspiracy offenses. The Nuremburg International Tribunal is reflective of customary international law. See also, Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n. 53 (examining International Tribunal at Nuremburg holding that person can be convicted of war crimes and crimes against humanity they are “connected with” even if not involved in or part of a prearrangement with the person who actually commits the crime).

Military tribunals in France and Great Britain continued to broaden conspiracy law as they conducted several military commissions where conspiracy or joint enterprise to commit war crimes was prosecuted. See Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999) (discussing the war crimes conspiracy convictions in France, Great Britain, United States and other countries). Admittedly, many of these cases discussed in Tadic rested their convictions on a joint enterprise theory of liability for the ultimate substantive offense. Based on the arguments presented, it is clear that the theory of prosecution is directly akin to conspiracy and joint enterprise liability as defined under MCI No. 2. Tadic at paras. 206-213 citing The Essen

Lynching Case *The Trial of Erich Heyer and Six Others*, British Military Court for the Trial of War Criminals Volume I, 88 (United Nations War Crimes Commission, 1947) and drawing the inference that “all concerned in the killing” were guilty, citing the United States military court case of Kurt Goebel et al. placing great emphasis on the “common purpose” argument of the prosecutor who stated all the accused were “cogs in the wheel of common design, all equally important, each cog doing the part assigned to it.”

Conspiracy law continued to develop and expand in International Law. Its existence is most prevalent in the Genocide Convention of 1948. In addition to establishing the crime of conspiring to commit genocide, it also mandated that members of the United Nations would ensure that conspiracy to commit genocide was a punishable offense in their domestic criminal codes. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, art. 3(b), 78 U.N.T.S. 277, 280. The conspiracy crime is proscribed in various other international conventions. See Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, June 26, 1936, art 2(c) (as amended) (requiring signatory states to make legislation providing for the severe punishment of conspiracy to traffic drugs); United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, adopted Dec. 19, 1988, art. 3(1)(c)(iv), 29 I.L.M. 493; International Convention on the Suppression and Punishment of the Crime of Apartheid, U.N. Gaor, 28<sup>th</sup> Sess., 2185<sup>th</sup> plen. Mtg., Annex, Supp. No. 30 at 76, art III(a), U.N. Doc. A/9030 (1973) (providing for international criminal responsibility for those who “commit, participate in, directly incite or conspire in the commission of the acts [of apartheid]”); Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30 n.126 (2003) (extensive discussion of conspiracy recognized in various international conventions). Based upon this established history of conspiracy law in the international arena, *ex post facto* concerns are alleviated and do not stand as an obstacle to prosecution under international criminal law. Richard P. Barrett and Laura E. Little, Lesson of the Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. 30, 60-61 (2003); Jordan J. Paust, Addendum: Prosecution of Mr. Bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims, ASIL Insights (Sept. 21, 2001) (identifying examples where *ex post facto* problems avoided because crimes already recognized under customary international law).

Conspiracy law has been recognized in the International Tribunals of Yugoslavia (ICTY) and Rwanda (ICTR). See Statute of the International Tribunal for Yugoslavia, art. 4(3)(b) (declaring that conspiracy to commit genocide is a punishable act); Statue for the International Tribunal for Rwanda, art. 2(3)(b); Amnesty International, *The International Criminal Court: Making the Right Choices*, pt. 1, VI(D) (1997) (stating that concept of “conspiracy” is recognized in the ICTY and ICTR statutes).

In Prosecutor v. Alfred Musema, the ICTR defined the crime of conspiracy to commit genocide established in the ICTR statute. Case No. ICTR-96-13-T, Trial Chamber, January 27, 2000 at para 185-198. Choosing a common law approach over a civil law approach, the Trial Chamber held that conspiracy is “an agreement between two or more persons.” Id. This is consistent with the language of MCI No. 2. Most importantly, the Trial Chamber recognized conspiracy as a crime in and of itself and not just a theory of liability. Id.

In Presbyterian Church of Sudan v. Talisman Energy, there is a comprehensive discussion of the sources of customary international law and whether conspiracy to commit a war crime is an offense under these laws. 244 F. Supp. 2d 289 (S.D.N.Y 2003). This case arose under the Alien Tort Claims Act (ATCA) where the Talisman Corporation was sued for conspiring to commit war crimes and other offenses. Id. at 296. Based on the wording of the ATCA statute, the court had to analyze the validity of the allegations by applying customary international law. Id. at 304. The court held that “an examination of international law reveals that the concepts of **conspiracy** and aiding and abetting are commonplace with respect to the types of allegations contained in the Amended Complaint, such as genocide and **war crimes**” (emphasis added). Id. at 321. In making this determination, the court examined the precedent from the various international criminal tribunals. Id. at 322-324.

MCI No. 2 establishes criminal liability through either entering into an agreement with one or more persons to commit a substantive offense triable by Military Commission or *otherwise joining an enterprise of persons who share a common criminal purpose*. MCI No. 2 para 6(C)(6). This liability based upon “joining an enterprise” was established solidly in an in-depth opinion in the seminal case of Prosecutor v. Tadic, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). Tadic was convicted of murdering five people because he “took part in the common criminal purpose to rid [the Prijedor region] of the non-Serb population, by committing inhumane acts,” and because the killing of non-Serbs in furtherance of this plan was a foreseeable outcome of which he was aware. Prosecutor v. Tadic, Case No. IT-94-1-T, paras 371-73 (ICTY Trial Chamber II, May 7, 1997), aff’d, Case No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). There is a distinction between the Tadic decision and Section 6(C)(6) of MCI No. 2. The Tadic court found liability for the ultimate substantive offenses because of sharing a common criminal purpose with others in the enterprise. Id. MCI No. 2 permits conviction of the enterprise offense in and of itself.

From a practical perspective this is a matter of little import. It appears that MCI No. 2 merely reflects the more traditional approach which practitioners before Military Commissions are accustomed to (as well as others in common law jurisdictions). Even under a traditional court-martial approach, a conspirator can be convicted of the underlying substantive offense solely because of his role in the analogous conspiracy. There is no prejudice to the Accused. See MCM, Section 5(c)(8); Pinkerton, 328 U.S. at 646.

The impact of the distinction is even more remote in the prosecution of this Accused as factually, the ultimate substantive offenses were carried out to completion. Prosecutor v. Mulinovic et al., Case No. IT 99-37-AR72, Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction – Joint Criminal Enterprise, para. 23, 21 May 2003 (identifying difference in that conspiracy only requires an agreement whereas joint criminal enterprise requires some criminal act in furtherance of the agreement). While there may be some differences, the underlying goal that is common to these offenses is the punishment of criminal thoughts when coupled with some action that advances the thought.

The Tadic Appeals Chamber delineated three categories of joint activity that could result in criminal liability for a person who joins a criminal enterprise. They are:

(1) where all co-defendants, acting pursuant to a common design possess the same criminal intention;

(2) where members of a unit act pursuant to a concerted plan, each with the requisite mental element deriving from “knowledge of the nature of the system . . . and intent to further the common design” (based on World War II concentration camp prosecutions of administrative and support staff);

(3) where the accused possesses “the intention to take part in a joint criminal enterprise and to further . . . the criminal purposes of that enterprise” and the offenses committed by members of the group are foreseeable.

Tadic, Appeals Chamber, July 15, 1999, paras. 196-220.

The ICTY continued to expand the enterprise liability case law established in Tadic in Prosecutor v. Furundzija, Case No. IT-95-17/1-A, Appeals Chamber, July 21, 2000. The Furundzija Appeals Chamber stated that a preexisting plan or purpose is not required for criminal liability to attach. *Id.* at para. 119. The “common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.” *Id.*

Some have suggested that the ICTY’s required proof of a “common plan” for criminal enterprise convictions is strikingly similar to the proof required for the “agreement” element in establishing a conspiracy. Richard P. Barrett and Laura E. Little, Lessons of Yugoslav Rape Trials: A Role for Conspiracy Law in International Tribunals, 88 Minn. L. Rev. at 42.

While not specifically mentioning the word “conspiracy” in the newly established International Criminal Court (ICC), a person can be held criminally responsible if they contribute to the “commission or attempted commission of . . . a crime by a group of persons acting with a common criminal purpose.” Section 3(d) of Article 25 Rome Statute of the International Criminal Court, July 17, 1998. For liability to attach, such contribution must be intentional and shall either: (1) Be made with the aim of furthering the criminal activity or criminal purpose of the group . . .; or (2) Be made in the **knowledge of the intention of the group** to commit the crime (emphasis added).

7. Attachments. None.

8. Oral Argument. If the Defense is granted oral argument, the Prosecution requests the opportunity to respond.

//Original Signed//

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Lieutenant Colonel, U.S. Marine Corps  
Prosecutor