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Hung Up on Words: A Conduct-Based Solution to the Problem of Conspiracy in Military Commissions

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Hung Up on Words: A Conduct-Based Solution to the Problem of Conspiracy in Military Commissions

I.	INTRODUCTION	1368
II.	HOW DIFFICULT IS IT TO CONVICT AN ADMITTED TERRORIST?	1372
	A. <i>The Law Governing Military Commissions</i>	1373
	1. UCMJ Article 21: The Law Prior to the MCA	1373
	2. The Military Commissions Act of 2006	1374
	B. <i>Bahlul and the D.C. Circuit's Non-resolution of the Ex Post Facto Question</i>	1375
	C. <i>Article III and Ex Post Facto: Two Issues, One Argument</i>	1379
III.	THE CONVOLUTED WORLD OF CONSPIRACY AT HOME AND ABROAD	1382
	A. <i>Ex Post Facto Is About Conduct and Notice of Criminality</i>	1383
	B. <i>The Typical Argument</i>	1386
	1. Conspiracy in International Law	1386
	2. How the MCA Is Different	1391
	3. The Premature Conclusion	1392
	C. <i>Delving Deeper</i>	1393
	1. Standalone Conspiracy Does Not Equal Inchoate Conspiracy	1394
	2. Completed Conspiracy Matches Conspiracy as a Mode of Liability	1395
	3. Correctly Characterizing the Ex Post Facto Violation	1396
IV.	A TEXT-BASED INTERPRETATION THAT RESOLVES THE PROBLEM	1398
	A. <i>The MCA's Unique Language Contemplates Completed Conspiracies</i>	1399
	B. <i>The Jurisdictional Requirement to Prove Completion</i>	1401

C.	<i>If Conspiracy Stands Alone, It Must Remain Alone</i>	1403
V.	CONCLUSION	1405

I. INTRODUCTION

At 9:02 a.m. on September 11, 2001, the world watched in horror as American Airlines Flight 175 slammed into the South Tower of the World Trade Center on live television,¹ ending all consideration that the first collision might have been an accident.² Halfway around the world, Ali al Bahlul sat in a remote part of Afghanistan operating a radio so that Usama Bin Laden could monitor reports of the attacks.³ That day, Al Qaeda terrorists killed 2,977 people,⁴ caused billions of dollars of economic damage,⁵ and initiated the defining sociopolitical issue of the early 21st century.

Legal practitioners have faced the difficult question of how best to hold terrorists such as Bahlul accountable while remaining true to fundamental constitutional principles and established law. After September 11, the United States quickly established military commissions to prosecute captured terrorists for violations of the law of war, but it did so in an ad hoc manner with little statutory authorization.⁶ The need for a more robust body of law to ensure

1. OFFICE OF RESEARCH AND ENG'G, NAT'L TRANSP. SAFETY BD., FLIGHT PATH STUDY – UNITED AIRLINES FLIGHT 175 2 (2002), <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB196/doc03.pdf> [<http://perma.cc/Z7WK-6UD6>].

2. See *Introduction to the Encyclopedia of 9/11*, NEW YORK, Sept. 5, 2011, at 34, <http://nymag.com/news/9-11/10th-anniversary/intro/> [<http://perma.cc/GKU3-SBAF>] (“Just as we’d begun to absorb this strange sight, wondering what pilot could have been so dim as to steer his plane into one of those towers . . . , came a second plane, then a terrible blossom of flame, then the billowing smoke enshrouding downtown.”).

3. *Al Bahlul v. United States (Bahlul I)*, 767 F.3d 1, 6 (D.C. Cir. 2014).

4. *Accounting of the Dead*, NEW YORK, Sept. 5, 2011, at 54–55, <http://nymag.com/news/9-11/10th-anniversary/number-of-deaths/> [<http://perma.cc/3LBV-WZZM>] (reporting 224 killed at the Pentagon and on UA Flight 93 and 2753 in New York).

5. *9/11 by the Numbers*, NEW YORK, <http://nymag.com/news/articles/wtc/1year/numbers.htm> [<http://perma.cc/V7MF-DWLW>] (last updated Sept. 2014).

6. Steven I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SEC. L. & POL'Y 295, 295 (2010). See also *Hamdan v. Rumsfeld (Hamdan I)*, 548 U.S. 557, 559–60 (2006) (holding that there was no explicit statutory authorization for the Guantanamo military commissions and that as constituted, they violated Geneva Conventions requirements for treatment of detainees); Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001) (establishing military commissions under authority of the Authorization for Use of Military Force); DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (Mar. 21, 2002), <http://www.mc.mil/Portals/0/milcomord1.pdf> [<http://perma.cc/TLM4-W4DP>] (establishing basic framework of procedure for military commissions).

consistency and fairness soon became apparent. Thus, Congress passed the Military Commissions Act (“MCA”) in 2006 to define charges and establish a comprehensive framework for the prosecution of alleged terrorists and others accused of committing war crimes in the course of hostilities against the United States.⁷ Among the crimes the MCA defined were terrorism, hijacking an aircraft, destruction of property in violation of the law of war, attacking civilians, attacking civilian property, and conspiracy to commit those offenses.⁸

Those charged under the MCA soon challenged its constitutionality, as well as the constitutionality of the commissions system more generally.⁹ A prominent contention was that the MCA retroactively permitted prosecution for some crimes in violation of the Ex Post Facto Clause of the Constitution,¹⁰ which prohibits retroactive criminalization of previously innocent acts. Most of those charged in commissions faced trial for acts they had allegedly committed before the MCA was written. They claimed that their actions were not criminalized under domestic or international law at the time they allegedly undertook them. By retroactively applying the MCA, they contended, Congress had created a paradigmatic example of the type of ex post facto law prohibited by Article I of the Constitution.

Prior to the MCA, the only statutory mention of military commissions was in Article 21 of the Uniform Code of Military Justice (“UCMJ”), which granted commissions jurisdiction over violations of the “law of war.”¹¹ Accordingly, the question of whether the MCA creates an ex post facto violation turns on what body or bodies of law the “law of war” includes and whether a given charge was criminalized under that law at the time of the accused’s alleged actions. While the courts have individually analyzed and resolved the ex post facto issue with respect to most charges available under the MCA, the question of whether the MCA’s criminalization of conspiracy violates the Ex Post Facto Clause remains unresolved.¹²

7. Military Commissions Act of 2006, 10 U.S.C. §§ 948a–950w (2006).

8. 10 U.S.C. § 950t (2006).

9. *E.g.*, *Boumediene v. Bush*, 553 U.S. 723 (2008); *Bahlul I*, 767 F.3d 1 (D.C. Cir. 2014); *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238 (D.C. Cir. 2012); *Al Maqaleh v. Gates*, 604 F. Supp. 2d 205 (D.D.C. 2009).

10. *Bahlul I*, 767 F.3d at 8.

11. 10 U.S.C. § 821 (2000). Section 821 was amended in 2006 to explicitly exclude military commissions under Chapter 47A—under which *Bahlul* was convicted—but at the time of his actions § 821 applied to all military commissions, as it had since 1956. Law of Aug. 10, 1956, ch. 1041, 70A Stat. 44 (1956) (current version at 10 U.S.C. § 821 (2012)).

12. *Bahlul I*, 767 F.3d at 62 (Brown, J., dissenting):

[B]y reviewing *Bahlul*'s retroactivity arguments under the plain error standard, the court disposes of this case without providing the government clear guidance for

The predominant understanding is that conspiracy is not a crime under international law.¹³ Accordingly, defendants and some scholars argue that if Article 21 refers to the international law of war, retroactive application of the MCA's conspiracy provision violates the Ex Post Facto Clause. In response, the government has argued that the law of war referenced in Article 21 includes not only international law but also domestic precedent arising out of commissions during the 19th century and World War II. Those commissions prosecuted conspiracy, at least sporadically, providing a basis to argue that the MCA's conspiracy provision merely codified a preexisting crime.

When presented with the opportunity to resolve this issue in *Al Bahlul v. United States (Bahlul I)*, the D.C. Circuit declined to do so.¹⁴ In light of apparent Supreme Court disagreement regarding the foregoing arguments,¹⁵ the D.C. Circuit sitting en banc held only that the lower court did not commit "plain error" in finding the charge of conspiracy to be constitutional.¹⁶ However, on remand to the panel to address other challenges to the conviction, the D.C. Circuit overcame its uncertainty about the content of the "law of war."¹⁷ Revitalizing the Circuit's earlier holding that the "law of war" is limited to international law,¹⁸ the panel vacated Bahlul's conspiracy conviction on the ground that it violated the separation of powers guaranteed in Article III of the Constitution.¹⁹ If conspiracy is only a domestic offense, the panel held, it does not fall within the exception for law-of-war military commissions

prosecuting the remaining detainees at Guantanamo. Thus, it may be many years before the government receives a definitive answer on whether it can charge the September 11 perpetrators with conspiracy, or whether Congress has the power to make such an offense triable by military commission even prospectively.

13. *E.g., id.* at 30 (Rogers, J., dissenting); Brian C. Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1, 111 (2005); David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 154–55 (2008).

14. 767 F.3d at 31.

15. In *Hamdan I*, a 4-3 plurality stated, while addressing a different issue, that Article 21 simply incorporated international law. 548 U.S. 557, 641 (2006). The dissent, on the other hand, maintained that it also included a U.S. "common law of war." *Id.* at 689–90 (Thomas, J., dissenting).

16. *Bahlul I*, 767 F.3d at 26–27.

17. *See Al Bahlul v. United States (Bahlul II)*, 792 F.3d 1, 8–10 (D.C. Cir. 2015) (stating that domestic law can restrict, but not expand, the "law of war" as defined in international law).

18. *Hamdan II*, 696 F.3d 1238, 1248 (D.C. Cir. 2012); *see also* Steve Vladek, *What's Left of Hamdan II? Quite a Lot, Actually...*, JUST SECURITY (July 17, 2014, 9:50 AM), <http://justsecurity.org/12989/left-hamdan-ii-lot-actually/> [<http://perma.cc/22RT-HZJX>] (arguing that the en banc ruling in *Bahlul* left undisturbed the panel's *Hamdan II* holding on the meaning of "law of war").

19. *Bahlul II*, 792 F.3d at 22.

to the Constitution's requirement that the judicial power be vested in Article III courts.²⁰

Although the legal basis differs for the Article III and Ex Post Facto arguments, they were treated similarly in *Bahlul* because both parties and the court uncritically adopted the predominant understanding that the international law of war does not criminalize conspiracy.²¹ This Note challenges that understanding, arguing that the MCA's conspiracy charge does not violate the Ex Post Facto Clause, even if the D.C. Circuit correctly held that the "law of war" is limited to international law.

First, although it has sometimes gone by other names, conspiracy has long existed as a mode of liability under international law.²² The conduct underlying this international mode of liability is the same as that underlying a completed, standalone conspiracy chargeable under the MCA—that is, one in which the underlying offense was carried out. A nuanced interpretation of the MCA's text reveals that it only criminalizes completed conspiracies and, accordingly, only conduct that was already criminal under international law. Consequently, the MCA merely codifies the international law mode of liability as a substantive offense. Furthermore, while the government's burden of proof for conspiracy under the MCA initially appears lower than that under international law, the jurisdictional restrictions on military commissions render these burdens of proof identical.

This Note's approach to the Article III and Ex Post Facto issues bears a critical advantage arising from a subtle difference in the nature of these questions. While both turn on what the "law of war" means, the Ex Post Facto question only requires a statutory interpretation of that phrase,²³ whereas the Article III question requires a constitutional interpretation, thereby permanently defining Congress's latitude in matters of foreign policy and national security.²⁴ Thus, the soundest route for defending the constitutionality of the MCA's conspiracy charge, as this Note does, is through the Ex Post Facto analysis.

Part II discusses the relevant law: UCMJ Article 21 prior to the MCA's enactment and the MCA's relevant substantive and jurisdictional provisions. It then describes the D.C. Circuit's en banc holding in *Bahlul I* and the court's failure to resolve the conspiracy

20. *Id.*

21. See generally *Bahlul I*, 767 F.3d 1 (D.C. Cir 2014); *Bahlul II*, 792 F.3d 1.

22. "Mode of liability" is an international-law term of art equivalent to the domestic-law notion of a theory of liability—a form of participation in an offense that gives rise to criminal liability for that offense. For a more in-depth discussion, see *infra* Section III.B.1.

23. *Bahlul I*, 767 F.3d at 22.

24. *Bahlul II*, 792 F.3d at 28 (Henderson, J., dissenting).

issue. Finally, it details the panel's invalidation of the conspiracy charge on separation-of-powers grounds in *Bahlul II* and explains why the Ex Post Facto analysis is still the most appropriate approach to the solution—because it allows the Supreme Court to resolve both the Article III and Ex Post Facto issues in a single stroke without making a binding constitutional pronouncement.

Part III assumes that the “law of war” in UCMJ Article 21 is limited to international law. It begins with a discussion of the purpose behind ex post facto protection and delineates the two-pronged approach by which it achieves that purpose: (1) protection of substantive conduct, and (2) protection against retroactively lowering the burden of proof. It then analyzes many courts' conclusions that the MCA's conspiracy provision violates the Ex Post Facto Clause, arguing that such conclusions are misguided because they overemphasize the MCA's use of the word “conspiracy.” Part III then differentiates between conspiracy as a standalone crime for a completed offense and the crime of an inchoate conspiracy—that is, a conspiracy that is never actually attempted. Finally, Part III asserts that charging standalone conspiracy for a completed offense is equivalent to the established practice in international law of charging conspiracy as a mode of liability. Therefore, the MCA only violates the Ex Post Facto Clause if it is interpreted to criminalize inchoate conspiracies.

Part IV offers a solution to the Ex Post Facto question: the MCA's conspiracy statute uniquely assumes in all cases that there will be victims of the conspiracy. The language of this statute provides a textual basis for interpreting the MCA as criminalizing only completed conspiracies. Interpreting the MCA in this way satisfies the conduct prong of ex post facto protection, as the conduct comprising a completed conspiracy has long been criminalized under international law. Under this interpretation of the conspiracy statute, the government must additionally prove at the jurisdictional stage an element not expressly found in the MCA: completion of the conspiracy. Accordingly, the government must prove all the same elements under the MCA as under international law, thereby satisfying the legal prong of ex post facto protection. Thus, this Note's interpretation of the MCA is constitutionally sound because it satisfies both prongs of ex post facto protection.

II. HOW DIFFICULT IS IT TO CONVICT AN ADMITTED TERRORIST?

The lack of detail in the law governing military commissions prior to the MCA has made it difficult to determine a clear answer to Bahlul's constitutional challenges. However, a brief history of the law

provides insight into these questions. This Part examines the legal background of military commissions, beginning with the original grant of authority to military commissions in place prior to the MCA. Because this Note focuses on the *Ex Post Facto* question, this Part begins by providing the basis for that challenge. It then recounts the D.C. Circuit's en banc and panel decisions and explains why an *Ex Post Facto* analysis is preferable to an Article III analysis—it minimizes the extent to which the Court must engage in constitutional interpretation with binding effects on the other branches of government.

A. The Law Governing Military Commissions

The law governing military commissions can be neatly divided into two categories:²⁵ (1) the law prior to the MCA, which primarily consists of case law, and (2) the MCA itself, which radically changed the nature of military-commissions law by providing the first robust statutory scheme governing commissions. Because the central question of this Note is whether the MCA's conspiracy charge retroactively criminalizes conduct that was previously legal, the status of conspiracy under each category is determinative. This Section discusses each category in turn.

1. UCMJ Article 21: The Law Prior to the MCA

Prior to the MCA's enactment, there was but one scant mention of military commissions in federal statute. UCMJ Article 21 stated:

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.²⁶

Article 21's preservation of jurisdiction effectively served as a congressional grant of authority to military commissions to try offenders for violations of the "law of war." Unfortunately, Congress did not define what those offenses were, nor did it clearly indicate what it meant by the "law of war."

25. A military commission is a criminal tribunal established under the President's authority as Commander in Chief to try persons for crimes committed in the context of armed conflict when other courts lack jurisdiction. *See Ex Parte Quirin*, 317 U.S. 1, 26–29 (1942) (describing the history and purpose of military commissions and the source of the President's authority to establish them). There are three sets of circumstances in which they may be employed. The first is as a stand-in for civilian courts in places where martial law has been declared. The second is to try civilians for crimes in occupied territory. The third, which is at issue in the controversy addressed by this Note, is to try enemy forces for violations of the law of war. *Hamdan I*, 548 U.S. 557, 595–97 (2006).

26. *See supra* note 11.

Given the phrase's usual usage both in case law and legal vernacular, "law of war" may be naturally understood to refer to the body of international law governing conduct in warfare.²⁷ Indeed, the D.C. Circuit in *Bahlul II* reached this decision with little more than one paragraph of reasoning.²⁸ According to the panel's understanding, Article 21 merely incorporates the international law of war into domestic law. For reasons explained below, however, whether Article 21 stops at incorporating the international law of war or also includes independent domestic precedent has become the central issue regarding the constitutionality of the MCA's conspiracy charge.²⁹ The D.C. Circuit's reasoning in *Bahlul I* indicates that Supreme Court precedent on the matter is not as clear as the panel made it seem in *Bahlul II*.³⁰

Even if it were clear to what body of law Article 21 refers, the Supreme Court would still face the potentially difficult task of determining the content of that body of law. It is at least clear that since 1956, Article 21 has explicitly authorized military commissions to try violations of the law of war.³¹ Accordingly, any crime defined in the MCA that was already a violation of the law of war under Article 21 would not retroactively create a new offense and thus would not violate the Ex Post Facto Clause.

2. The Military Commissions Act of 2006

In 2006 Congress passed the MCA and significantly expanded the statutory basis for military commissions. It did so in response to the Supreme Court's decision in *Hamdan v. Rumsfeld* that the commissions then underway did not comply with certain requirements of the Geneva Conventions.³² The substantive offenses in the MCA include terrorism,

27. See *Hamdan I*, 548 U.S. at 641 (Kennedy, J., concurring) ("[T]he law of war . . . is the body of international law governing armed conflict."); *Madsen v. Kinsella*, 343 U.S. 341, 354 (1952) ("The 'law of war' . . . includes at least that part of the law of nations which defines the powers and duties of belligerent powers."); *Ex Parte Quirin*, 317 U.S. at 29 (describing the law of war as a "branch of international law"); *Bahlul I*, 767 F.3d at 37 (Rogers, J., dissenting) ("For more than seventy years, the Supreme Court has interpreted the 'law of war' to mean the international law of war."); see also *Hamdi v. Rumsfeld*, 542 U.S. 507, 520–21 (2004) (citing the Geneva and Hague Conventions to determine the content of the "law of war").

28. *Bahlul II*, 792 F.3d at 8–9.

29. *Bahlul I*, 767 F.3d at 22 ("We must therefore ascertain whether conspiracy to commit war crimes was a 'law of war' offense triable by military commission under section 821 when Bahlul's conduct occurred because, if so, Bahlul's *ex post facto* argument fails.")

30. *Id.* at 22–24.

31. Law of Aug. 10, 1956, ch. 1041, 70A Stat. 44 (1956) (current version at 10 U.S.C. § 821).

32. *Bahlul I*, 767 F.3d at 6 ("In response to the *Hamdan* decision, the Congress enacted the Military Commissions Act of 2006."); *Hamdan I*, 548 U.S. at 559–60; David Glazier, *The Misuse of History: Conspiracy and the Guantanamo Military Commissions*, 66 BAYLOR L. REV. 295, 304 (2014).

hijacking an aircraft, destruction of property in violation of the law of war, attacking civilians, and attacking civilian property, among others.³³ The MCA also criminalizes conspiracy to commit any of these crimes:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.³⁴

The MCA grants 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.”³⁵ Its retroactivity immediately raises an Ex Post Facto concern.³⁶ The Constitution prohibits ex post facto laws—those that retroactively criminalize a previously innocent act.³⁷ This includes removing an element from the definition of a crime, as well as increasing the punishment for a crime.³⁸ Accordingly, if any of the crimes the MCA defines were not already criminalized, their retroactive application violates the Ex Post Facto Clause.³⁹ The testing ground for the constitutionality of the MCA’s alleged retroactive application has been the case of *Al Bahlul v. United States*.⁴⁰

B. Bahlul and the D.C. Circuit’s Non-resolution of the Ex Post Facto Question

By his own admission, Ali Hamza Ahmad Suliman al Bahlul was Usama Bin Laden’s personal assistant and public relations secretary.⁴¹ Bahlul grew up in Yemen.⁴² He first associated with Al Qaeda in the 1990s when he traveled to Afghanistan to undergo paramilitary training while living in an Al Qaeda guesthouse.⁴³ He eventually met

33. 10 U.S.C. § 950t (2006).

34. *Id.* § 950v(28) (2006) (current version at 10 U.S.C. § 950t(29) (2012)).

35. 10 U.S.C. § 948d (2006) (emphasis added).

36. *Bahlul I*, 767 F.3d. at 17.

37. U.S. CONST. art. I, § 9, cl. 3.

38. *Bahlul I*, 767 F.3d at 17–18 (citing *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798)).

39. *See, e.g.*, *Collins v. Youngblood*, 497 U.S. 37, 44 (1990); *Mallet v. North Carolina*, 181 U.S. 589, 597 (1901).

40. *Bahlul II*, 792 F.3d 1 (D.C. Cir. 2015); *Bahlul I*, 767 F.3d 1.

41. *Bahlul I*, 767 F.3d at 7.

42. *Id.* at 5.

43. *Id.*

Bin Laden in person and swore a loyalty oath to him.⁴⁴ Bahlul began working in Al Qaeda's media branch, where he produced a propaganda film about the bombing of USS *Cole* (DDG 67). This video impressed Bin Laden and prompted Bahlul's promotion to personal assistant and public relations secretary.⁴⁵

During the planning of the 9/11 attacks, Bahlul volunteered to be one of the hijackers.⁴⁶ Bin Laden denied his request due to Bahlul's value as Al Qaeda's public relations secretary.⁴⁷ He was permitted, however, to play several other significant roles in the attack. He administered loyalty oaths and prepared martyr-will videos for Mohamed Atta, the leader of the operation within the United States, and Ziad al Jarrah, one of the pilots.⁴⁸ On the day of the attacks, Bahlul operated a radio for Bin Laden to monitor their success; afterward, he researched and prepared a report for Bin Laden on the economic impact of the attacks.⁴⁹ The United States later detained and prosecuted Bahlul after allies captured him in Pakistan.⁵⁰

A military commission originally convicted Bahlul under the MCA of material support for terrorism, soliciting terrorism, and conspiracy to commit terrorism.⁵¹ He challenged all three convictions on the ground that they violated the Ex Post Facto Clause because they were not law-of-war offenses as referenced by UCMJ Article 21 at the time of his actions. The government conceded that neither material support nor solicitation were law-of-war offenses—neither domestically nor internationally—at the time of Bahlul's actions.⁵² Thus, the D.C. Circuit overturned his convictions for those charges,⁵³ and the focus of the litigation became the constitutionality of his conspiracy conviction.⁵⁴

In *Bahlul I*, the D.C. Circuit upheld the constitutionality of Bahlul's conspiracy conviction via two independent routes.⁵⁵ First, it

44. *Id.*

45. *Id.* at 5–6.

46. *Id.* at 6.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* Bahlul has consistently admitted to all of the factual allegations recounted here. *Id.* at 7. In fact, the only allegation by the government that he denied was wearing a suicide vest as a bodyguard to Usama Bin Laden. *Id.*

51. *Id.* at 5.

52. *Id.* at 27, 30.

53. *Id.* at 5. The D.C. Circuit hears all appeals from military commissions after they pass through the Court of Military Commission Review ("CMCR").

54. *See generally id.*

55. *Id.* at 18.

held that conspiracy to kill Americans abroad was already criminalized under 18 U.S.C. § 2332(b), and neither the change in forum (from federal court to military commission) nor the change in the statute under which he was charged (from § 2332(b) to the MCA) constituted a clear violation of the Ex Post Facto Clause.⁵⁶ Second, it held that the UCMJ already authorized military commissions to try violations of the law of war.⁵⁷ The court then considered the content of the law of war, asking whether it means purely the international law of war, or whether it includes what the government referred to as the “common law of war developed in U.S. military tribunals.”⁵⁸ As the court put it, “The answer is critical because the Government asserts that conspiracy is *not* an international law-of-war offense.”⁵⁹

56. *Id.* This Note will not directly address the D.C. Circuit’s reasoning regarding 10 U.S.C. § 2332(b). See *id.* at 18–22. Arguably, it provides an even stronger case for upholding Bahlul’s conspiracy conviction than the Article 21 route. It suffers from a potential weakness, however, in that it may never get off the ground: the court’s necessary first move was that it was not “plain error” to try Bahlul in a military commission for a crime that was exclusively within the jurisdiction of Article III courts at the time Bahlul committed it. *Id.* at 19–20. Although the court characterized the change in forum as merely a procedural change, *id.* at 19, its reasoning implicitly expanded on the precedent it cited. While military commissions have a panel of “members” that in a practical sense resemble a jury, they are not ordinarily considered to be equivalent to a trial by jury of one’s peers. *E.g.*, Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 460 (2007) (“By their very nature [military commissions] are the antithesis of a civilian jury in a civilian court with an independent Article III judge presiding.”); see Maryellen Fullerton, *Hijacking Trials Overseas: The Need for an Article III Court*, 28 WM. & MARY L. REV. 1, 21 (1986) (“A court-martial is tried, not by a jury of the defendant’s peers . . . , but by a panel of officers.”). The court pointed out that a change in size of the jury is not an ex post facto violation (although it was once considered to be one). *Bahlul I*, 767 F.3d at 19. However, it did not appear to consider that the removal from a jury-trial forum entirely would violate Bahlul’s Sixth Amendment right to a trial by jury of his peers (if he has that right), which he would have had in the Article III court that had jurisdiction to try offenses of § 2332(b). U.S. CONST. amend. VI. Even if the court considers the members of a military commission the practical equivalent of a jury, there is a reasonable argument that American military officers are not Bahlul’s peers. 152 Cong. Rec. 20732 (2006) (statement of Rep. Kucinich) (“The jury of commissioned military officers are not peers of these detainees.”); see Fullerton, *supra*; Renzo, *supra*. Finally, and perhaps most powerfully, the § 2332(b) argument is vulnerable to the exact line of reasoning that led the panel to invalidate Bahlul’s conviction on Article III grounds. See generally *Bahlul II*, 792 F.3d 1 (D.C. Cir. 2015). Analyzing the problem under Article 21 avoids the forum-change problem entirely because it empowered military commissions to try offenses of the law of war at the time of Bahlul’s conduct. 10 U.S.C. § 821 (2000). See also *Bahlul I*, 767 F.3d at 77–78 (expressing “serious doubts” about Congress’s authority to retroactively authorize prosecution in military commissions for federal offenses).

57. See *supra* note 11.

58. *Bahlul I*, 767 F.3d at 22–23.

59. *Id.* at 23 (emphasis in original). This Note offers a different interpretation. In conceding this point, the government engages in the same simple analysis as Bahlul’s defense. As this Note will argue, however, conspiracy is an international law of war offense, albeit in a different structural form from the traditional American notion of conspiracy. See *infra* Sections III.B.1 and III.C.2.

The D.C. Circuit declined to conclusively rule on this issue due to the standard of review that it elected to apply.⁶⁰ Holding that it was not “plain error” to rely on the U.S. common law of war, the court relied exclusively on domestic precedent to find that conspiracy existed as a violation of the law of war at the time of Bahlul’s actions.⁶¹ It upheld his conspiracy conviction despite Bahlul’s *Ex Post Facto* challenge and remanded to the original three-member panel to consider alternative challenges to the conspiracy conviction.⁶²

Those challenges included Bahlul’s contention that Congress violated Article III of the Constitution by granting military commissions jurisdiction over an offense that is not part of the international law of war.⁶³ Bahlul argued that the Constitution vests the judicial power of the United States in Article III courts.⁶⁴ Thus, any proceeding within this judicial power (including criminal cases) must be heard by an Article III court only, subject to a very limited set of exceptions.⁶⁵ One of those exceptions is that Congress may assign prosecutions for law-of-war offenses to military commissions.⁶⁶ From that point, the issue turns on the same question raised by the *Ex Post Facto* issue: are the law-of-war offenses over which Congress may grant commissions jurisdiction limited to those defined in international law, or do they include offenses established by domestic precedent?⁶⁷

On remand, both Bahlul and the government reprised their arguments from the *Ex Post Facto* challenge, with the government arguing that the exception to Article III for military commission jurisdiction over violations of the “law of war” includes the domestic

60. *Bahlul I*, 767 F.3d at 24. See also Jonathan Hafetz, *Guest Post: The D.C. Circuit’s En Banc Ruling in Al Bahlul: Legal Innovation, Tradition, and America’s Domestic Common Law of War*, OPINIO JURIS (July 22, 2014, 2:30 PM), <http://opiniojuris.org/2014/07/22/guest-post-d-c-circuits-en-banc-ruling-al-bahlul-legal-innovation-tradition-americas-ruling-al-bahlul-common-law-war/> [<http://perma.cc/GGP3-WAXN>] (noting that the court gave no clear resolution on the status of conspiracy as a violation of the law of war).

61. *Bahlul I*, 767 F.3d at 24.

62. *Id.* at 31.

63. *Id.*

64. *Bahlul II*, 792 F.3d 1, 7 (D.C. Cir. 2015).

65. *Id.*

66. See *id.* at 7–8 (delimiting the exceptions to the requirement that Article III courts preside over cases within the judicial power); *id.* at 8 (quoting *Ex Parte Quirin*, 317 U.S. 1, 46 (1942)) (“The Supreme Court held that the law of war military commission had jurisdiction to try ‘offense[s] against the law of war.’”).

67. Compare *Bahlul I*, 767 F.3d at 22 (“What body of law is encompassed by section 821’s reference to the ‘law of war’? That dispute takes center stage here.”), with *Bahlul II*, 792 F.3d at 10 (“The question, therefore, is whether a law of war military commission may try *domestic* offenses—specifically conspiracy—without intruding on the judicial power in Article III.”).

common law,⁶⁸ and Bahlul arguing that it was limited to the international law of war.⁶⁹ The panel reviewed this challenge de novo rather than for plain error because it “presents a structural violation of Article III and is [therefore] not waivable or forfeitable,” unlike the Ex Post Facto challenge.⁷⁰ Under the de novo standard of review, the panel revived its holding from *Hamdan II*—potentially cast into doubt by the en banc decision—that the “law of war” means international law only.⁷¹ It then concluded that a military commission cannot constitutionally be granted jurisdiction over conspiracy because it is not a violation of the international law of war and therefore is not within the exception to Article III.⁷² The conviction was vacated, and the government is now almost certain to petition the Supreme Court for certiorari in an effort to save it.⁷³

C. Article III and Ex Post Facto: Two Issues, One Argument

The reason why the substantive arguments are nearly identical for both the Article III and Ex Post Facto issues lies in the analytical structure that each requires. Answering the Article III question requires a two-step analysis: First, where does Article III establish the limit of military-commission jurisdiction?⁷⁴ Second, was conspiracy already extant within that limit when Bahlul acted?⁷⁵ Answering the Ex Post Facto question requires a nearly identical exercise: First, what is the limit of the law of war criminalized at the time of Bahlul’s actions

68. *Bahlul II*, 792 F.3d at 10.

69. *Id.* at 3.

70. *Id.* But see *id.* at 29 (Henderson, J., dissenting) (arguing that plain error is the proper standard of review for Bahlul’s Article III challenge).

71. *Id.* at 8–9.

72. *Id.* at 22.

73. Lyle Denniston, *Appeals court sharply narrows war crimes prosecutions*, SCOTUSBLOG (June 12, 2015, 3:09 PM), <http://www.scotusblog.com/2015/06/appeals-court-sharply-narrows-war-crimes-prosecutions/> [<http://perma.cc/EF55-35S9>]; Jens David Ohlin, *Will Al-Bahlul’s Appeal of his Conspiracy Conviction go to the Supreme Court?*, OPINIO JURIS (June 15, 2015, 2:00 PM), <http://opiniojuris.org/2015/06/15/will-al-bahluls-appeal-of-his-conspiracy-conviction-go-to-the-supreme-court/> [<http://perma.cc/Q8CX-9C58>].

74. See *Bahlul II*, 792 F.3d at 10 (“The question, therefore, is whether a law of war military commission may try *domestic* offenses—specifically conspiracy—without intruding on the judicial power in Article III.”).

75. See *id.* at 7–8 (“[T]he question is whether conspiracy falls within the Article III exception for that type of commission.”).

under UCMJ Article 21?⁷⁶ Second, did conspiracy exist within that limit when Bahlul acted?⁷⁷

There is, however, one critical but easily overlooked difference between these analyses. The Ex Post Facto analysis calls for *statutory* interpretation of the meaning of the “law of war.” The Court would decide whether, as a matter of statute, UCMJ Article 21 incorporates only international law into federal law or also includes the American common law of war. Congress could respond to such a ruling by amending the statute—indeed, it did so with the MCA, which is why the Ex Post Facto issue only calls into question conspiracy convictions for pre-2006 conduct. By contrast, the Article III analysis calls for *constitutional* interpretation of the meaning of the “law of war.”⁷⁸ Such an interpretation would irrevocably set the jurisdictional boundary for law-of-war military commissions absent a constitutional amendment.⁷⁹ Therefore, while the substantive arguments are similar, the stakes are much higher for the Article III issue. Accordingly, it seems best to resolve both questions without making a final determination on the meaning of the “law of war” for Article III purposes, if possible.

One way to do so is to adopt the most restrictive statutory interpretation of the “law of war” in UCMJ Article 21. At the time of Bahlul’s actions, Article 21 criminalized *at least* the international law of war,⁸⁰ and Article III grants military commissions jurisdiction over *at least* the international law of war.⁸¹ If the Court finds that the MCA’s definition of conspiracy was not already criminalized under the international law of war, then while that would answer the Ex Post Facto question, the Court would still need to proceed to the question of how far beyond the international law of war Congress may constitutionally expand the jurisdiction of law-of-war military commissions in order to determine conspiracy’s viability for post-2006

76. See *Bahlul I*, 767 F.3d 1, 22 (D.C. Cir. 2014) (“What body of law is encompassed by section 821’s reference to the ‘law of war?’”).

77. See *id.* (“We must therefore ascertain whether conspiracy to commit war crimes was a ‘law of war’ offense triable by military commissions under section 821 when Bahlul’s conduct occurred.”).

78. *Bahlul II*, 792 F.3d at 28 (Henderson, J., dissenting).

79. See *id.*

80. See *Bahlul I*, 767 F.3d at 22–23 (framing the issue as whether the “law of war” means international law “full stop” or *also* includes “the common law of war developed in U.S. military tribunals”) (internal quotation omitted).

81. See *Bahlul II*, 792 F.3d at 24–25 (Tatel, J., concurring) (characterizing the issue as whether Article III limits military-commission jurisdiction to international law or also includes “crimes recognized only by domestic law”).

conduct.⁸² However, if the Court determines that the MCA's definition of conspiracy is within the *statutory* limitation of the international law of war established by UCMJ Article 21, then it must by definition also be within the *constitutional* limitation on the jurisdiction of law-of-war military commissions, which extends at least as far as international law. It would therefore be unnecessary to determine whether the Article III exception stops there or grants Congress more leeway.

The alternative route to upholding the constitutionality of the MCA's conspiracy charge involves overturning the D.C. Circuit's ruling on the Article III issue in *Bahlul II*. Even if the Supreme Court were to find the MCA's conspiracy charge constitutional, the utility of such a holding would be limited—it would only reinstate the uncertain landscape left by the D.C. Circuit's *Bahlul I* decision. Under a “plain error” standard of review, courts and attorneys will remain unsure about the viability of conspiracy for pre-2006 conduct.⁸³ Additionally, if the Court overturns *Bahlul II* while applying the “plain error” standard of review to the Article III question (as Judge Henderson would do),⁸⁴ it would not only restore that uncertainty but also reproduce it in the constitutional realm.

If the Supreme Court affirms the D.C. Circuit's decision in *Bahlul II*, then it has no occasion to revisit the Ex Post Facto question.

82. See Charlie Savage, *Guantánamo Detainee's Conviction is Thrown Out on Appeal*, N.Y. TIMES, (June 12, 2015), http://www.nytimes.com/2015/06/13/us/ruling-finds-tribunal-is-no-place-for-guantanamo-detainees-case.html?_r=0 [<http://perma.cc/57QE-YD3E>] (noting that while the en banc decision was focused on pre-2006 conduct, the panel decision regarding the Article III challenge also invalidates conspiracy for future acts). The viability of conspiracy for post-2006 conduct is of more than academic concern; at least one person currently faces conspiracy charges for post-2006 conduct. *Id.*; see also Charlie Savage, *Guantánamo Bay Prosecutors Accuse Detainee of Conspiracy*, N.Y. TIMES, (Feb. 14, 2014), <http://www.nytimes.com/2014/02/15/us/guantanamo-bay-prosecutors-accuse-detainee-of-conspiracy.html> [<http://perma.cc/564B-PHRR>] (noting the addition of a conspiracy charge against Abd al Hadi al Iraqi). More individuals could potentially face the same charges if the MCA's conspiracy provision is not invalidated.

83. *Bahlul I*, 767 F.3d at 62 (Brown, J., concurring); Jonathan Hafetz, *Guest Post, supra* note 60 (noting that the court gave no clear resolution on the status of conspiracy as a violation of the law of war). Granted, Brigadier General Mark Martins, the current Chief Prosecutor of Military Commissions, has creatively minimized future repercussions by amending all charges stemming from pre-2006 conduct to include conspiracy only as a mode of liability rather than as a standalone offense. See Remarks by Chief Prosecutor Mark Martins at Guantanamo Bay (Jan. 27, 2013) at 2, <http://s3.documentcloud.org/documents/562514/27-jan-2013-statement-of-the-chief-prosecutor.pdf> [<http://perma.cc/9QAV-9572>] (announcing his recommendation to drop conspiracy as an independent charge and use it as a mode of liability); Remarks by Chief Prosecutor Mark Martins at Guantanamo Bay (Oct. 25, 2013) at 1, <http://lawfare.s3-us-west-2.amazonaws.com/staging/s3fs-public/uploads/2013/10/25-October-2013-Statement-of-the-Chief-Prosecutor.pdf> [<http://perma.cc/9YK7-G6DE>] (noting judge's grant of motion to supplement brief seeking amendment of charges). This, however, is a symptom of the problem, not a solution. It reacts to the legal issue, but does not resolve it.

84. *Bahlul II*, 792 F.3d at 29.

However, if it upholds the constitutionality of the MCA's conspiracy charge, the best route by which to do so is via the Ex Post Facto analysis. Assuming the most restrictive *statutory* interpretation in finding that the statute is constitutional resolves both challenges at once and frees the Court from having to engage in binding *constitutional* interpretation on a separation-of-powers question that impacts foreign policy and national security.⁸⁵

III. THE CONVOLUTED WORLD OF CONSPIRACY AT HOME AND ABROAD

The constitutionality of the MCA's conspiracy provision under the Ex Post Facto Clause turns on whether it criminalizes anything that was not already criminalized by UCMJ Article 21's incorporation of the law of war.⁸⁶ The predominant understanding is that if "law of war" means the international law of war, then retroactive application of the MCA's conspiracy provision violates the Ex Post Facto Clause.⁸⁷ Section III.A explores this contention by discussing the purpose of ex post facto protection and principles by which that purpose is realized.

Section III.B adopts the more restrictive approach of assuming that the law of war is limited to international law. It begins with an overview of the status of conspiracy in international law and highlights the key way in which the MCA is different. Then, it challenges the

85. *Id.* at 28. Additionally, those who argue that the "law of war" in Article 21 means international law arguably have a stronger basis in precedent. In declining to decide the issue, the en banc court relied primarily on disagreement between Supreme Court Justices in a single, recent case: *Hamdan I*, 548 U.S. 557 (2006). The majority pointed out that the *Hamdan* Court did not resolve the question of what the "law of war" encompasses. *Bahlul I*, 767 F.3d at 22. While they also managed to find ambiguity in most of the other cases that reached the issue, *id.* at 23–24, when addressing the question directly the Supreme Court has consistently considered the law of war to mean the international law of war. *Hamdan I*, 548 U.S. at 641 (Kennedy, J., concurring) ("[T]he law of war . . . is the body of international law governing armed conflict."); *Madsen v. Kinsella*, 343 U.S. 341, 354–55 (1952) ("The 'law of war' . . . includes at least that part of the law of nations which defines the powers and duties of belligerent powers occupying enemy territory pending the establishment of civil government."); *Yamashita v. Styer (In re Yamashita)*, 327 U.S. 1 (1946); *Ex Parte Quirin*, 317 U.S. 1, 29 (1942) (describing the law of war as a "branch of international law"); *Ex Parte Milligan*, 71 U.S. 2, 14 (1866) ("The laws of war are the laws which govern the conduct of belligerents towards each other and other nations, *flagranti bello*."); *Bahlul I*, 767 F.3d at 37 (Rogers, J., dissenting) ("For more than seventy years, the Supreme Court has interpreted the 'law of war' to mean the international law of war."); see *Hamdi v. Rumsfeld*, 542 U.S. 507, 520 (2004) (citing Geneva Conventions as source of law of war); *The Paquete Habana*, 175 U.S. 677, 698 (1900) (treating the law of war as a part of international law).

86. *Bahlul I*, 767 F.3d at 22 ("We must therefore ascertain whether conspiracy to commit war crimes was a 'law of war' offense triable by military commission under section 821 when Bahlul's conduct occurred because, if so, Bahlul's *ex post facto* argument fails.")

87. *E.g., id.* at 22–23 (indicating that the government agrees with Bahlul's contention that conspiracy is not an international law-of-war offense).

predominant understanding that, because of that difference, the MCA violates the Ex Post Facto Clause.

Section III.C delves deeper into the analysis, showing that the predominant understanding conflates two different concepts regarding conspiracy: (1) the inchoate nature of conspiracy as a standalone offense, and (2) the factual possibility of an inchoate conspiracy. Understanding the difference between these concepts elucidates how, if at all, the MCA might violate the Ex Post Facto Clause.

A. Ex Post Facto Is About Conduct and Notice of Criminality

The Ex Post Facto Clause is founded on the principle of legality, a foundational legal principle stating that “no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”⁸⁸ The prohibition on ex post facto laws serves two purposes. As the Supreme Court has explained, “Through this prohibition, the Framers sought to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed. The ban also restricts governmental power by restraining arbitrary and potentially vindictive legislation.”⁸⁹ Thus, the Clause helps ensure that citizens have notice of what conduct is criminal and that the government applies the criminal law fairly.

In order to fulfill those purposes, the Ex Post Facto Clause consists of two primary prohibitions.⁹⁰ First, and most intuitively, it prohibits retroactive creation of new crimes.⁹¹ Behavior that was

88. *United States v. Lanier*, 520 U.S. 259, 265 (1997) (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 351 (1964)) (internal quotation marks omitted); see John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 190 (1985) (“The principle of legality forbids the retroactive definition of criminal offenses.”); see also Peter Margulies, *Defining, Punishing, and Membership in the Community of Nations: Material Support and Conspiracy Charges in Military Commissions*, 36 FORDHAM INT’L L.J. 1, 4 (2013).

89. *Weaver v. Graham*, 450 U.S. 24, 27–28 (1981) (citations omitted).

90. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798). As formulated in *Calder* there are actually four prohibitions:

1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender.

Id. The second, third, and fourth of these will all be treated as one for purposes of this Note, because they all amount to substantive changes that are legalistic in nature. In fact, the Supreme Court has described them as “mirror images of one another.” *Carmell v. Texas*, 529 U.S. 513, 533 (2000).

91. *Calder*, 3 U.S. at 390.

entirely legal at the time the actor engaged in it cannot later be criminalized and used against him.⁹² This prong of protection—the *conduct prong*—does not concern technical changes in the name of that conduct.⁹³ Rather, its purpose is to ensure that individuals have sufficient notice of what behavior is criminal and to allow them to rely on that notice in acting.⁹⁴ In essence, people should not be held criminally responsible for actions they could not have known to be criminal. Importantly, that also implies the converse: actions recognized as criminal give rise to criminal liability due to notice of their criminality. Thus, what matters in terms of *ex post facto* is the conduct itself, not the precise legal language used to describe it.⁹⁵

On the international level, the application of the legality principle to underlying conduct, rather than specific statutory provisions, is widespread and apparent as a matter of international law.⁹⁶ There, the legality principle is embodied in the phrase *nullem crimen sine lege*.⁹⁷ From the first great foray into international criminal responsibility, at Nuremberg in the wake of the Second World War, the international community has recognized that criminals cannot hide behind the legality principle. In other words, they cannot avoid responsibility for conduct they knew to be criminal under one law just because they happen to be indicted under a different statutory provision that was not yet codified at the time they acted.⁹⁸

Indeed, international tribunals have wrestled with the legality principle more extensively than domestic courts.⁹⁹ Due to the often indeterminate nature of international law, the legality principle has been raised frequently and argued extensively in international

92. *Id.* (“[T]he plain and obvious meaning and intention of the prohibition is this; that the Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it.”).

93. *Id.* (contrasting the literal meaning, prohibition on any retroactive laws, with the “plain and obvious meaning,” that conduct should not be retroactively criminalized).

94. *Id.*

95. *See, e.g.,* *Collins v. Youngblood*, 497 U.S. 37, 44 (1990); *Mallet v. North Carolina* 181 U.S. 589, 597 (1901). While numerous sources clearly state that criminalizing previously innocent conduct does violate the *Ex Post Facto* Clause, it is surprisingly difficult to find any explicit statement of the converse: statutes that criminalize conduct that is already criminalized elsewhere in the Code do not violate the *Ex Post Facto* Clause. Although that proposition logically follows from the definition of *ex post facto* laws, the Author has been unable to find any concise, explicit statement of it in the case law or secondary sources.

96. ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON & ELIZABETH WILMSHURST, *AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 17 (2d ed. 2010).

97. “There is no crime without law.” *Id.* at 19 n.87.

98. *See infra* note 102 and accompanying text.

99. CRYER ET AL., *supra* note 96, at 17.

tribunals.¹⁰⁰ In these venues, the legality principle has been interpreted entirely as a matter of whether the actor knew he was committing wrongdoing at the time he acted.¹⁰¹ The Nuremberg Tribunal described the principle as follows:

The maxim *nullem crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong was allowed to go unpunished.¹⁰²

Thus, the core concern of the legality principle is the defendant's conduct and mental state, rather than the precise wording used to describe them or the prior existence of the particular statute under which the defendant is charged.

Returning to the domestic level, the second prong of protection provided by the Ex Post Facto Clause—the *legal prong*—is a prohibition on retroactive removal of elements that the government must prove in crimes that already exist.¹⁰³ This aspect is legalistic in nature because it concerns the definition of the crime. The concern here is that “the government subverts the presumption of innocence by reducing the number of elements it must prove to overcome that presumption.”¹⁰⁴ Even if the conduct was already criminalized, it is fundamentally unfair for the government to change the rules after the fact to suit its own purposes.¹⁰⁵ This applies apart from the notice requirement, and it carries force even when the defendant's factual guilt seems obvious.¹⁰⁶

For the MCA to pass an Ex Post Facto examination, it must satisfy both the conduct and legal prongs. This Note next analyzes whether the MCA's conspiracy statute violates the Ex Post Facto Clause, starting with the prevailing argument offered by those who believe it does.

100. *Id.* at 17–20.

101. *Id.* at 18–19.

102. Nuremberg IMT Judgment (1947), reprinted in 41 AM. J. INT'L L. 172, 217.

103. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (fourth formulation described); *Bahlul I*, 767 F.3d 1, 20 (D.C. Cir. 2014) (quoting *Carmell v. Texas*, 529 U.S. 513, 532 (2000)) (stating that removal of an element violates the Ex Post Facto Clause).

104. *Carmell*, 529 U.S. at 532.

105. *Id.* at 533.

106. *Id.* (discussing the case of Sir John Fenwick, who was quite clearly guilty of the offense charged but was saved by an evidentiary rule that Parliament attempted to retroactively change in violation of the ex post facto principle).

B. The Typical Argument

Many scholars conclude—and the D.C. Circuit in *Bahlul I* appears to have assumed—that because conspiracy does not exist as a standalone offense in international law, the MCA’s retroactive criminalization of conspiracy violates the Ex Post Facto Clause if the “law of war” is limited to international law.¹⁰⁷ Assuming that the “law of war” is so limited, this Section explains the difference between conspiracy in international law and in the MCA and briefly recounts the conclusion argued by *Bahlul* and apparently assumed by the D.C. Circuit.

1. Conspiracy in International Law

Conspiracy first appeared in the international law of war in the Charter of the International Military Tribunal (“IMT”) at Nuremberg following World War II.¹⁰⁸ However, its inclusion was controversial and, essentially, a concession to the American delegation because they had framed their entire case against the Nazis as a vast conspiracy.¹⁰⁹ In the end, conspiracy charges were dismissed for all crimes except conspiracy to commit the crime of aggression, due to its “inherently conspiratorial nature.”¹¹⁰

In the Nuremberg IMT, conspiracy was used not as an independent offense but as a mode of liability.¹¹¹ A mode of liability is simply a form of participation in an offense that gives rise to criminal liability for that offense.¹¹² A familiar example within American

107. *E.g.*, Glazier, *supra* note 32, at 331; Jonathan Hafetz, *Policing the Line: International Law, Article III, and the Constitutional Limits of Military Jurisdiction*, 2014 WIS. L. REV. 681, 683 (2014); Vladeck, *supra* note 6, at 324–25. *See Bahlul I*, 767 F.3d at 23 (“[T]he Government asserts that conspiracy is *not* an international law-of-war offense.”).

108. *See* CLAIRE DE THAN & EDWIN SHORTS, INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS 276 (2003) (“[The IMTs] focused the world’s attention, truly for the first time, not only on the general principles of international law regarding war crimes, but also defined those crimes and founded a proper forum to implement those laws.”); CRYER ET AL., *supra* note 96, at 367 (“The Nuremberg and Tokyo IMTs both provided that those who participated in 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 a plan.’”).

109. ROBERT CRYER, PROSECUTING INTERNATIONAL CRIMES 309 (2005).

110. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE 279 (Antonio Cassese ed., 2006). Conspiracy also featured prominently in the Tokyo IMT, where it was applied more widely; CRYER ET AL., *supra* note 96, at 368.

111. *See* CRYER ET AL., *supra* note 96, at 368 (“The use of ‘conspiracy’ in this regard is misleading as it is apt to cause confusion between this type of liability and the separate (common law) offense of conspiracy.”).

112. Stuart Ford, *Fairness and Politics at the ICTY: Evidence from the Indictments*, 39 N.C. J. INT’L L. & COM. REG. 45, 80 (2013) (quoting CRYER ET AL., *supra* note 96, at 361) (“Modes of

jurisprudence—apart from direct commission of the crime—is aiding and abetting. A person may be guilty of a crime he did not personally commit because he assisted the perpetrator in some manner, either before or after the fact.¹¹³ In such a case, while he would be guilty of the underlying crime, the mode of liability is aiding and abetting.¹¹⁴

Since the days of the Nuremberg IMT, the term “conspiracy” itself has largely disappeared from international law.¹¹⁵ Conspiracy as an independent crime (similar to the offense as used in American law) exists only for genocide.¹¹⁶ Nevertheless, conspiracy modes of liability have garnered widespread acceptance in international law under other names.¹¹⁷

In cases for crimes committed in the early 1990s, the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) developed and applied a mode of liability known as Joint Criminal Enterprise (“JCE”).¹¹⁸ There are two types of JCE, but both require: (1) “a plurality of persons,” (2) “the existence of a common plan, design or purpose which amounts to or involves the commission of a crime,” and (3) “participation of the accused in the common design.”¹¹⁹

Notably, the bar for JCE is lower than for a domestic conspiracy¹²⁰ in that the perpetrators need not make an express agreement beforehand,¹²¹ although in practice an agreement is often

liability are principles of liability that ‘apply across the various [substantive] offenses and provide for the doctrines by which a person may commit, participate in, or otherwise be found responsible for those crimes.’”).

113. *E.g.*, *United States v. Williams*, 341 U.S. 58, 64 (1951) (“Aiding and abetting means to assist the perpetrator of the crime.”).

114. *Cf.* *United States v. Marchan*, 32 F. Supp. 3d 753, 761–62 (S.D. Tex. 2013) (“[A]iding and abetting . . . is not a separate and distinct offense. Rather, [it] allows one who has been indicted as a principal to be convicted on evidence that shows he merely aided and abetted offense.”) (citing *United States v. Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998)).

115. *See* DE THAN & SHORTS, *supra* note 108, at 9 (2003) (“Conspiracy to commit offenses other than genocide existed under the Nuremberg and Tokyo Charters but has not been on the agenda at ICTY or ICTR.”). This is probably due in large part to the same sort of inherent conflation under the term “conspiracy” of the inchoate nature of conspiracy as a standalone offense and the notion of an inchoate conspiracy that will feature so prominently below in Part III.B.1.

116. CRYER ET AL., *supra* note 96, at 368.

117. *E.g.*, *Bahlul I*, 767 F.3d 1, 59–60 (D.C. Cir. 2014) (Brown, J., concurring); THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 279.

118. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 392–93.

119. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶ 227 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> [<http://perma.cc/4B9X-7VA3>].

120. Throughout, the term “domestic conspiracy” will refer to the traditional American conception of conspiracy.

121. *Tadić*, Case No. IT-94-1-A, at ¶ 227; CRYER ET AL., *supra* note 96, at 369.

proven as the most conclusive evidence that a JCE existed.¹²² A defendant's personal participation in the JCE need not involve a criminal act.¹²³ Like domestic conspiracy, if all the other elements of a JCE are met, the defendant may incur individual responsibility through a non-criminal act that contributes to or furthers the common plan.¹²⁴

The required mental state depends on which type of JCE is alleged. There are two primary types of JCE.¹²⁵ The first requires "intent to perpetrate a certain crime."¹²⁶ The second requires "intent[] to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or . . . the commission of a crime by the group."¹²⁷ Although these mental states seem similar, the difference is that in the first one, the defendant must intend to contribute to a particularized crime, whereas the second one only requires a general intent to contribute to an overall criminal goal. Domestic conspiracy may not include an express mental element, but it does require the agreement to commit a crime,¹²⁸ which necessarily includes intent to perpetrate the crime.

Because JCE is only a mode of liability—not an independent offense—once the JCE is established and the defendant is shown to be a member thereof, a prosecutor must also prove that an underlying

122. *E.g.*, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 612 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> [<http://perma.cc/M4RT-JKVJ>].

123. *Tadić*, Case No. IT-94-1-A, at ¶ 227.

124. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 392. For example, it is not a crime under international law (or probably any law) for a general to transfer a unit of combat engineers to another's command. However, if he knows that the receiving commander needs those engineers in order to dig mass graves, he may incur individual criminal liability under a JCE theory, even though transferring command of soldiers is, in itself, perfectly legal. *Cf.*, *e.g.*, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment, ¶ 308 (Int'l Crim. Trib. For the Former Yugoslavia Jan. 17, 2005), http://www.icty.org/x/cases/blagojevic_jokic/tjug/en/bla-050117e.pdf [<http://perma.cc/VT7K-GE82>] (describing the Defendant's transfer of a driver from one of his subordinate commands to a separate civilian command for the purpose of burying war-crime victims in mass graves).

125. *Prosecutor v. Kvočka*, Case No. IT-98-30/1-A, Judgment, ¶ 82 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005), <http://www.icty.org/x/cases/kvočka/acjug/en/kvo-aj050228e.pdf> [<http://perma.cc/5MUG-HJFU>]. A third type, really a variant of the first, was designed to reach low-level guards and other workers at concentration camps who may not know enough of the details of the common plan to meet the requirements for the first category, but are fully aware that they are contributing to the ongoing, systematic perpetration of crime(s). *Id.*; CRYER ET AL., *supra* note 96, at 369–71.

126. *Tadić*, Case No. IT-94-1-A, at ¶ 228; CRYER ET AL., *supra* note 96, at 371.

127. *Tadić*, Case No. IT-94-1-A, at ¶ 228 (emphasis omitted).

128. *See Iannelli v. United States*, 420 U.S. 770, 777 (1975) (“[T]he essence of [conspiracy] is an agreement to commit an unlawful act.”).

substantive crime occurred.¹²⁹ This does not require showing that the defendant himself committed the underlying substantive crime or any other criminal act.¹³⁰ As long as the government establishes that someone in the JCE committed the underlying crime, the defendant bears individual criminal responsibility for it.¹³¹

The elements of a JCE, taken together, show that it is a conspiracy mode of liability.¹³² It requires that the defendant, along with at least one other person, create a common plan with intent to commit a crime—essentially an agreement to commit a crime. Once the plan is created, the defendant must participate in that plan by some overt act, which need not be criminal and need not amount to personal perpetration of the object offense—just as with conspiracy. And the requirement to prove the underlying substantive crime, rather than just the agreement, makes JCE a mode of liability rather than an independent offense.

Other international tribunals have uniformly adopted the concept of JCE from the ICTY. The International Criminal Tribunal for Rwanda, presiding over crimes committed in 1994,¹³³ considers JCE to be a part of customary international law.¹³⁴ The Special Court for Sierra Leone likewise held JCE to be a part of international law in a case governing criminal conduct spanning from 1996 to 2002.¹³⁵ Finally, the Extraordinary Chambers in the Courts of Cambodia found that customary international law included JCE as early as 1975.¹³⁶

129. Cf. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 395 (“The *Tadić* AC implicitly classified JCE liability as a form of ‘commission.’ ”); CRYER ET AL., *supra* note 96, at 368 (“The substantive definitions of crimes provide only a part of the picture of criminal liability. The general principles of liability apply across the various different offences and provide for the doctrines by which a person may commit, participate in, or otherwise be found responsible for those crimes.”).

130. *Tadić*, Case No. IT-94-1-A, at ¶ 227.

131. See CRYER ET AL., *supra* note 96, at 361 (“[I]n international law, the paradigmatic offender is often the person who orders, masterminds, or takes part in a plan at a high level.”).

132. See THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 391 (discussing JCE and referring to it as a version of the conspiracy mode of liability).

133. Statute of the International Criminal Tribunal for Rwanda, art. 7 (Jan. 31, 2010).

134. *E.g.*, Prosecutor v. Kanyarukiga, Case No. ICTR-2002-78-T, Judgment, ¶ 623 (Nov. 1, 2010), <http://www.unicttr.org/sites/unicttr.org/files/case-documents/ictr-02-78/trial-judgements/en/101101.pdf> [<http://perma.cc/CTF4-QJEJ>].

135. Prosecutor v. Taylor, Case No. SCSL-03-01-T, Judgment, ¶¶ 13, 458 (May 18, 2012), <http://www.rscsl.org/Documents/Decisions/Taylor/1283/SCSL-03-01-T-1283.pdf> [<http://perma.cc/VH8W-CZ7V>].

136. Prosecutor v. Kaing, Case No. 001/18-07-2007/ECCC/TC, Judgment, ¶ 512 (July 26, 2010), http://www.eccc.gov.kh/sites/default/files/documents/court/20100726_Judgement_Case_001_ENG_PUBLIC.pdf [<http://perma.cc/3CP7-LJVQ>].

Additionally, the Rome Statute of the International Criminal Court (“ICC”), of which 139 states are signatories,¹³⁷ describes what is essentially a conspiracy mode of liability.¹³⁸ Article 25.3(d) of the Rome Statute establishes criminal liability for a person who

in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) be made in the knowledge of the intention of the group to commit the crime.¹³⁹

This is also essentially a conspiracy mode of liability. There must be a group of persons with a common criminal purpose that the defendant intends to further by his contribution. An explicit agreement is not required, but any agreement to participate in the plan would necessarily satisfy the requirement of intent to conspire. In other words, requiring an agreement sets a higher bar than that set by the ICC statute. The defendant must actually make some contribution to the criminal purpose, but the contribution itself need not be illegal.

The uniform, widespread adoption of conspiracy modes of liability in international law indicates that while the word “conspiracy” is not often used, conspiracy as a mode of liability has been a feature of international law since the end of the Second World War, and had gained enough acceptance by 1998 to be included in the Rome Statute of the ICC.¹⁴⁰ The particulars of its codification have varied, but its substance has not. Its elements can be fairly characterized as follows: under international law, a person may be guilty of an offense via the conspiracy mode of liability if he (1) makes an agreement with another person or persons, (2) the object of which is to commit a violation of the relevant body of law, and (3) he performs some overt act in furtherance of that agreement.¹⁴¹ Additionally, because it is a mode of liability, at

137. United Nations Status for the Rome Statute of the International Criminal Court, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Jan. 9, 2015) [<http://perma.cc/E556-FM9M>]. While the United States is not a Party to the Rome Statute, the Rome Statute, which contains a conspiracy mode of liability, meets with near universal acceptance in the international community.

138. CRYER, *supra* note 109, at 315.

139. Rome Statute of the International Criminal Court, art. 25.3(d) (July 1, 2002). The Special Tribunal for Lebanon included nearly identical language in its governing statute. Statute of the Special Tribunal for Lebanon, art. 3 (Jan. 31, 2007).

140. United Nations Status for the Rome Statute, *supra* note 137.

141. See Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 38–51 (Int’l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-ts/70507JT2-e.pdf> [<http://perma.cc/4B9X-7VA3>] (elements of JCE); Rome Statute of the International Criminal

least one member of the conspiracy must carry out the intended violation in order for there to be a crime at all.¹⁴²

2. How the MCA Is Different

In contrast to international law, domestic conspiracy is treated as an independent offense for which liability accrues as soon as any conspirator takes an action, even a legal one, in furtherance of the conspiracy.¹⁴³ For example, the federal offense of conspiracy under Title 18 of the U.S. Code is defined as follows:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.¹⁴⁴

The offense has three elements, which mirror the elements of the conspiracy mode of liability: (1) making an agreement to commit an offense (2) against the United States, and (3) doing an act to effect the object of the conspiracy.¹⁴⁵ Once those elements are satisfied, the offense is complete, even if the object of the conspiracy is never even attempted.¹⁴⁶

Completion of the offense, and thus accrual of liability, without an attempt is the primary difference between domestic conspiracy and conspiracy as a mode of liability. Without the occurrence of the underlying crime, the act of conspiring to commit that crime is not itself a violation of international law.¹⁴⁷ Under the domestic conception, the opposite is true: the act of conspiring is itself illegal, even if the

Court, art. 25.3(d) (elements of conspiracy analogue in the Rome Statute); *CRYER ET AL.*, *supra* note 96, at 367 (noting inclusion of “common plan or conspiracy” in the Nuremberg and Tokyo IMTs); *see also* *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 110, at 392 (stating that the ICTY understood its JCE theory to be a reflection of customary international law); *CRYER ET AL.*, *supra* note 96, at 369 (same).

142. *Cf.* *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 110, at 395 (“The *Tadić* AC implicitly classified JCE liability as a form of ‘commission.’”); *CRYER ET AL.*, *supra* note 96, at 368 (“The substantive definitions of crimes provide only a part of the picture of criminal liability. The general principles of liability apply across the various different offences and provide for the doctrines by which a person may commit, participate in, or otherwise be found responsible for those crimes.”).

143. *E.g.*, *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 110, at 279.

144. 18 U.S.C. § 371 (2012).

145. *United States v. Contreras*, 950 F.2d 232, 238 (5th Cir. 1991) (quoting *United States v. Schmick*, 904 F.2d 936, 941 (5th Cir. 1990)).

146. *E.g.*, *United States v. Massey*, 827 F.2d 995, 1002 (5th Cir. 1987); *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 110, at 279.

147. *E.g.*, *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 110, at 279.

underlying crime never occurs.¹⁴⁸ The other significant difference is that when conspiracy is used as a mode of liability, the charge is not for conspiracy but for the substantive crime itself.¹⁴⁹ One cannot be guilty of conspiracy under international law; rather, one is guilty of, say, murdering civilians by reason of having conspired with the person who actually pulled the trigger.¹⁵⁰

The MCA's definition of conspiracy seemingly follows the domestic pattern, requiring the accused only to conspire and commit some overt act to effect the object of the conspiracy:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result to any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.¹⁵¹

The similarity of the first half of the statute to Title 18 conspiracy reasonably supports an interpretation that the MCA's version of conspiracy is the same. This notion is doubtlessly reinforced by familiarity with the domestic conception of conspiracy. It is easy to automatically interpret the MCA's use of the word "conspiracy" in the way in which it has traditionally been used in other areas of American law.¹⁵²

3. The Premature Conclusion

Conspiracy's acceptance within international law only as a mode of liability, coupled with the MCA's codification of it as an independent offense, has led many scholars to conclude that the MCA's conspiracy charge violates the Ex Post Facto Clause when applied retroactively.¹⁵³ In order for the MCA to survive an Ex Post Facto challenge, it may only codify activity that was already criminalized elsewhere in federal

148. *E.g., id.*

149. *E.g.,* Prosecutor v. Krstić, Case No. IT-98-33-T, Judgment, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001), <http://www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf> [<http://perma.cc/M4RT-JKVJ>]; Prosecutor v. Tadić, Case No. IT-94-1-T, Judgment, ¶¶ 38–51 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997), <http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj70507JT2-e.pdf> [<http://perma.cc/4B9X-7VA3>].

150. *E.g., Tadić*, Case No. IT-94-1-T, at ¶¶ 38–51; *Krstić*, Case No. IT-98-33-T, at ¶¶ 719, 721.

151. 10 U.S.C. § 950v(28) (2006) (current version at 10 U.S.C. § 950t(29) (2012)).

152. *See, e.g., Bahlul II*, 792 F.3d 1, 3, 11–12, 22 (D.C. Cir. 2015) (interpreting—inaccurately, as this Note will argue—the charge against Bahlul as one of inchoate conspiracy).

153. *E.g., Bahlul I*, 767 F.3d 1, 34 (D.C. Cir. 2014) (Rogers, J., dissenting); Baldrate, *supra* note 13, at 111; Glazier, *supra* note 13, at 154–55.

law.¹⁵⁴ UCMJ Article 21 criminalized violations of the law of war—meaning the international law of war—but under international law, conspiracy is not a distinct offense.¹⁵⁵ It is only a mode of liability, which still requires proving an underlying substantive crime.¹⁵⁶ Thus, scholars argue that because the MCA does not require proof of an underlying crime, it criminalizes previously legal behavior (simply conspiring without carrying out the crime), thereby violating the Ex Post Facto Clause.¹⁵⁷

Such simplicity is attractive. Ultimately, though, it turns out to be too simple. It fails to recognize that not all conspiracies are the same, even if they are charged as standalone offenses. As the next Section reveals, at least one subclass of standalone conspiracies—those where the underlying offense is actually carried out—describes the same conduct as the conspiracy mode of liability in international law.

C. Delving Deeper

To justify the MCA's conspiracy charge under the Ex Post Facto Clause, conspiracy as a standalone offense must be distinguished from conspiracy as an inchoate crime. By comparing a defendant's conduct in a standalone, completed conspiracy with a defendant's conduct in conspiracy as a mode of liability, it becomes evident that the MCA does not necessarily violate the Ex Post Facto Clause. It only does so if it is interpreted to permit the government to charge conspiracy for a crime that was never carried out.¹⁵⁸ However, criminalizing only *completed* conspiracies—as in international law—does not violate the Ex Post Facto Clause.

154. See, e.g., *Bahlul I*, 767 F.3d at 18 (rejecting an Ex Post Facto challenge to the MCA because the conduct was already criminalized elsewhere in federal law).

155. E.g., THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 279.

156. CRYER ET AL., *supra* note 96, at 367.

157. See, e.g., Hafetz, *supra* note 107, at 713 (“The type of inchoate liability under MCA-based offenses such as MST and conspiracy exceeds even the most liberal interpretations of vicarious liability by international tribunals.”); Margulies, *supra* note 88, at 84 (“[C]onspiracy is a plausible mode of liability in military commission cases, including *al Bahlul*. However, international law and practice dim the prospects for charging conspiracy as a separate and independent offense.”).

158. Cf. *Bahlul II*, 792 F.3d 1, 3–22 (D.C. Cir. June 12, 2015) (consistently referring, in the majority opinion, to the charge it was invalidating on Article III grounds, as a charge of inchoate conspiracy).

1. Standalone Conspiracy Does Not Equal Inchoate Conspiracy

There are two separate but related concepts regarding conspiracy: (1) conspiracy as a standalone offense, and (2) the crime of inchoate conspiracy. Conflating the two largely gives rise to the perception that the MCA's conspiracy charge violates the Ex Post Facto Clause.¹⁵⁹ Both concepts are related to conspiracy's nature as an "inchoate offense," which is "[a] step toward the commission of another crime, the step in itself being serious enough to merit punishment."¹⁶⁰ But *standalone conspiracy* refers to conspiracy's existence as a separate offense from the underlying crime—in other words, its inchoate nature itself—while *inchoate conspiracy* refers more specifically to the notion that a defendant can be guilty of a conspiracy even when the underlying object crime was never attempted.

Under American jurisprudence, conspiracy is a separate and distinct crime from the underlying crime that is its object.¹⁶¹ Often, when the underlying crime is carried out, conspiracy and the underlying crime are charged together.¹⁶² However, this need not be the case. As the Supreme Court has pointed out, "[T]he conspiracy to commit an offense and the subsequent commission of that crime normally do not merge into a single punishable act. [Therefore,] . . . separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end."¹⁶³ Given its separate existence, conspiracy may be charged without charging the underlying crime as well. Such a charge is referred to as a *standalone conspiracy*, in contrast to conspiracy charged along with its object crime.¹⁶⁴

Standalone conspiracy may be further broken down into two categories. First, a defendant may be guilty of conspiracy even if the object crime was never attempted.¹⁶⁵ This is an *inchoate conspiracy*,

159. *See id.*

160. *Inchoate Offense*, BLACK'S LAW DICTIONARY (9th ed. 2009).

161. *E.g.*, *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

162. *E.g.*, *United States v. Rigas*, 605 F.3d 194, 200 (3d Cir. 2010); *United States v. Snow*, 48 F.3d 198, 200–01 (6th Cir. 1995); *May v. United States*, 175 F.2d 994, 998–99 (D.C. Cir. 1949); *United States v. DeSapio*, 299 F. Supp. 436, 439 (S.D.N.Y. 1969); *United States v. Guterma*, 189 F. Supp. 265, 268 (S.D.N.Y. 1960).

163. *Iannelli*, 420 U.S. at 777–78 (internal citations omitted).

164. *See Patchen v. McGuire*, No. 11-5388, 2012 WL 4473233, at *18 (E.D. Pa. Sept. 27, 2012); Margulies, *supra* note 88, at 88; Benjamin Wittes, *The Lawfare Podcast Episode #23: Brig. Gen. Mark Martins on His Decision to Drop Standalone Conspiracy Charges Against 9/11 Defendants*, LAWFARE BLOG (Jan. 10, 2013), <http://www.lawfareblog.com/lawfare-podcast-episode-23-brig-gen-mark-martins-his-decision-drop-standalone-conspiracy-charges> [<http://perma.cc/YML8-Z8KA>].

165. *See United States v. Howard*, 918 F.2d 1529, 1533 (11th Cir. 1990) (citing *United States v. Corley*, 824 F.2d 931, 936 (11th Cir. 1987) (“[A]ttempt requires proof that a substantial step has been taken towards completion of the crime, while conspiracy does not.”)). This is in distinct

which is merely a subset of standalone conspiracy. Conflating this concept with standalone conspiracy itself leads many scholars and courts to the conclusion that the MCA's conspiracy provision necessarily violates the Ex Post Facto Clause.¹⁶⁶ The term *inchoate conspiracy*, however, should be understood to refer specifically to a charge or conviction for conspiracy for which the underlying crime was never carried out, either because the conspirators changed their plans or because they were arrested before they began their attempt.

In contrast, *completed conspiracy* is the subset of standalone conspiracy in which a crime was successfully committed. *Bahlul* itself provides an apt example.¹⁶⁷ Completed conspiracy denotes that the conspiracy achieved its object and has thus run its course, unlike an inchoate conspiracy.¹⁶⁸ Thus, as a matter of the defendant's conduct and the factual state of the world, there is no difference between charging a completed conspiracy and charging conspiracy together with the underlying crime. The only difference is a legal one: for a completed conspiracy, the government need not prove all the elements of the underlying crime in court.

Charging conspiracy as a standalone crime does not necessarily equate to charging an inchoate conspiracy. The inchoate nature of conspiracy allows it to be charged for inchoate conspiracies, but it also allows conspiracy to be charged as its own offense for completed conspiracies. This distinction is the key to showing that the MCA's conspiracy provision does not violate the Ex Post Facto Clause.

2. Completed Conspiracy Matches Conspiracy as a Mode of Liability

Comparing the conduct constituting a completed standalone conspiracy with that constituting conspiracy as a mode of liability reveals that the two concepts criminalize the same conduct. Accordingly, the MCA does not criminalize anything new to military commissions, but rather mirrors what is already understood to be part of the international "law of war."

contrast from aiding and abetting, which "unlike conspiracy, is not a separate and distinct offense." *United States v. Marchan*, 32 F. Supp. 3d 753, 761 (S.D. Tex. 2013) (citing *United States v. Sorrells*, 145 F.3d 744, 752 (5th Cir. 1998)).

166. *See supra* note 158.

167. *Bahlul I*, 767 F.3d 1 (D.C. Cir. 2014).

168. *See, e.g.*, *United States v. Grimm*, 738 F.3d 498, 503 (2d Cir. 2013) (using "completed conspiracy" to refer to a conspiracy that was carried out); *United States v. Upton*, 559 F.3d 3, 10 (1st Cir. 2009) (same); *United States v. Hong Vo*, 978 F. Supp. 2d. 49, 53 (D.D.C. 2013) (same); *United States v. Stein*, 249 F. Supp. 873, 875 (E.D. Pa. 1966) (same); *see also* *United States v. Freeman*, 498 F.2d 569, 575 (2d Cir. 1974) (contrasting "aborted conspiracy" and "completed conspiracy").

To prove conspiracy as a mode of liability under international law, a person must (1) make an agreement with another person or persons, (2) the object of which is to commit a violation of the relevant body of law, and (3) perform some overt act in furtherance of that conspiracy.¹⁶⁹ Additionally, at least one member of the conspiracy must actually carry out the intended violation in order for there to be a chargeable crime via a conspiracy mode of liability.¹⁷⁰

In a completed standalone conspiracy, the first three elements are identical.¹⁷¹ Additionally, some member(s) of the conspiracy must actually carry out the intended violation in order for the conspiracy to be completed.¹⁷² In either case, the defendant's conduct is the same. Accordingly, a statute that criminalized only completed conspiracies as a standalone offense would only criminalize conduct that was already criminal under international law, and would therefore comply with the Ex Post Facto Clause. As the next Section shows, the MCA is just such a statute.

3. Correctly Characterizing the Ex Post Facto Violation

The crucial difference between conspiracy as a mode of liability and a standalone charge for completed conspiracy has nothing to do with the defendant's conduct. The difference is whether the underlying crime must be proven in court. In either case, the defendant's conduct that must be proven is the same. Conspiracy as a mode of liability, however, additionally requires a fourth element: some member of the conspiracy must actually carry out the intended violation.¹⁷³ Generally, however, for a standalone charge of conspiracy, even a completed one, that element is absent.¹⁷⁴ Thus, at first glance, it appears that

169. See *supra* Section III.B.1.

170. See *supra* Section III.B.1.

171. See *supra* Section III.C.2. In concurrence, Judge Rogers suggests in *Bahlul I* that the overt act committed by the accused must itself be a law-of-war offense. *Bahlul I*, 767 F.3d at 50 (Rogers, J., concurring in part and dissenting in part). This is not supported by the language of the MCA, which requires that he "knowingly do[] any overt act to effect the object of the conspiracy." 10 U.S.C. § 950v(28) (2006).

172. See *supra* Section III.C.2.

173. Cf. THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 395 ("The *Tadić* AC implicitly classified JCE liability as a form of 'commission.'"); CRYER AT AL., *supra* note 96, at 368 ("The substantive definitions of crimes provide only a part of the picture of criminal liability. The general principles of liability apply across the various different offences and provide for the doctrines by which a person may commit, participate in, or otherwise be found responsible for those crimes.").

174. E.g., THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE, *supra* note 110, at 279.

conspiracy as a mode of liability under international law has an element that conspiracy under the MCA lacks.

The entire difference between standalone conspiracy and conspiracy as a mode of liability lies in lack of a need to prove that fourth element. Indeed, it is this very difference that permits convictions for the subcategory of inchoate conspiracies. It would be logically impossible to convict someone for a conspiracy that was never carried out if an element of the conspiracy charge was proving that someone had carried out the object crime. Even with inchoate conspiracies, however, the government must prove the same conduct with respect to the defendant as for completed conspiracies and for conspiracy as a mode of liability.¹⁷⁵ The factual difference is whether that conspiracy is carried out; the legal difference is whether the conspiracy's completion must be proven in court.

That legal difference in turn affects notice of criminality, which implicates *ex post facto* concerns. Conspiracy as a mode of liability puts people on notice that their acts will incur criminal liability when the conspiracy is completed. Criminalization of standalone conspiracy puts people on notice that their acts will incur criminal liability when they take any overt action in furtherance of the conspiracy, which could be an otherwise innocuous act occurring far earlier in time.¹⁷⁶ The former is simply a description of the pre-MCA content of international law. The latter, however, captures inchoate conspiracies and therefore adds criminality outside the scope of international law.

Consequently, if the MCA retroactively criminalizes all standalone conspiracies—both completed and inchoate—it violates the *Ex Post Facto* Clause. But the violation does not arise from the MCA's retroactive criminalization of completed conspiracies, such as the one at issue in *Bahlul*. Rather, it arises only from its retroactive criminalization of inchoate conspiracies by way of criminalizing all standalone conspiracies.¹⁷⁷ However, if the MCA only criminalizes

175. All three require the conduct described in the previous Section: (1) make an agreement with another person or persons, (2) the object of which is to commit a violation of the law of war, and (3) perform some overt act in furtherance of that conspiracy.

176. *United States v. Contreras*, 950 F.2d 232, 238 (5th Cir. 1991) (quoting *United States v. Schmick*, 904 F.2d 936, 941 (5th Cir. 1990)); *THE OXFORD COMPANION TO INTERNATIONAL CRIMINAL JUSTICE*, *supra* note 110, at 279.

177. See *Bahlul II*, 792 F.3d 1, 13 (D.C. Cir. 2015) (explicitly noting that the conspiracy charges upheld in *Quirin* and *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), were completed conspiracies). Although the D.C. Circuit panel attempted to distinguish *Bahlul*'s case from the cases that upheld completed conspiracies, it did so on the ground that *Bahlul*'s individual actions were not themselves war crimes. *Id.* However, what matters is not whether the defendant's personal acts were criminal, but whether the underlying object of the conspiracy was a war crime. See *supra* notes 130, 139, and accompanying text.

completed conspiracies—not all standalone conspiracies—it does not violate the Ex Post Facto Clause. Unfortunately, the MCA's language is similar to that of other conspiracy statutes that criminalize inchoate conspiracy, and American jurisprudence has a long tradition of conspiracy including both types of standalone conspiracy. But the MCA need not be interpreted that way. As the next Part shows, the MCA's text should be interpreted to coincide with international law while preserving our domestic tradition of criminalizing conspiracy as a standalone offense.¹⁷⁸

IV. A TEXT-BASED INTERPRETATION THAT RESOLVES THE PROBLEM

Unlike other domestic conspiracy statutes, the language of the MCA's conspiracy statute specifically contemplates completed conspiracies by mentioning victims in both of its punishment provisions. This language is unique among American definitions of conspiracy, occurring only in the MCA and the one other statute within the UCMJ that defines conspiracy in violation of the law of war. Thus, the MCA's conspiracy statute provides a textual basis upon which to interpret the MCA to criminalize only completed conspiracies, as only completed conspiracies can possibly have victims. As such, the MCA satisfies the conduct prong of ex post facto protection by aligning the MCA with international law. Further, adopting such an interpretation requires the government to demonstrate as a jurisdictional matter that the underlying offense occurred. Doing so satisfies the ex post facto prohibition on removing elements by recovering the one element of conspiracy that is missing from the legal concept of a completed standalone conspiracy: proving in court the completion of the

178. For an approach to this issue that leans more heavily on the Define and Punish Clause, see Margulies, *supra* note 88. Judge Henderson's dissent from the panel decision hews closely to Prof. Margulies's argument that the underlying conduct is the important factor. See *Bahlul II*, 792 F.3d at 41 (Henderson, J., dissenting) ("Bahlul's conduct was indisputably illegal under international law, whether or not he was charged with an offense the international community expressly recognizes."). Judge Henderson and Prof. Margulies argue that the Define and Punish Clause gives Congress the power to define new crimes, not found in international law, so long as the underlying conduct is the same. *Id.* at 44 (quoting Margulies, *supra* note 88). Where their argument differs from that of this Note is in the distinction between standalone conspiracy and inchoate conspiracy. See *infra* Part IV. In recognizing that the MCA criminalizes only completed conspiracy, which is already criminalized under international law, this Note avoids defending even a slight congressional addition to current international law. The difference between international law and the MCA, according to Henderson and Margulies, is mostly wording with a small substantive innovation. See *Bahlul II*, 792 F.3d at 43–44 (criticizing Bahlul's argument that the crime must be found element-for-element in international law in favor of recognizing underlying principles); *id.* at 44 (citing Margulies, *supra* note 88) (arguing that the Define and Punish Clause permits Congress to contribute to the development of new international law). For this Note, the difference between international law and the MCA is *only* the wording.

conspiracy's object. Finally, this approach prohibits charging a person with both conspiracy and the underlying crime under the MCA. If the MCA's conspiracy charge is interpreted as a domestic codification of what is a single, indivisible crime in international law, convictions for both the underlying crime and the conspiracy cannot be permitted in the way that they are under other domestic conspiracy statutes.

A. The MCA's Unique Language Contemplates Completed Conspiracies

The MCA's conspiracy statute differs from the general federal conspiracy statute in one important way: both of the former's punishment provisions assume the existence of victims of the conspiracy.¹⁷⁹ The statute states that those found guilty of conspiracy

shall be punished, if death results *to one or more of the victims*, by death or such other punishment as a military commission under this chapter may direct, and, if death does not result *to any of the victims*, by such punishment, other than death, as a military commission under this chapter may direct.¹⁸⁰

There is no mention of victims in the general federal conspiracy statute in Title 18, which requires only that the conspiracy be proven and provides that conspirators "shall be fined under this title or imprisoned not more than five years, or both."¹⁸¹

The reference to victims is just the textual hook needed to indicate that the MCA is an accurate domestic codification of international law. Unlike proving conspiracy as a mode of liability, proving completed conspiracy as a standalone offense does not require proving in court that the conspiracy was carried out.¹⁸² Simply reading that element into the MCA without a textual basis would likely amount to judicial legislation; however, the MCA's reference to victims incorporates a completed conduct element and thereby provides the necessary textual basis to interpret the MCA as criminalizing only completed conspiracies.

Federal law defines a "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense or an offense in the District of Columbia."¹⁸³ For a "victim" to exist, two requirements must be met: (1) an offense must have been committed, and (2) a person must have been directly and proximately harmed by

179. 10 U.S.C. § 950v(28) (2006) (current version at 10 U.S.C. § 950t(29) (2012)).

180. *Id.* (emphasis added).

181. 18 U.S.C. § 371 (2012). Other conspiracy statutes similarly lack mention of victims. *See infra* note 192.

182. *See supra* Sections III.B.3–4.

183. 18 U.S.C. § 3771(e)(2)(A) (2012).

it.¹⁸⁴ Black's Law Dictionary similarly defines "victim" as a "person harmed by a crime, tort, or other wrong."¹⁸⁵

There cannot be any victims of an inchoate conspiracy. Granted, if inchoate conspiracy is an offense, the first element of the federal definition of "victim" is clearly met. However, incomplete conspiracies lack the second, more relevant factor. If the conspiracy is never carried out, nobody can be "directly and proximately harmed by it." The same is true for the Black's Law definition, which also requires harm to a person.

The MCA presumes that there will be victims of the conspiracy. It provides for punishment if the victims die and for punishment if the victims do not die.¹⁸⁶ However, it does not provide for punishment if there are no victims.¹⁸⁷ Because the MCA expects that there will be victims, it necessarily follows that the MCA expects that the conspiracy will be completed, as only completed conspiracies have victims.

The UCMJ's definition of conspiracy lends additional support for interpreting the MCA's conspiracy statute to criminalize only completed conspiracies. The UCMJ defines two different types of conspiracy: (1) general conspiracy to commit an offense under the UCMJ, and (2) conspiracy to commit an offense under the law of war.¹⁸⁸ These are codified as separate subsections of Article 81.¹⁸⁹ The provision for conspiracy to violate the UCMJ, like its Title 18 counterpart, does not mention victims. However, conspiracy to violate the law of war matches the MCA definition in assuming the presence of victims in all of its punishment provisions.¹⁹⁰ Moreover, the bill by which Congress amended the UCMJ to reflect these two different types of conspiracy was the MCA itself.¹⁹¹ This indicates that Congress was aware of the

184. *Id.*

185. *Victim*, BLACK'S LAW DICTIONARY (9th ed. 2009).

186. 10 U.S.C. § 950v(28) (2006) (current version at 10 U.S.C. § 950t(29) (2012)).

187. *Id.*

188. The statute reads:

(a) Any person subject to this chapter who conspires with any other person to commit an offense under this chapter shall, if one or more of the conspirators does an act to effect the object of the conspiracy, be punished as a court-martial may direct.

(b) Any person subject to this chapter who conspires with any other person to commit an offense under the law of war, and who knowingly does an overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of *the victims*, by death or other such punishment as a court-martial or military commission may direct, and, if death does not result to any of *the victims*, by such punishment, other than death, as a court-martial or military commission may direct.

10 U.S.C. § 881 (2012) (emphasis added).

189. *Id.*

190. *Id.*

191. Military Commissions Act of 2006, Pub. L. No. 109-366, § 4(b), 120 Stat. 2631 (2006).

difference between conspiracy under the international law of war and the general domestic definition of conspiracy. Congress dealt with that difference by defining conspiracy under the law of war to require victims and thereby only criminalize completed conspiracies. The MCA and UCMJ Article 81(b)—the only U.S. statutes that define conspiracy under the law of war—are unique in American law in expecting the presence of victims. No other state or federal definition of conspiracy inherently expects the presence of victims or otherwise contains language requiring completion of the object offense.¹⁹²

Accordingly, the MCA should not be interpreted as defining a new crime of inchoate conspiracy, but as simply codifying the existing international law in a way that accords with the American tradition of criminalizing conspiracy as an offense rather than a mode of liability. Under this interpretation, inchoate conspiracies are not within the MCA's definition of conspiracy. This resolves the potential conflict with the conduct prong of *ex post facto* protection, because the MCA does not define as criminal any conduct that was not already criminalized.

B. The Jurisdictional Requirement to Prove Completion

If the MCA is to survive the *Ex Post Facto* challenge, it must also satisfy the Clause's legal prong. Although both completed conspiracy and conspiracy as a mode of liability involve the same conduct, the former lacks the element requiring proof that the

192. 18 U.S.C. § 371 (2012); *id.* § 241 (2012); 21 U.S.C. § 846 (2012); ALA. CODE § 13A-4-3 (2014); ALASKA STAT. § 11.31.120 (2014); ARIZ. REV. STAT. ANN. § 13-1003 (2014); ARK. CODE ANN. § 5-3-401 (2014); CAL. PENAL CODE § 182 (West 2014); COLO. REV. STAT. ANN. § 18-2-201 (2014); CONN. GEN. STAT. ANN. § 53a-48 (2015); DEL. CODE ANN. tit. 11, §§ 511-513 (2015); D.C. CODE § 22-1805a (2015); FLA. STAT. ANN. § 777.04 (West 2014); GA. CODE ANN. § 16-4-8 (2014); HAW. REV. STAT. § 705-520 (2014); IDAHO CODE ANN. § 18-1701 (2014); 720 ILL. COMP. STAT. 5/8-2 (2014); IND. CODE § 35-41-5-2 (2014); IOWA CODE § 706.1 (2014); KAN. STAT. ANN. § 21-5302 (2014); KY. REV. STAT. ANN. § 506.040 (West 2014); LA. REV. STAT. ANN. § 14:26 (2014); ME. REV. STAT. tit. 17-A, § 151 (2014); MICH. COMP. LAWS § 750.157a (2014); MINN. STAT. § 609.175 (2015); MISS. CODE ANN. § 97-1-1 (2014); MO. REV. STAT. § 562.014 (2014); MONT. CODE ANN. § 45-4-102 (2014); NEB. REV. STAT. § 28-202 (2014); N.H. REV. STAT. ANN. § 629:3 (2014); N.J. STAT. ANN. § 2C:5-2 (West 2015); N.M. STAT. ANN. § 30-28-2 (2014); N.Y. PENAL LAW §§ 105.00-105.17 (McKinney 2014); N.D. CENT. CODE § 12.1-06-04 (2013); OHIO REV. CODE ANN. § 2923.02 (West 2014); OKLA. STAT. tit. 21, § 421 (2014); OR. REV. STAT. § 161.450 (2014); 18 PA. CONS. STAT. § 903 (2014); S.C. CODE ANN. § 16-17-410 (2014); S.D. CODIFIED LAWS § 22-3-8 (2014); TENN. CODE ANN. § 39-12-103 (2014); TEX. PENAL CODE ANN. § 15.02 (West 2013); UTAH CODE ANN. § 76-4-201 (West 2014); VT. STAT. ANN. tit. 13, § 1404 (2014); VA. CODE ANN. § 18.2-22 (2014); WASH. REV. CODE § 9A.28.040 (2014); W. VA. CODE § 61-10-31 (2014); WIS. STAT. § 939.31 (2013); WYO. STAT. ANN. § 6-1-303 (2014). Maryland, Massachusetts, Nevada, North Carolina, and Rhode Island lack a statutory definition for conspiracy, but define it in the typical way at common law, regardless of presence of victims. *Mason v. State*, 488 A.2d 955, 960 (Md. 1985); *Commonwealth v. Corridori*, 417 N.E.2d 969, 974 (Mass. App. Ct. 1981); *Nunnery v. Eighth Judicial Dist.*, 186 P.3d 886, 888 (Nev. 2008); *State v. Horton*, 170 S.E.2d 466, 469 (N.C. 1969); *State v. Smith*, 662 A.2d 1171, 1177 (R.I. 1995).

conspiracy was carried out. Even if the MCA's definition of conspiracy only describes completed conspiracies, there is still an Ex Post Facto problem if the government is not required to prove that the conspiracy was carried out.¹⁹³ However, the MCA's jurisdictional restrictions show how the government may be so required.

The MCA grants military commissions very limited "jurisdiction to try any offense made punishable by [the MCA] or the law of war."¹⁹⁴ Assuming the "law of war" means international law, this Note has shown that inchoate conspiracies are not a violation thereof.¹⁹⁵ Further, this Note has shown that a proper interpretation of the MCA's definition of conspiracy only encompasses completed conspiracies. This means that only completed conspiracies are within the jurisdiction granted to military commissions by the MCA—inchoate conspiracies are not.

Therefore, when bringing a conspiracy charge under the MCA, the government must prove as a jurisdictional matter that the crime that was the object of the conspiracy was committed. The commission's jurisdiction is fully contestable by the accused.¹⁹⁶ While the government only needs to establish jurisdiction by a preponderance of the evidence in order for the commission to proceed,¹⁹⁷ a guilty verdict requires that the commission members find jurisdiction is met beyond a reasonable doubt.¹⁹⁸ Establishing at the jurisdictional phase that the underlying crime occurred does not make it an element of conspiracy *per se*. But it does mean that during the course of litigation, the government must necessarily prove all the same elements to achieve a conspiracy conviction under the MCA at the same standard previously required when applying international law under Article 21.¹⁹⁹

Requiring the government to prove completion of the conspiracy at the jurisdictional stage does not risk the jurisdictional stage

193. See *supra* notes 104–107 and accompanying text.

194. 10 U.S.C. § 948d (2006). The current version is largely the same, adding jurisdiction over the UCMJ offenses of aiding the enemy and prisoner misconduct. 10 U.S.C. § 948d (2012).

195. CRYER ET AL., *supra* note 96, at 368.

196. See *United States v. Khadr*, 717 F. Supp. 2d 1215, 1238 (U.S.C.M.C.R. 2007) (noting that the Rules for Military Commissions permit the accused to move to dismiss for lack of jurisdiction, and that lack of jurisdiction is a nonwaivable ground for dismissal at any stage of the proceedings).

197. *Id.*

198. See, e.g., *United States v. Al Bahlul*, 820 F. Supp. 2d 1141, 1182–83 (U.S.C.M.C.R. 2011), *rev'd on other grounds*, *Bahlul I*, 767 F.3d 1 (D.C. Cir. 2014) (noting that judge's instructions required the members to find another jurisdictional requirement—the accused's status as an alien unlawful enemy combatant—beyond a reasonable doubt in order to return a conviction).

199. Cf. *Bahlul I*, 767 F.3d at 20–21 (stating that removal of an element does not violate the Ex Post Facto Clause when the court's findings necessarily include finding that the element was met).

swallowing the entire trial. It is not necessary at that point to prove any of the other elements of the conspiracy or to present any evidence about the defendant's involvement. Taking Bahlul's case as an example, the object of the conspiracy in which he participated was the attacks on 9/11. Following the procedure recommended by this Note, the government would charge that Bahlul participated in a conspiracy to commit the 9/11 attacks. At the jurisdictional stage, the government need only argue—and the commission need only find—that the 9/11 attacks in fact occurred. At that point, the commission would not need to make any finding about the existence of a conspiracy to carry out the attacks, the members of that conspiracy, or Bahlul's involvement. However, by proving that the 9/11 attacks occurred, the government would bring the case within the commission's jurisdiction to hear a charge for a completed conspiracy as defined by the MCA. In order to return a conviction, in addition to finding all the explicit elements of the conspiracy charge, the commission members would also have to find beyond a reasonable doubt that the 9/11 attacks occurred. Doing so would satisfy the requirement under international law to prove that the underlying crime occurred.

For a conspiracy conviction under this interpretation of the MCA, the commission must find (1) that a violation of the law of war occurred, (2) that the defendant made an agreement with another person or persons, (3) the object of which is to commit that violation of the law of war, and (4) that the defendant performed some overt act in furtherance of the conspiracy. These are the same requirements to establish a violation of the international law of war via a conspiracy mode of liability, just in a different order.²⁰⁰ Thus, this textually supported interpretation of the MCA's conspiracy statute as criminalizing only completed conspiracies, combined with the MCA's jurisdictional restrictions, meets the Ex Post Facto Clause's restrictions on retroactive criminalization of conduct (the conduct prong) and removal of elements from the government's burden of proof (the legal prong).

C. If Conspiracy Stands Alone, It Must Remain Alone

One final point remains. Adopting this interpretation of the MCA's conspiracy statute necessarily precludes convicting a person for both conspiracy and the underlying offense. While convictions for both are normal and perhaps even common under the usual American

200. See *supra* Section III.B.1.

conception of conspiracy,²⁰¹ the entire thrust of this Note's argument is that the MCA does not reflect the usual American conception of conspiracy.

Under international law, conspiracy is only a mode of liability for a crime, not a crime itself.²⁰² A person convicted via the conspiracy mode of liability is charged with, and found guilty of, only one offense.²⁰³ This Note has identified an interpretation of the MCA that comports with and reflects the existing international law through a domestic lens. It would be counterproductive to permit simultaneous conviction for both the conspiracy and the crime itself. Doing so would untether the conspiracy from the underlying crime, which would be incompatible with this Note's interpretation of the MCA.²⁰⁴

By foreclosing inchoate conspiracies, this Note's interpretation of the MCA also strips away the inchoate nature of a standalone charge for completed conspiracy. The theory upon which convictions for both conspiracy and the underlying crime are permitted is that they are two distinct crimes with different social harms, and the conspiracy itself gives rise to criminal liability as soon as an overt act is committed in its furtherance.²⁰⁵ This Note's interpretation, by virtue of denying jurisdiction without proof of the completed offense, cannot give rise to criminal liability until the underlying offense is carried out. Accordingly, it must necessarily be understood as an interpretation under which the crime and the conspiracy merge into a single offense.²⁰⁶

201. *E.g.*, *United States v. Rigas*, 605 F.3d 194, 200 (3d Cir. 2010); *United States v. Snow*, 48 F.3d 198, 200–01 (6th Cir. 1995); *May v. United States*, 175 F.2d 994, 998–99 (D.C. Cir. 1949); *United States v. DeSapio*, 299 F. Supp. 436, 439 (S.D.N.Y. 1969); *United States v. Guterma*, 189 F. Supp. 265, 268 (S.D.N.Y. 1960).

202. *See supra* Section III.B.1.

203. *E.g.*, *Prosecutor v. Tadić*, Case No. IT-94-1-T, Judgment, ¶¶ 38–51 (Int'l Crim. Trib. for the Former Yugoslavia May 7, 1997); *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgment, ¶ 4 (Int'l Crim. Trib. for the Former Yugoslavia Aug. 2, 2001).

204. This Note's interpretation of the MCA is also incompatible with the § 2332(b) justification employed by the D.C. Circuit in *Bahlul I*. *See supra* note 56 and accompanying text. Like other domestic conspiracy charges, § 2332(b) does not require the presence of victims. The MCA can be interpreted to re-codify either § 2332(b) or existing international law, but not both. Therefore, it would be internally inconsistent to rely on both justifications. On the other hand, even adopting this Note's interpretation of the MCA does not preclude prosecutors from using conspiracy as a mode of liability for other MCA offenses, as the Chief Prosecutor has done. *See supra* note 83. The MCA grants jurisdiction over violations of its enumerated offenses or the law of war, and conspiracy is a well-recognized mode of liability under the international law of war.

205. *E.g.*, *Iannelli v. United States*, 420 U.S. 770, 777 (1975).

206. Though rare, there have been other examples of this phenomenon in American law. Crimes that require two persons for their commission cannot be charged in conjunction with conspiracy by those two persons to commit the crime. *E.g.*, *United States v. Dietrich*, 126 F. 664, 667 (D. Neb. 1904). Neither can two persons engaging in adultery be tried for conspiracy to commit adultery. *E.g.*, *Shannon v. Commonwealth*, 14 Pa. 226, 226 (Pa. 1850). It does not seem initially problematic for the prosecutor to charge both conspiracy and the object offense under the MCA, so

V. CONCLUSION

Congress and the courts have struggled to bring terrorists to justice while upholding our foundational legal principles and adhering to the Constitution. Much progress has been made, but fourteen years after the events of September 11, the constitutionality of charging conspiracy in military commissions remains unresolved.²⁰⁷

This Note resolves the issue of conspiracy's constitutionality through a novel, but textually supported, interpretation of the MCA. Rather than fighting the consensus that the "law of war" in UCMJ Article 21 is limited to international law, this Note adopts that understanding. Contrary to the assertions of many scholars and the D.C. Circuit, limiting the law of war to international law does not end the analysis. A nuanced examination of concepts related to conspiracy reveals that the MCA's unique definition thereof comports with established international law in all respects. The only difference between the MCA and international law prior to 2006 is the wording Congress used. Therefore, the MCA does not violate the Ex Post Facto Clause.

Upholding the MCA's conspiracy charge against an Ex Post Facto challenge under the most restrictive *statutory* interpretation of the meaning of "law of war" obviates the need to consider the *constitutional* Article III challenge. Ruling on statutory rather than constitutional grounds is generally preferable. It is particularly crucial when a constitutional ruling could permanently constrain both other branches of government as they grapple with a body of law (the law of war) that is struggling to evolve to account for a simultaneously evolving and nontraditional class of actors (belligerents associated with ideologically driven non-state organizations).

Accordingly, if the Supreme Court rules on *Bahlul*, it should adopt an interpretation of the MCA's conspiracy statute that only criminalizes completed conspiracies. Doing so would definitively resolve the issue of conspiracy's viability for pre-2006 conduct, uphold Bahlul's conviction without violating the Constitution, and avoid wading into a question of constitutional interpretation that stands to increase the

long as an instruction is given that only a conviction for one or the other may be returned. This, however, is a topic that must be left for further discussion.

207. *Bahlul I*, 767 F.3d 1, 62 (D.C. Cir. 2014) (Brown, J., dissenting):

[B]y reviewing Bahlul's retroactivity arguments under the plain error standard, the court disposes of this case without providing the government clear guidance for prosecuting the remaining detainees at Guantanamo. Thus, it may be many years before the government receives a definitive answer on whether it can charge the September 11 perpetrators with conspiracy, or whether Congress has the power to make such an offense triable by military commission even prospectively.

uncertainty surrounding military commissions or unnecessarily restrict Congress in a way that may have unforeseen impacts on foreign policy and national security.

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