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No Crime without Law: War Crimes, Material Support for Terrorism, and the Ex Post Facto Principle

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NO CRIME WITHOUT LAW: WAR CRIMES, MATERIAL SUPPORT FOR TERRORISM, AND THE EX POST FACTO PRINCIPLE

INTRODUCTION

On August 6, 2008, Salim Ahmed Hamdan, widely known as Osama Bin Laden's former chauffeur, was convicted of material support for terrorism (MST) in the first military tribunal held at Guantanamo Bay, Cuba under the Military Commissions Act of 2006 (MCA).[1] He was sentenced to five and a half years in prison, with a credit for sixty-one months of time served at Guantanamo.[2]

MST is not a new crime, and it has been used extensively in recent years to prosecute alleged terrorists and their supporters in U.S. federal courts.[3] Although the legal basis for federal criminal prosecution of this crime is well-grounded in the War Crimes Act of 1996 and other statutes, the prosecution of Hamdan for war crimes under the MCA raises novel questions. To support a prosecution for war crimes under the MCA, a crime must be a violation of international law, rather than domestic law.[4] MST has never before been recognized as an international crime, and thus, the question is raised as to whether the acts that Hamdan engaged in were, in fact, criminal under international law at the time he committed them. If they were not, then Hamdan's prosecution and subsequent conviction was an ex post facto application of the law, and it is in violation of the principle of *nullum crimen sine lege* (no crime without law). Such ex post facto prosecutions are barred under the U.S. Constitution, Common Article 3 of the Geneva Conventions, and the law of nations.[5]

This Note argues that MST is not currently a crime under international law, and that Congress did not have the power to unilaterally create a new international crime. Consequently, Hamdan's trial on that charge violated the principle of *nullum crimen sine lege*, and his conviction is thus void. In support of this thesis, Part II discusses the status of war crimes in domestic and international law, which serve as

1. *See* William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1.

2. *See* William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1.

3. *See infra* notes 24–26 and accompanying text.

4. *See infra* Part IV.A.

5. *See* U.S. CONST. art. I, § 9, cl. 3; *infra* notes 18–19 (collecting international treaties).

the basis for the prosecution of MST in international and U.S. federal courts.[6] Part III examines the background of the Hamdan war crimes tribunal, specifically the tribunal's opinion dismissing Hamdan's challenge to the prosecution on ex post facto grounds.[7] Part IV analyzes the tribunal's opinion in light of the application of international law in U.S. courts, including the extent of Congress's power to create or interpret international law under the Define and Punish Clause.[8] Part V considers the impact of Hamdan's conviction on domestic and international law.[9]

II. BACKGROUND

To understand the logic of the tribunal's decision, it is necessary to recognize the legal basis for war crimes prosecutions under both domestic and international law. This Part first examines the bases for prosecuting war crimes under U.S. federal criminal law, with special emphasis on prohibitions against crimes of terrorism.[10] It next considers the structure of international law, including the methods of creating both positive and customary international law, as well as the relevant treaties covering international crimes.[11]

A. War Crimes Under Domestic Law

1. War Crimes Act

The War Crimes Act was passed in 1996 in order to implement the penal provisions of the 1949 Geneva Conventions.[12] While the United States had ratified the Conventions, implementing legislation had previously been considered unnecessary because federal criminal law was seen as providing adequate grounds for prosecution of any foreseeable violations.[13] Congress later determined that additional legislation was required after questions were raised as to whether then-current federal criminal law would allow prosecution of all war crimes committed against Americans.[14] Prior to the passage of the Act, pros-

6. *See infra* notes 10–63 and accompanying text.

7. *See infra* notes 67–90 and accompanying text.

8. *See infra* notes 91–171 and accompanying text.

9. *See infra* notes 172–195 and accompanying text.

10. *See infra* notes 12–40 and accompanying text.

11. *See infra* notes 41–63 and accompanying text.

12. The War Crimes Act granted U.S. federal courts criminal jurisdiction over war crimes. *See* Pub. L. No. 104-192, 110 Stat. 2104 (codified as amended at 18 U.S.C. § 2441 (2006)).

13. *See* H.R. REP. NO. 104-698, at 3–4 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 2166, 2168–69.

14. *See id.* at 6. Congress was apparently particularly concerned with the possibility that American civilians and military personnel would be murdered during the overseas conflicts and

ecutions for war crimes were only available under federal and state criminal statutes, courts-martial, and military commissions.[15] At the time, it was theorized that military commissions would cover certain jurisdictional gaps in previous statutes.[16] Congress acknowledged, however, that the Supreme Court had "condemned [military commissions'] breadth of jurisdiction to uncertainty," and thus, positive congressional action was needed to ensure the legitimacy of any prosecutions.[17]

Under the provisions of the War Crimes Act, American courts are granted jurisdiction over "war crimes," defined as: (1) a grave breach of any of the Geneva Conventions[18] or any additional protocols[19] to which the United States is a party;[20] (2) conduct prohibited by certain articles of the Annex to the Fourth Hague Convention;[21] (3) a grave

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peacekeeping missions that were prevalent at the time, as well as the lack of jurisdiction over military personnel after their discharge from active service. *See id.* at 7. The push for expanded jurisdiction over war crimes had been building for some time, at least since a 1984 case raised significant questions as to whether individuals could be prosecuted for grave breaches of the Conventions even though Congress had not passed any implementing legislation. *See* Tel-Oren v. Libyan Arab Republic, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, J., concurring); *see also* David Weissbrodt & Andrea W. Templeton, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 391 (2008) (citing Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 164–65 (D.D.C. 2004), *rev'd*, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 548 U.S. 557 (2006)) (discussing jurisdictional hurdles to prosecuting war crimes).

15. *See* H.R. REP. NO. 104-698, at 4–6.

16. *See id.* at 6. The major uncertainties regarding prior existing law centered on

> American civilians subjected to grave breaches of [Geneva] Convention IV . . . in an armed conflict overseas . . . . American prisoners of war subjected to grave breaches of [Geneva] Convention III . . . . [and] [t]he ability to court martial members of our armed forces who commit war crimes [after] they leave [active] service.

Id. at 7.

17. *Id.* at 6 (referring to *Ex Parte* Quirin, 317 U.S. 1 (1942), which concluded that German saboteurs who entered the United States were triable by military commission).

18. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

19. Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 5; Protocol Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 610.

20. The United States is not a party to either of the Additional Protocols. *See* United Nations Treaty Collection, *available at* http://treaties.un.org.

21. Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. The War Crimes Act specifically refers to Articles 23, 25, 27, and 28, prohibiting, for example, the use of poison weapons, bombardment of civilian areas, and treachery. *See* 18 U.S.C. § 2441(c)(2) (2006).

breach of Common Article 3 of the Geneva Conventions when committed during a conflict not of an international character;[22] and (4) conduct in violation of the Protocol on Prohibitions and Restrictions on the Use of Mines, Booby-Traps, and Other Devices.[23]

2. 18 U.S.C. §§ 2339A, 2339B

While the War Crimes Act makes no direct mention of the crime of material support for terrorism, 18 U.S.C. § 2339A and 18 U.S.C. § 2339B specifically criminalize harboring and supporting terrorists. These statutes have formed the basis for a relatively large number of prosecutions in recent years.[24] Under these statutes, individuals who materially support terrorists or designated foreign terrorist organizations may be imprisoned up to fifteen years, or if the death of any person results due to a terrorist act, life imprisonment may be imposed.[25] "Material support" as defined in these statutes encompasses a wide range of activities, including

> [providing] any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.[26]

The definition of MST under these statutes has been incorporated into several other pieces of legislation, most notably the Military Commissions Act of 2006.

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22. Such violations are defined in the statute as torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, intentionally causing serious bodily injury, rape, sexual assault or abuse, and taking hostages. *See* 18 U.S.C. § 2441(d)(1)(A)–(I) (2006).

23. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices As Amended on 3 May 1996 (Protocol II As Amended on 3 May 1996) Annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, May 3, 1996, 2048 U.N.T.S. 133.

24. *See* Norman Abrams, *The Material Support Terrorism Offenses: Perspectives Derived from the (Early) Model Penal Code*, 1 J. NAT'L SECURITY L. & POL'Y 5, 6 n.3 (2005). In 2003, at least sixty-one individuals were charged under the "support" portion of the statute. *Id.*

25. 18 U.S.C. §§ 2339A(a), 2339B(a)(1) (2006). The provisions of the statutes have come under scrutiny in the courts in recent years, with at least one circuit striking down certain terms as unconstitutionally vague. *See* Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007) (striking down portions relating to providing "training," "other specialized knowledge," and "service" to foreign terrorist organizations). For an example of these provisions in action, see United States v. Sattar, 314 F. Supp. 2d 279 (S.D.N.Y. 2004). *See also* Abrams, *supra* note 24, at 12 (analyzing in detail the statute as applied in *Sattar*).

26. 18 U.S.C. § 2339A(b)(1).

3. *Military Commissions Act of 2006*

In the landmark decision of *Hamdan v. Rumsfeld*, the U.S. Supreme Court struck down the system of military commissions used by the Bush Administration to prosecute detainees at Guantanamo for alleged war crimes.[27] In response, Congress passed the MCA in 2006, establishing a new, comprehensive system of military commissions.[28] As part of the MCA, Congress codified twenty-eight specific war crimes to be triable by military commission under the Act.[29] These offenses included many "traditional" war crimes that had long been recognized, such as pillage, the attack of protected persons and civilians, and the use of poison weapons, torture, and treachery.[30] The MCA, however, also claimed to grant jurisdiction over other crimes of more uncertain pedigree. Crimes such as "terrorism" and "providing material support for terrorism" had never before been recognized as war crimes in previous tribunals, and their validity was almost immediately called into question.[31]

As some commentators note, Congress was well aware of these potential criticisms.[32] In passing the MCA, Congress declared that the Act "does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commis-

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27. *See* 548 U.S. 557 (2006).

28. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified as amended at 10 U.S.C. §§ 948a–950w (2006)). The MCA, along with the entire concept of military commissions, has been the subject of a large amount of criticism and discussion since its passage. *See generally* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (2002) (arguing in favor of inherent executive authority to establish military commissions); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002) (arguing against military commissions); Jill K. Lamson, Hamdan v. Rumsfeld *and the Government's Response: The Military Commissions Act of 2006 and Its Implications on the Separation of Powers*, 39 U. TOL. L. REV. 497 (2008) (discussing various provisions of the MCA that may violate the Constitution); Weissbrodt & Templeton, *supra* note 14 (arguing that the Manual for Military Commissions, published to implement the MCA, fails to protect the integrity of the judicial process).

29. *See* 10 U.S.C. § 950v(b).

30. *See id.* § 950v(b)(1), (2), (5), (8), (11), (17).

31. *See, e.g.*, Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56, 61 (2007) ("[The MCA] is likely also to raise concerns with respect to the ex post facto application of these new war crimes."); John Cerone, *The Military Commissions Act of 2006: Examining the Relationship Between the International Law of Armed Conflict and U.S. Law*, 10 AM. SOC'Y INT'L L. INSIGHTS, Nov. 13, 2006, http://www.asil.org/insights061114.cfm.

> [T]o the extent [the MCA] purports to create criminal liability for conduct that was not prohibited under international law or US law at the time it occurred, it risks running afoul of the principle against ex post facto criminalization, as recognized in international law [as] well as US constitutional law.

Cerone, *supra*.

32. *See, e.g.*, Beard, *supra* note 31, at 61.

sion."[33] Congress sought to avoid the expected ex post facto problem by insisting that "[b]ecause the provisions . . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter."[34]

The MCA forms the legal basis of the current prosecutions of detainees at Guantanamo, and in early 2007, the first detainee to be tried under the new system pled guilty to providing material support for terrorism.[35] Although the commissions under the MCA have been in operation since 2006, only one additional case has come to trial.[36]

4. *Congress's Power to Define and Punish Offenses Against the Law of Nations*

In defining war crimes triable by military commissions under the MCA, Congress relied on its constitutional power to "define and punish . . . offenses against the law of nations."[37] This clause is one of the more obscure among Congress's Article I powers, and in recent years only a "handful" of scholars have made an extensive analysis of its meaning.[38] While widely divergent views exist on the ultimate limits on congressional power under the Define and Punish Clause, the majority view is that this clause creates a "rather limited power to either enact regulatory statutes governing the conduct of individual persons who violate international law, or to constitute tribunals to adjudicate the conduct of such individuals."[39] As an example of the Define and Punish Clause in action, the MCA is generally accepted as a valid exercise of Congress's power to define international law as it is applied in the United States.[40]

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33. *Id.* (citing 10 U.S.C. § 950p(a) (Supp. 2008)).

34. 10 U.S.C. § 950p(b).

35. *See* William Glaberson, *Plea of Guilty from a Detainee in Guantánamo*, N.Y. TIMES, Mar. 27, 2007, at A1.

36. *See* William Glaberson, *A Conviction, but a System Still on Trial*, N.Y. TIMES, Aug. 10, 2008, at 27. This additional case is the trial of Salim Ahmed Hamdan.

37. U.S. CONST. art. I, § 8, cl. 10.

38. *See* J. Andrew Kent, *Congress's Under-Appreciated Power to Define and Punish Offenses Against the Law of Nations*, 85 TEX. L. REV. 843, 848 n.19 (2007).

39. *Id.* at 849 ("[This] conception is so entrenched that current academic debates about the Clause generally assume its correctness."). Kent further observes that

> [t]he debates concern, first, whether Congress may punish individuals only by authorizing criminal penalties, or whether it may also use civil remedies, and second, whether Congress may punish individuals' violations of the law of nations as the law existed when the Constitution was adopted or as it has evolved over time.

Id. at 849 n.25.

40. A general discussion of the constitutional validity of the MCA or of military commissions is beyond the scope of this Note. This Note is confined to a narrower question: Is material support for terrorism a valid crime under the MCA?

B. War Crimes Under International Law

Unlike domestic law in the United States, international law is not a collection of statutes passed by a single legislature, and therefore, determining what constitutes a crime under international law requires a more detailed analysis. To hold an individual accountable for a crime under international law, it must first be determined whether that crime does in fact exist. Even if a crime is recognized under international law, universally recognized legal principles such as *nullum crimen sine lege* will bar ex post facto prosecutions if the crime came into existence after the allegedly wrongful acts were committed.

In general, international law is created through one of several methods. In order of precedence, international law is ascertained by reference to "international conventions . . . establishing rules expressly recognized by the contesting states;" "international custom, as evidence of a general practice accepted as law;" and "the general principles of law recognized by civilized nations."[41] Additionally, "judicial decisions and the teachings of the most highly qualified publicists of the various nations" are also used as persuasive authority to aid in determining the existence and parameters of international law.[42]

Treaties are perhaps the most common and simple method of ascertaining international law, and the law surrounding treaties is well-established.[43] The Rome Statute of the International Criminal Court is the most recent leading treaty to codify international criminal law, although other treaties contain similar provisions, such as those that created the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda.[44] While treaties are advantageous in that they contain explicit written provisions and

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41. Statute of the International Court of Justice art. 38(1), June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute]; *see also* The Paquete Habana, 175 U.S. 677, 700 (1900) (enunciating principles of interpretation for international law as it is applied in the United States). In *The Paquete Habana*, the Court observed,

> [W]here there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators, who by years of labor, research and experience, have made themselves peculiarly well acquainted with the subjects of which they treat.

Id.

42. ICJ Statute, *supra* note 41, art. 38(1)(d); *see also The Paquete Habana*, 175 U.S. at 700 (enumerating the sources of international law).

43. *See, e.g.*, Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

44. *Compare* Rome Statute of the International Criminal Court art. 8, July 1, 2002, 2187 U.N.T.S. 90 [hereinafter Rome Statute], *with* Statute of the International Criminal Tribunal for Rwanda art. 4, Annex, U.N. Doc. S/RES/955 (Nov. 8, 1994) [hereinafter ICTR Statute], *and* Statute of the International Criminal Tribunal for the Former Yugoslavia arts. 2, 3, Annex, U.N.

provide clear guidance on their subject, treaties are only binding upon those states that consent to being bound by their terms.[45] For example, while the provisions of the Rome Statute are binding on those states that have ratified the treaty, they are not binding upon the United States, which is not yet a party to the treaty.[46] Thus, the International Criminal Court (ICC) could not try a national of the United States for a crime over which the court otherwise has jurisdiction.[47]

Custom is also a common method of developing international law, although determining the rule of law created by this process is more difficult and subject to varying interpretation.[48] Customary law is underpinned by two requirements: "state practice" and *opinio juris*. The state practice element examines the "actual practice and behavior of states."[49] *Opinio juris* requires that states observe the relative rule "out of a sense of legal obligation" to determine whether a particular rule is customary.[50] The presence and scope of state practice is generally the critical consideration in determining whether a rule rises to the level of customary international law, and thus, the discussion below focuses on this element.

Exactly what type and extent of state practice is necessary to transform a custom into binding law has been the subject of much discussion, and it is therefore instructive to consider the leading U.S. case on the subject: *The Paquete Habana*.[51] This case dealt with the question of whether certain coastal fishing vessels were exempt from capture as prizes of war.[52] The U.S. Supreme Court examined the historical practices of the United States, Britain, France, and other nations, as well as the character of treaties of the United States with other nations.[53] The Court held that, based on nearly universal historical state practices, fishing vessels of this kind were legally exempt from cap-

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Doc. S/RES/827 (May 25, 1993) [hereinafter ICTY Statute] (enumerating nearly identical war crimes for which the different courts have jurisdiction).

45. *See* Vienna Convention, *supra* note 43, art. 34 ("A treaty does not create obligations or rights for a third State without its consent.").

46. As of November 2009, there were 139 signatories and 110 parties to the Rome Statute. *See* United Nations Treaty Collection, *available at* http://treaties.un.org.

47. *Cf.* Rome Statute, *supra* note 41, art. 12(1) ("A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court . . . .").

48. *See* Christiana Ochoa, *The Individual and Customary International Law Formation*, 48 VA. J. INT'L L. 119, 132–34 (2007).

49. *Id.* at 132.

50. *Id.*; *see also* INT'L LAW ASS'N, STATEMENT OF PRINCIPLES APPLICABLE TO THE FORMATION OF GENERAL CUSTOMARY INTERNATIONAL LAW, REPORT OF THE SIXTY-NINTH CONFERENCE (2000) (discussing various principles of construction for international law).

51. 175 U.S. 677 (1900).

52. *Id.* at 686.

53. *Id.* at 687–98.

ture.[54] The Court recognized that the immunity from capture of this sort of vessel had become binding international law due to the nearly unbroken historical practice by the United States and other nations of exempting fishing vessels from capture as prizes of war.[55]

It should be emphasized that the Court in *The Paquette Habana* did not confine its analysis to the practice of the United States alone, but rather looked to the practice of all maritime states in determining whether, in the absence of positive law on point, the custom did in fact rise to a level that was legally binding.[56] While the question of how many states must conform to a particular custom before it can become law is a question that has long been the subject of inquiry and debate,[57] it is at least clear that the practice of one state alone cannot create a rule of international customary law.[58] Indeed, the danger of a single state unilaterally creating new rules of international law is of great concern, as one court has observed, "The requirement that a rule command the 'general assent of civilized nations' to become binding upon them all is a stringent one. Were this not so, the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law."[59]

International crimes had their beginnings in customary international law and were only later codified by treaties such as the Rome Statute.[60] Over the years, certain acts have been consistently proscribed and criminalized both through treaties and state practice.[61] As acceptance of these norms has increased over time, various proscriptions have come to have the force of law. For example, certain provisions of the Geneva Conventions are widely considered to be

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54. *Id.* at 708.

55. *Id.* The Supreme Court stated,

> This review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law . . . that coast fishing vessels . . . are exempt from capture as prize of war.

Id.

56. *Id.* at 687–98.

57. *See* Ochoa, *supra* note 48, at 134 (citing North Sea Continental Shelf (F.R.G. v. Den. / F.R.G. v. Neth.), 1969 I.C.J. 3, 42 (Feb. 20)).

58. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980) (citing Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964)).

59. *Id.*

60. *See* M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 109 (2003).

61. *See id.* at 116. In examining the character of acts to determine what precisely qualifies as an "international crime," Professor Bassiouni analyzed 281 conventions and identified 28 categories of actions that can truly be said to be criminal in the international sense. *See id.* at 116–17.

declarative of customary law, in addition to the provisions of the Additional Protocols.[62] Moreover, the leading treaties concerning international criminal law, such as the Rome Statute, are generally considered to embody the modern state of customary law on the subject.[63]

III. SUBJECT OPINION: *UNITED STATES V. HAMDAN*

The case of *United States v. Hamdan* raises the crucial question of how terrorism prosecutions fit within traditional war crimes jurisprudence, if at all. Section A of this Part briefly summarizes the history of the case and its procedural posture.[64] Section B examines the tribunal's rejection of the defense's motion to dismiss the charges against Hamdan on ex post facto grounds.[65] Section C concludes with a brief discussion of the subsequent conviction and sentencing of Hamdan.[66]

A. The History

Salim Ahmed Hamdan was captured in Afghanistan in November 2001 by "militia forces" and subsequently turned over to American control.[67] In June 2002, he was transferred to Guantanamo Bay, where he was held without charge for eighteen months; in mid-2004, he was finally charged with "one count of conspiracy 'to commit . . . offenses triable by military commission.'"[68] Hamdan's attorneys

62. *See, e.g.*, Theodor Meron, *The Geneva Conventions As Customary Law*, 81 AM. J. INT'L L. 348, 364 (1987) (discussing the status of the Conventions as declarative of customary law); J. Ashley Roach, *Missiles on Target: Targeting and Defense Zones in the Tanker War*, 31 VA. J. INT'L L. 593, 594 n.4 (1991).

63. Some debate exists as to whether the entire Rome Statute is declarative of the existing state of customary law because the treaty has not been definitively interpreted by the International Criminal Court. *See, e.g.*, Robery Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, 11 J. CONFLICT & SECURITY L. 239, 257–62 (2006) (identifying divergent points between customary law and the Rome Statute); Anthony Cullen, *The Definition of Non-International Armed Conflict in the Rome Statute of the International Criminal Court: An Analysis of the Threshold of Application Contained in Article 8(2)(f)*, 12 J. CONFLICT & SECURITY L. 419, 420–423 (2007) (examining the customary status of non-international conflict provisions); Jeremy K. Schrag, Comment, *The Tenth Circuit's Misconstruction of Statutory Rape in International Law Under the Alien Tort Claims Act of 1789*, 47 WASHBURN L.J. 817, 848–49 (2008) (discussing arguments in support of the customary status of the Rome Statute); Cristina Villarino Villa, Comment, *The Crime of Aggression Before the House of Lords*, 4 J. INT'L CRIM. JUST. 866, 874 n.43 (2006) (pointing to diplomatic negotiations as evidence of the customary status of the crime of aggression, as defined by the Rome Statute).

64. *See infra* notes 67–71 and accompanying text.

65. *See infra* notes 72–88 and accompanying text.

66. *See infra* notes 89–90 and accompanying text.

67. Hamdan v. Rumsfeld, 548 U.S. 557, 566 (2006).

68. *Id.*

brought a petition of habeas corpus challenging his detention, and in the landmark case of *Hamdan v. Rumsfeld*, the U.S. Supreme Court held that the system of military commissions created by President George W. Bush in 2001 deviated from acceptable standards of due process and were hence unconstitutional.[69]

In response to the ruling, Congress enacted the MCA to promulgate a new system of military commissions that were thought to be in compliance with the law and reflective of the Court's concerns.[70] Hamdan was subsequently charged on February 2, 2007, with conspiracy and providing material support for terrorism, in violation of the MCA.[71]

B. The Tribunal

A great deal of legal maneuvering preceded Hamdan's actual trial, which did not begin until July 2008.[72] Among the many motions made by both the government and the defense, one of the most far-reaching was a defense motion to dismiss the charges against Hamdan on the grounds that they violated "the prohibition against Ex Post Facto application of the law, found both in the Constitution, in Common Article 3 of the Geneva Conventions, and in the law of nations."[73] The government opposed the motion on the grounds that "the Constitution does not protect aliens held outside the United States," and alternatively, that "there is ample precedent in the Law of Armed Conflict for the trial of these offenses by military commission."[74]

While the government acknowledged that "the offense of 'providing material support for terrorism' does not appear in any international treaty or list of enumerated offenses," the government argued that "the *conduct* now criminalized by the MCA provision has long been recognized as a violation of the law of war."[75] Thus, the prosecution of Hamdan under the MCA did not implicate ex post facto concerns,

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69. *See id.* at 635.

70. *See* 10 U.S.C. §§ 948a–950w (2006).

71. *See* Charge Sheet at 3–7, United States v. Hamdan (Military Comm'n Feb. 2, 2007), *available at* http://www.defense.gov/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf.

72. *See* William Glaberson & Eric Lichtblau, *Guantánamo Detainee's Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12.

73. United States v. Hamdan, No. D012, slip op. at 1 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

74. *Id.*

75. *Id.* at 5. Although the motion at issue concerned both the conspiracy and material support for terrorism charges, this discussion will be confined to a description and analysis of the portions of the tribunal's opinion relating to the material support for terrorism charge.

as "Congress merely *defined* . . . conduct that was already proscribed and subject to trial by military commission."[76]

To determine the sufficiency of this argument, the tribunal examined U.S. practice during the Civil War.[77] The tribunal referred to three sources: (1) an 1894 congressional document; (2) the work of Colonel William Winthrop, an eminent military historian; and (3) general orders creating military commissions at the time.[78] Each of these sources was quoted heavily from and relied upon by Justice Clarence Thomas in his dissent in *Hamdan v. Rumsfeld*.[79] All three sources spoke of

> numerous rebels . . . that . . . furnish the enemy with arms, provisions, clothing, horses and means of transportation; [such] insurgents are banding together in several areas of the interior counties for the purpose of assisting the enemy to rob, to maraud, and to lay waste of the country. All such persons are by the laws of war in every civilized country liable to capital punishment . . . . Numerous trials were held under this authority.[80]

The tribunal observed that the "guerrillas" referred to in Justice Thomas' opinion "were more akin to . . . 'spies,' 'bridge-burners,' 'pirates,' 'highway robbers' and 'guerrilla-marauders,'" and they "were subject to trial by military commission, along with those who 'join, belong to, act or co-operate' with them."[81] Based on this description, "[i]n modern parlance, they might be referred to as terrorists, or those who provided material support for terrorism."[82] Thus, the tribunal recognized that "[a]t least in American Civil War practice, they were subject to trial by military commission."[83]

The tribunal then considered whether Hamdan could in fact be tried for material support for terrorism (MST). The tribunal cited both *Hamdan v. Rumsfeld* and *Ex Parte Quirin* in recognition of the general rule that

> [a]bsent Congressional action under the define and punish clause to identify offenses as violations of the Law of War, the Supreme Court has looked for "clear and unequivocal" evidence that an of-

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76. *Id.*

77. *See id.* at 4.

78. *See id.*

79. *See* 548 U.S. 557, 692–704 (2006) (Thomas, J., dissenting).

80. *United States v. Hamdan*, No. D012, slip op. at 4 (quoting *Hamdan*, 548 U.S. at 694 n.9 (Thomas, J., dissenting)) (internal emphasis omitted). The similarity between the quoted materials in the tribunal's opinion appears to indicate that all three Civil War-era sources may have incorporated language from a single primary source. *See id.*

81. *Id.* at 4–5.

82. *Id.* at 5.

83. *Id.*

> fense violates the common law of war . . . or that there is "universal agreement and practice" for the proposition.[84]

However, because Congress had acted in this situation by means of the MCA, the tribunal found that "a greater level of deference . . . is appropriate."[85] Authoritative case law for this proposition is sparse, but the tribunal found support from the federal district court opinion in *United States v. Bin Laden*, where the court stated,

> [E]ven assuming the acts . . . are not *widely* regarded as violations of international law, it does not necessarily follow that these provisions exceeded Congress's authority under [Article I, Section 8] Clause 10. . . . [P]rovided that the acts in question are recognized by at least some members of the international community as being offenses against the law of nations, Congress arguably has the power to criminalize these acts pursuant to its power to *define* offenses against the law of nations.[86]

Although the tribunal found the historic evidence to be "mixed," it ultimately deferred to "Congress's determination that [MST] is not a new offense."[87] Consequently, the tribunal decided that the charges were not in violation of the ex post facto prohibition and denied the defense's motion to dismiss.[88]

C. *The Conviction*

Subsequently, on August 6, 2008, Hamdan was found guilty of MST but was acquitted of the conspiracy charge.[89] Despite the prosecution's recommendation for a sentence of at least thirty years in prison, Hamdan was sentenced to only five and a half years with credit for the sixty-one months that he had already served in custody at Guantanamo.[90]

IV. ANALYSIS

An analysis of the *United States v. Hamdan* tribunal's opinion requires two separate inquiries. First, it is necessary to examine the tribunal's rationale behind the finding that MST was a crime under the law of nations before the enactment of the MCA in 2006. If MST was indeed a recognized crime, then Congress was well within its authority

84. *Id.* (citing *Hamdan*, 548 U.S. at 601, and *Ex Parte* Quirin, 317 U.S. 1, 30 (1942)).

85. *Id.*

86. 92 F. Supp. 2d 189, 220 (S.D.N.Y. 2000).

87. United States v. Hamdan, No. D012, slip op. at 5–6 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

88. *See id.* at 6.

89. *See* Glaberson, *supra* note 1.

90. *See* Glaberson, *supra* note 2.

to codify the crime under the MCA.[91] However, if MST is not a crime under international law, then it is necessary to further examine whether Congress has the authority under the Define and Punish Clause to unilaterally create a crime that is not recognized by the law of nations. If MST is not a recognized crime under international law and Congress exceeded its authority under the Define and Punish Clause, then Hamdan's conviction was in violation of the prohibition against ex post facto applications of the law that is found in the Constitution and in international law.[92]

Section A discusses the status of MST as a war crime, both historically in domestic U.S. law and in modern customary international law.[93] Section B examines the ability of Congress to define war crimes subject to trial by military commission in the absence of customary international law.[94] This Part concludes that the tribunal's decision to deny the defense's motion to dismiss the charge of MST on ex post facto grounds was incorrect.

A. Is MST a War Crime?

In determining whether MST is a war crime that is triable by military commission, the tribunal focused its analysis solely on historical practices during the Civil War.[95] To analyze the correctness of this approach, it is instructive to consider the Supreme Court's discussion of the validity of Hamdan's conspiracy charge in *Hamdan v. Rumsfeld*.[96] In regard to the substantive and historical requirements that prove that a crime is in fact a war crime and thus triable under the MCA, the plurality in *Hamdan v. Rumsfeld* observed that "[a]t a minimum, the Government must make a *substantial* showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the law of war."[97] The plurality looked to both domestic and international law in questioning the validity of the conspiracy charge as a war crime, given that "[t]he crime of 'conspiracy' has rarely if ever been tried as such in this country by any law-of-war military commission . . . and does not appear in

91. *See infra* notes 95–137 and accompanying text.

92. *See infra* notes 138–171 and accompanying text.

93. *See infra* notes 95–137 and accompanying text.

94. *See infra* notes 138–171 and accompanying text.

95. *See* United States v. Hamdan, No. D012, slip op. at 4–5 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

96. 548 U.S. 557, 595–614 (2006). Conspiracy was the only crime Hamdan was charged with at the time. *See id.* at 598. He was not charged with material support for terrorism until after *Hamdan v. Rumsfeld* was decided. *See supra* note 71 and accompanying text.

97. *Hamdan*, 548 U.S. at 603 (emphasis added).

either the Geneva Conventions or the Hague Conventions."[98] Moreover, the plurality explained that "[w]hen . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous."[99]

The tribunal in this case admitted that "[t]he evidence for . . . MST is mixed."[100] Under any reasonably strict interpretation of the above principles, it would seem that "mixed" precedent regarding whether an asserted war crime is triable by military commission should be insufficient to sustain the charge, given that any doubt would not make the precedent plain and unambiguous. The tribunal, however, relied on Congress's enactment of the MCA and deferred to Congress's determination that MST is a war crime.[101] Leaving aside for the moment issues raised by congressional action, this Part first examines the validity of the tribunal's reliance on U.S. practice during the Civil War and its refusal to examine international custom.

In evaluating the historical legal precedent for the criminalization of MST, the *Hamdan* tribunal relied exclusively on U.S. practice during the Civil War.[102] The tribunal's analysis was erroneous for two reasons. First, because the tribunal recognized that MST had never been tried as a war crime before, the tribunal analogized to other offenses. The tribunal's use of attenuated analogies is inconsistent with the requirement in Supreme Court precedent that international criminal offenses based on customary law be "plain and unambiguous."[103] Second, the tribunal's failure to consider the absence of widespread criminalization of MST by other states is fatal to its analysis. American judicial precedent clearly requires a detailed consideration of state practice and *opinio juris* when questions of customary international law are at issue.[104]

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98. *Id.* at 603–04.

99. *Id.* at 602; *see also Ex Parte* Quirin, 317 U.S. 1, 30 (1942) (requiring "universal agreement and practice" in the absence of congressional action).

100. United States v. Hamdan, No. D012, slip op. at 5 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

101. *See id.* The validity of relying on congressional action to overcome the ex post facto problem is discussed in Part IV.B.

102. *See id.* at 4.

103. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 602, 737 (2006) ("When, however, neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.").

104. *See, e.g.*, Sosa v. Alvarez-Machain, 542 U.S. 692, 734–38 (2004) (examining UN declarations and national constitutions to determine whether arbitrary detention is prohibited by international law); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 421 (1964) (holding that a survey of "the practice of nations" shows that international law does not require application of the act of state doctrine); The Paquete Habana, 175 U.S. 677, 687–700 (1900) (examining American, European, and Japanese practice relating to the capture of civilian merchant ships as prizes

1. Precedent for MST in U.S. Domestic Law

The Hamdan tribunal relied exclusively on the trial by military commission of rebel guerrillas and their supporters during the Civil War as a basis for finding that the conduct defined in 18 U.S.C. § 950v(b)(24) as MST has long been recognized as a war crime and was only codified, not created, by the MCA.[105] This position is incorporated directly from Justice Thomas' dissent in *Hamdan v. Rumsfeld*, where he argued that the guerrillas of the Civil War era were analogous to modern-day terrorists and that history shows that numerous military tribunals were convened to try the guerrillas for violating the laws of war.[106] Justice Thomas further argued that conspiracy was adequately established as a war crime by the indictments and trials of these guerrillas, and he cited as additional evidence the charge of conspiracy against German saboteurs during World War II in *Ex Parte Quirin*.[107] Even though Justice Thomas's arguments were focused on the historical support for conspiracy as a war crime, the tribunal incorporated these arguments into its reasoning about MST, a crime that was not even under consideration in *Hamdan v. Rumsfeld*. As a result, the tribunal concluded, in effect, that because a crime similar to MST was once subject to trial by military commission, sufficient precedent existed to prosecute Hamdan for the crime in modern times.[108]

Justice Thomas's analysis of the conspiracy charge was specifically addressed and rejected by the plurality in *Hamdan v. Rumsfeld*.[109] The plurality observed that the *Quirin* Court declined to address the validity of conspiracy as a war crime and instead based its ruling on the strength of the other charges of espionage against the saboteurs.[110] Importantly, the *Hamdan* plurality observed that the *espionage* charge, not the conspiracy charge, in *Quirin* "was, by 'universal agreement and practice' both in this country and internationally, recognized as an offense against the law of war."[111] In further countering Justice Thomas's argument, the plurality noted that "an act does not become a crime without its foundations having been firmly established in precedent," and it found that the evidence for conspiracy in the context

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of war); Filartiga v. Pena-Irala, 630 F.2d 876, 881–84 (2d Cir. 1980) (examining the UN Charter, UN General Assembly resolutions, treaties, and official government acts to determine whether officially sanctioned torture violates international law).

105. *See United States v. Hamdan*, No. D012, slip op. at 4–5.

106. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 694 n.9 (2006) (Thomas, J., dissenting).

107. *See id.* at 698; *Ex Parte* Quirin, 317 U.S. 1, 23 (1942).

108. *See United States v. Hamdan*, No. D012, slip op. at 5.

109. *See Hamdan*, 548 U.S. at 605.

110. *See id.*

111. *Id.* at 603 (quoting *Ex Parte Quirin*, 317 U.S. at 30, 35–36).

of *Hamdan* did not meet this "high standard" while the war crimes charges in *Quirin* did.[112]

In the context of material support for terrorism, this analysis is compelling. The Civil War-era practice of trying guerrillas and their allies for acts of plunder and banditry is a far cry from trying the modern terrorist who attacks civilian targets out of political motivation. Crimes of brigandage, such as those at issue in the Civil War tribunals, are primarily economically motivated,[113] similar to the crime of piracy. Piracy has long been recognized as one of the core prohibitions under international law, due to its clear threat to the vital economic interests of seafaring nations.[114] In contrast, terrorism is a relatively new crime and has generally been treated as an ordinary, domestic criminal matter by most nations, rather than as an offense that warrants universal jurisdiction under international law.[115] While it is possible to analogize these isolated, century-old tribunals to current military commissions, it is unlikely that this practice rises to the level of being "firmly established in precedent."[116] Even assuming for the sake of argument that Civil War bandits and guerrillas were the forerunners of modern terrorists, the Civil War-era tribunals would not serve as adequate precedent for the prosecution of terrorist's supporters as war criminals because these tribunals concerned war crimes *personally* committed by the defendants, rather than passive or even active support of others who engaged in criminal acts.[117]

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112. *Id.* at 602 n.34, 603.

113. *See id.* at 694 n.9 (Thomas, J., dissenting) (discussing examples of indictments during the Civil War). Several indictments emphasized the economic nature of the defendant's crimes, noting for example that "[such] insurgents are banding together . . . to rob, to maraud, and to lay waste the country." *Id.* (quoting H.R. Doc. No. 65, 55th Cong., 3d Sess., 164 (1984)). Another defendant allegedly "did join, belong to, consort and co-operate with a band of guerrillas, insurgents, outlaws, and public robbers." *Id.* (quoting U.S. War Dep't, General Court Martial Order No. 51, at 10–11 (1866)).

114. *See, e.g.*, Christopher L. Blakesley, *Extraterritorial Jurisdiction*, *in* 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 3, 31 (M. Cherif Bassiouni ed., 1986) (piracy is the "most ancient offense of universal interest"), *cited in* Evan P. Lestelle, Comment, *The Foreign Corrupt Practices Act, International Norms of Foreign Public Bribery, and Extraterritorial Jurisdiction*, 83 TUL. L. REV. 527, 552 n.130 (2008); *see also generally* Michael H. Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, 33 TUL. MAR. L.J. 1 (2008) (discussing the origins of the prohibition against piracy and the status of pirates under modern law).

115. Even the United States treated terrorism and material support for terrorism as normal federal crimes until the advent of the MCA. *See supra* notes 12–26 and accompanying text.

116. *Hamdan*, 548 U.S. at 603 n.34.

117. *Id.* at 609. The plurality rejected Justice Thomas's assertion that a war crimes tribunal could be used to try someone who did not personally commit a war crime:

> [The defendant] was alleged to have *personally committed* a number of atrocities against his victims . . . . Crucially, [the prosecution recommended] that one of [the defendant's] co-conspirators, R.B. Winder, should *not* be tried by military commission

In sum, the historical practices that the *Hamdan* tribunal relied on provide, at best, some support for prosecuting acts of terrorism as a war crime. However, the cited Civil War-era tribunals provide no support for the conclusion that MST is a war crime, much less precedent rising to the level of "plain and unambiguous."[118]

2. *Precedent for MST in Customary International Law*

Even if U.S. practice did support a finding that MST is a war crime, the tribunal failed to examine the practices of other states and even acknowledged that the offense is neither in any international agreement nor "mentioned in any of the treaties or statutes that define law of war offenses."[119] However, to determine the existence of a crime under international law, absent its recognition by treaty, there must be a "general and consistent practice" by states that is "followed . . . from a sense of legal obligation."[120]

The state practice doctrine necessitates a comprehensive examination of the practices of a wide variety of states, and the practice of a single state is insufficient to give rise to a rule of customary international law.[121] Most importantly, the state practice doctrine requires the "general *assent* of civilized nations" in order for a custom to become a rule of international law, rather than simply silence or acquiescence in the face of action by a single state.[122] Contrary to these requirements, the *Hamdan* tribunal inquired only into the historical practices of the United States, while neglecting to inquire into the practices of other states.[123]

The tribunal's oversight is significant, given the lack of any foreign state practices criminalizing MST as a war crime. Indeed, the tribunal acknowledges that the United Nations questioned the validity of the MST offense, stating that it is "beyond offen[s]es under the laws of war."[124] The lack of a UN General Assembly resolution or declara-

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because there was as yet insufficient evidence of his own personal involvement in the atrocities . . . .

Id.

118. *Id.* at 602.

119. United States v. Hamdan, No. D012, slip op. at 3 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

120. David Ginn, *The Domestic Legal Status of Customary International Law in the United States: Lessons from the Federal Courts' Experience with General Maritime Law*, 4 J. INT'L L. & INT'L REL. 105, 114 (2008).

121. *See* Filartiga v. Pena-Irala, 630 F.2d 876, 881 (2d Cir. 1980).

122. The Paquete Habana, 175 U.S. 677, 694 (1900) (emphasis added).

123. *See United States v. Hamdan*, No. D012, slip op. at 5.

124. Human Rights Council, *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 12, U.N. Doc.A/

tion recognizing MST as a crime is particularly important because actions of the General Assembly are considered declarative of customary international law and are looked to when analyzing international state practice.[125] It is telling that of the numerous General Assembly resolutions condemning acts of terrorism, those that condemn MST call for punishment under national criminal systems rather than military commissions.[126]

Because General Assembly resolutions are not legally binding, they are considered only declarative of an emerging custom and cannot create binding law unless confirmed by actual state practice.[127] Of the sixteen international legal instruments relating to terrorism that are currently in force, only the International Convention for the Suppression of the Financing of Terrorism deals with the support of terrorism; it does so by obligating states to hold terrorist financiers criminally, civilly, or administratively liable.[128] It makes no mention of war crimes.[129]

Similar conventions and laws prohibiting MST are in place in other areas, notably in Europe. The Council of Europe's Convention on the Prevention of Terrorism, enacted in 2005, requires member states to establish domestic laws criminalizing MST.[130] England in particular has enacted progressively more restrictive terrorism laws,[131] and other nations such as France have stringent laws that aggressively target suspected terrorists and their supporters.[132] Notably, even the most draconian laws under the European approach to terrorism support are restricted to criminal prosecution and make no reference to either ter-

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HRC/6/17/Add.3 (Nov. 22, 2007) (*prepared by* Martin Scheinin), *cited in United States v. Hamdan*, No. D012, slip op. at 3.

125. *See Filartiga*, 630 F.2d at 882–83; *see, e.g.*, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102 (1987); Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. INT'L L. 757, 758 (2001).

126. *See, e.g.*, Measures to Eliminate International Terrorism, G.A. Res. 60/43, U.N. Doc. A/RES/60/43 (Jan. 6, 2006) (calling on states to criminally prosecute supporters of terrorism); United Nations Global Counter-Terrorism Strategy, G.A. Res. 60/288, U.N. Doc.A/RES/60/288 (Sep. 20, 2006) (calling on member states to cooperate in prosecuting supporters of terrorism).

127. *See* Roberts, *supra* note 125, at 758.

128. *See* International Convention for the Suppression of the Financing of Terrorism, G.A. Res. 54/109, art. 5, U.N. Doc.A/RES/54/109 (Feb. 25, 2000). As of October 2009, the convention had 132 signatories and 171 parties. *See* United Nations Treaty Collection, *available at* http://treaties.un.org (last visited Oct. 26, 2009).

129. *See* G.A. Res. 54/109, *supra* note 128.

130. *See* Council of Europe Convention on the Prevention of Terrorism, art. 9, May 16, 2005, Europ. T.S. No. 196.

131. *See* Terrorism Act, 2006 (Eng.); Anti-Terrorism, Crime and Security Act, 2001 (Eng.); Terrorism Act, 2000 (Eng.).

132. *See* Craig Whitlock, *French Push Limits in Fight on Terrorism*, WASH POST, Nov. 2, 2004, at A1.

rorism or support of terrorism as crimes triable by anything other than a regular criminal court.[133] Additionally, there appear to be no statutes authorizing military commissions comparable to the MCA. Even in the United States, MST was not defined under the War Crimes Act, but was instead codified in a separate federal criminal statute.[134]

If the *Hamdan* tribunal had conducted a proper analysis of the customary international law surrounding MST, it would have come to two conclusions. First, historical practice in the United States is too sporadic and unclear to rise to the "plain and unambiguous" standard—the standard that must be met in order to recognize MST as a war crime. The practice of trying bandits and guerrillas by military tribunal is not clearly similar to the prosecution of modern terrorists, and the precedential force of that example is limited to prosecutions of actual terrorists, rather than their supporters.[135] Second, an examination of international state practice reveals that while MST has been widely criminalized by a number of states, it is not recognized as a war crime. Indeed, state practice seems to weigh *against* trying MST by military commission, and the United States thus appears to be alone in advocating this course of action. Although the movement toward the criminalization of terrorism began in the 1990s, the concept did not garner broad international support until after 2001.[136] Given that the court in *The Paquete Habana* dedicated the bulk of its opinion to a detailed analysis of state practice over hundreds of years,[137] it seems unlikely that a new and binding custom of international law could emerge in the five years between 2001 and the enactment of the MCA in 2006. Even so, clear evidence of a custom's existence before 2001 would be necessary in order to hold Hamdan liable for his actions in that year, given the generally recognized prohibition against ex post facto applications of law.

In sum, insufficient precedent exists under either U.S. or international practice to sustain the tribunal's finding that MST is a war crime under international law. The tribunal should have conducted a proper analysis of historical precedent using the correct principles of interna-

133. For example, the Terrorism Act of 2000 specifically requires the consent of the Director of Public Prosecutions prior to initiating a prosecution for any offense prohibited under the Act. *See* Terrorism Act, 2000, ch. 117, § 2 (Eng.).

134. *See supra* notes 24–26 and accompanying text.

135. *See supra* note 117 and accompanying text.

136. *See* Christian Much, *The International Criminal Court (ICC) and Terrorism As an International Crime*, 14 MICH. ST. J. INT'L L. 121, 122–23 (2006). "[M]ost of the existing legal framework against terrorism . . . date from years before 2001. But September 11th turned a dramatic spotlight on terrorism and gave new impetus to combating it." *Id.*

137. *See* The Paquete Habana, 175 U.S. 677, 687–98 (1900).

tional law, and if it had done so, it would likely have reached the conclusion that MST is not a war crime. While the tribunal did find that the evidence was inconclusive, it ultimately deferred to Congress's declaration under the MCA that MST was in fact a crime prior to 2006. As a result, the next question is whether Congress itself had the power to make MST a war crime.

B. Did Congress Exceed Its Power Under the Define and Punish Clause?

While it is clear that MST is not a war crime under customary international law, the remaining question concerns the extent of Congress's power to create and punish new war crimes in the absence of a controlling treaty or customary norm. Congress derives its authority over international crimes from the Define and Punish Clause, which grants Congress the power to "define and punish . . . Offenses against the Law of Nations."[138] The clause has rarely been invoked by Congress when enacting statutes or by courts when interpreting them, and it remains one of the most overlooked of Congress's enumerated powers.[139] Subsection 1 reviews the history and interpretation of the clause, and Subsection 2 analyzes the correctness of the *Hamdan* tribunal's decision to defer to Congress's determination that MST is a war crime.[140]

1. The History and Scope of the Define and Punish Clause

Although the legislative history regarding the Define and Punish Clause is sparse, it is generally acknowledged that the clause was intended to ensure that the federal government—not the states—retained sole authority to deal with international offenses, and to allow Congress to clarify the uncertain nature of this type of offense.[141] Given the concern in the ratification debates about the relatively unclear nature of international offenses recognized at the time, the Framers apparently intended that Congress be able to adapt U.S. law to new offenses as they arose under international law, as opposed to

138. U.S. Const. art. I, § 8, cl. 10. In full, the text reads, "To define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." *Id.*

139. *See* Beth Stephens, *Federalism and Foreign Affairs: Congress's Power to "Define and Punish . . . Offenses Against the Law of Nations"*, 42 WM. & MARY L. REV. 447, 449 (2000).

140. *See* United States v. Hamdan, No. D012, slip op. at 5 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

141. *See* Charles D. Siegal, *Deference and Its Dangers: Congress' Power to Define . . . Offenses Against the Law of Nations*, 21 VAND. J. TRANSNAT'L L. 865, 874 (1988); Stephens, *supra* note 139, at 463–64.

limiting offenses to only those extant in 1789.[142] While there was some discussion of the clause in the ensuing ratification debates, little else can be inferred about the Framers' intent regarding the clause other than that the Framers perceived the need for some centralized authority over international offenses to be vested in Congress.[143] The paucity of debate, however, lends no authority to the proposition that the Framers intended to grant Congress the sole right to "define offenses without a clear international law basis."[144]

A purely textual analysis of the clause indicates that the Framers contemplated a reasonably strong role for Congress in defining international crimes, though perhaps not an absolute monopoly.[145] Standard canons of constitutional construction hold that the Vesting Clause grants to Congress the exclusive legislative authority over the powers enumerated in Article I of the Constitution.[146] Because the Define and Punish Clause is an enumerated power, this would seem to imbue Congress with the primary authority to determine the character of international law.[147] Comparison of the Define and Punish Clause with other similar clauses of the Constitution, such as the Vesting Clause, in addition to separation of powers concerns and the legislative history surrounding the Define and Punish Clause, all indicate that Congress has "a special claim to predominance" in defining the scope of international offenses.[148]

In practice, this argument is borne out by Supreme Court cases that analyze claims with an international legal component. In *The Paquete Habana*—the leading case on international law in the United States—the Supreme Court observed, "[W]here there is no treaty, and no con-

142. *See* Siegal, *supra* note 141, at 876–77.

143. *See id.* at 879.

144. *Id.*

145. *See* Mark K. Moller, *Old Puzzles, Puzzling Answers: The Alien Tort Statute and Federal Common Law in* Sosa v. Alvarez-Machain, 2004 CATO SUP. CT. REV. 209, 223. For a more absolutist argument on Congress's sole authority to determine international offenses, as well as criticism of the entire line of Supreme Court international law jurisprudence, see Jason Jarvis, *Constitutional Constraints on the International Law-Making Power of the Federal Courts*, 13 J. TRANSNAT'L L. & POL'Y 251, 254 (2003) (arguing that the Define and Punish Clause completely prohibits federal courts from defining international law).

146. *See* Moller, *supra* note 145, at 224.

147. *See id.* As Professor Moller explains,

> Because Article I, section 8's reference to the law of nations takes the form of a grant, the Vesting Clause creates a strong presumption that that grant is a *legislative* power within the scope of the Vesting Clause, and that the *entire* quantum of that enumerated power ("all [of that] legislative power") is vested in Congress, rather than shared among the branches.

Id.

148. *Id.* at 224–25.

trolling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."[149] Subsequent cases have widely employed the analysis laid down in *The Paquete Habana*, heavily deferring to Congress when a relevant statute or treaty is applicable and only venturing into other modes of analysis in the absence of congressional action on the subject.[150] This suggests that the *Hamdan* tribunal was likely correct that some deference was due to Congress's determination that MST is a war crime under the MCA.[151]

2. *Defining and Punishing Material Support for Terrorism*

While the Define and Punish Clause entitles Congress to some measure of deference in defining international offenses, courts are not prohibited from reviewing a congressional determination on international criminal offenses.[152] To be sure, judicial deference appears to be substantial, and indeed "no court has ever invalidated a statute enacted pursuant to the [Define and Punish Clause] on the ground that no offense against the law of nations existed."[153] Courts, however, tend not to base their deference directly on the Define and Punish Clause, but rather find other powers of Congress implicated in the case at issue that require judicial restraint.[154] When dealing with definitions of international crimes, courts have made at least cursory attempts to ground the congressional definition of the crime in international precedent, often playing "somewhat fast and loose with precedent" in order to avoid finding congressional action in conflict with international law.[155] Although judicial deference can at times result in strained or cursory readings of international precedent, these actions are largely consistent with the *Charming Betsy* canon of inter-

149. 175 U.S. 677, 700 (1900).

150. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557, 602 (2006); Sosa v. Alvarez-Machain, 542 U.S. 692, 734 (2004); *Ex Parte* Quirin, 317 U.S. 1, 30 (1942); Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980).

151. *See* United States v. Hamdan, No. D012, slip op. at 6 (Military Comm'n 14 July 2008), *available at* http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf.

152. *See generally* Siegal, *supra* note 141 (arguing against absolute judicial deference to congressional legislation enacted under the Define and Punish Clause).

153. *Id.* at 880.

154. *See id.* at 880–81.

155. *Id.* at 883 (citing *In re* Yamashita, 327 U.S. 1 (1946)). The dissent in *Yamashita* was particularly disgusted with the Court's cursory review of international law, observing, "[T]here was no serious attempt to charge or to prove that [Yamashita] committed a recognized violation of the laws of war. . . . The recorded annals of warfare and the established principles of international law afford not the slightest precedent for such a charge." *Yamashita*, 327 U.S. at 28 (Murphy, J., dissenting).

pretation in the area of international law.[156] Simply put, the canon states that, if at all possible, an act of Congress will not be interpreted to be contrary to international law.[157]

While courts are often deferential to clear congressional actions, precedent weighs in favor of judicial review to some extent in order to guard against congressional overreaching. Indeed, one early Supreme Court case dealing with offenses under the Clause held that although Congress had passed a statute defining the international slave trade as piracy, this did not make the slave trade an international crime.[158] On its face, this holding indicates that while Congress has the power to *define* offenses against the law of nations, it may not simply *create* a new crime.[159] Analyzing this early formulation of the Supreme Court's view of the Define and Punish Clause in conjunction with later interpretations of congressional enactments in light of international practice and norms, two principles that limit congressional power under the Define and Punish Clause emerge. First, Congress must base its definition of an international crime on an actual offense recognized under international law.[160] Second, the crime cannot contravene other constitutional provisions.[161]

The first principle requires either a treaty that establishes the international offense at issue or state practice sufficient to create binding customary international law.[162] As discussed above, MST is not a war crime under any international treaty or customary law.[163] As a result, the *Hamdan* tribunal erred in granting deference to Congress's determination that MST is a war crime under the MCA without a more detailed inquiry. While a review of congressional actions generally requires only a cursory "rational basis" review by the courts, the Define and Punish Clause would seem to require something much more strin-

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156. *See* The Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804).

157. *Id.*

158. *See* The Antelope, 23 U.S. (10 Wheat.) 66 (1825), *cited in* Siegal, *supra* note 141, at 883–84. Piracy was one of the three crimes that were widely recognized as offenses against the law of nations at the time of the Constitution's ratification. *See* Siegal, *supra* note 141, at 875 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES 66 (1st ed. 1765)).

159. Siegal, *supra* note 141, at 886.

160. *Id.*

> [E]ven the *Yamashita* court does not, at least explicitly, give Congress broad enough discretion to characterize an emerging norm as an existing norm. That is, the Supreme Court has not said that Congress has authority to *create* the law of nations; Congress only has authority to *define* the law of nations.

Id.

161. *Id.*

162. *See id.* at 887–88.

163. *See supra* notes 95–137 and accompanying text.

gent.[164] The text of the clause clearly contemplates the existence of some norm of international law, specifically offenses against the law of nations.[165] At the very least, this would seem to require sufficient judicial review to ensure that a congressional enactment is in conformity with international law, especially where Congress purports to create a new offense rather than simply codify one that is already in existence.[166] Rather than deferring to Congress's assertion that MST is a war crime, the tribunal should have made a thorough inquiry into the validity of the charge under the laws of war. While congressional determinations should be given significant weight in the tribunal's evaluation of the evidence for the offense's existence, nothing in the Define and Punish Clause or judicial precedent requires or even encourages granting Congress the final say in the international arena.[167] As has been settled for more than two centuries the courts—not Congress—decide "what the law is."[168]

Even if Congress did in fact have the authority under the Define and Punish Clause to create a new war crime when it enacted the MCA in 2006, the tribunal would still be prohibited from trying Hamdan for MST because his alleged crimes occurred five years *before* the MCA was enacted. Because Congress's power under the Define and Punish Clause is circumscribed by other constitutional limits, the prohibition against ex post facto applications of the law would prevent the conviction of Hamdan in 2008 for his actions in 2001.[169] The MCA attempted to avoid this precise constitutional problem by explicitly stating that it "does not establish new crimes that did not exist before its enactment, but rather codifies those [previously existing] crimes for trial by military commission."[170] But international law also prohibits ex post facto prosecutions.[171] If the MCA were to be interpreted to allow prosecutions of a crime committed before the MCA was even enacted, there would be a clear conflict between the MCA and international law, a result that is prohibited under the *Charming Betsy* canon. In order to harmonize the MCA with the fact that MST is not an international crime, the MCA must be read to

164. *See* Siegal, *supra* note 141, at 937–42.

165. *See id.* at 941.

166. *See id.*

167. *See id.* at 933–34.

168. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803), *cited in* Siegal, *supra* note 141, at 933.

169. *See* U.S. CONST. art. I, § 9, cl. 3.

170. 10 U.S.C. § 950p(a) (Supp. 2008).

171. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), art. 11, U.N. Doc. A/810 (Dec. 10, 1948); International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 15, U.N. Doc. A/6316 (Dec. 16, 1966).

mean that MST only became a war crime at the time Congress exercised its power under the Define and Punish Clause. As a result, even if it is assumed that Congress acted within its authority in declaring MST to be a war crime, Hamdan's actions would not have been a crime at the time he committed them, and the Constitution's ex post facto provision would therefore prohibit his prosecution under the MCA. It is apparent that the tribunal's opinion denying the defense's motion to dismiss the charge of MST on ex post facto grounds was incorrect. The opinion improperly relied solely on U.S. historical practice in determining that MST was historically recognized as a war crime. Moreover, the tribunal failed to consider the leading U.S. Supreme Court cases dealing with the application of customary international law in American courts. Finally, the tribunal failed to properly consider the constitutional limits on Congress's power to criminalize MST in the absence of domestic or customary international law on point. Because Congress lacks the power to create a new war crime, it could not confer the power to prosecute MST on the tribunal through the MCA. Thus, the tribunal erred by failing to dismiss the MST charge, and Hamdan's conviction was in violation of the constitutional prohibition against ex post facto crimes and the international law principle of *nullum crimen sine lege.*

V. IMPACT

The conviction of Hamdan for MST will likely be seen as a historical aberration in the context of war crimes prosecutions. Mere months after the tribunal rendered its verdict, the legal basis underpinning the prosecution has been heavily undermined by later court decisions and actions of the U.S. government. Indeed, the Administration of President Barack Obama has already moved to end the Guantanamo system of military tribunals and has repudiated the legal theories of the Bush Administration's so-called war on terror.[172] This Part first examines the impact of Hamdan's conviction under international law[173] and then summarizes its impact on domestic law.[174]

A. The Impact of United States v. Hamdan *on International Law*

As an example of a successful prosecution for the alleged war crime of MST, *Hamdan* is rare. Of the hundreds of detainees imprisoned at Guantanamo, Hamdan is only one of two prisoners to have come

172. *See infra* note 189 and accompanying text.
173. *See infra* notes 175–184 and accompanying text.
174. *See infra* notes 185–194 and accompanying text.

before a tribunal that rendered a verdict and a sentence for the crime of MST.[175] In addition to the two tribunals that actually delivered a verdict, one other detainee pled guilty to a charge of MST.[176]

Given the paucity of successful convictions for MST during the Guantanamo tribunals and the lack of any similar charges in any other war crimes proceedings in other nations, it is unlikely that the crime will be accepted as a valid war crime under international law anytime soon. Disdain for the procedures used at the tribunals and the perceived unfairness of the charges has made Guantanamo a "global symbol of abuse" in the view of many around the world.[177] It is highly unlikely that a major treaty will be concluded in the near future in order to add MST to the list of declared war crimes, given the prevailing stigma attached to the charges used to try Hamdan and others at Guantanamo.

Absent a major treaty, future prosecutions for MST would have to rely on customary international law for their validity. As discussed above, customary law is only formed out of a sense of legal obligation, as a result of widespread and persistent state practice.[178] While it could easily be argued that the convictions at Guantanamo are evidence of a single state's practice, they are not sufficient to create new customary international law. More than the practice of a single state is required,[179] and at this time, the United States stands alone in asserting that MST is a war crime. Many more nations would have to prohibit MST as not just an ordinary crime but as a war crime before it rises to the level of customary international law.

Few if any nations have indicated a willingness to treat MST as a war crime, and many now sponsor comprehensive social outreach and rehabilitation initiatives for former "terrorists." An example of the policy movement away from punishment and toward treatment is

175. The other was that of Ali Hamza al Bahlul, who was convicted of a number of charges on November 3, 2008, including conspiracy, solicitation to commit murder, and material support for terrorism. *See* William Glaberson, *Detainee Convicted on Terrorism Charges*, N.Y. TIMES, Nov. 4, 2008, at A19. Al Bahlul was the former propaganda chief of al Qaeda, and during his trial he refused to put on a defense, even "insist[ing] that his lawyer remain mute in a weeklong trial that drew little attention." *Id.*

176. David Hicks, an Australian national who was captured in Afghanistan after training with al Qaeda, pled guilty to material support for terrorism on March 26, 2007. *See* Glaberson, *supra* note 35 . Hicks was sentenced to nine months in prison, most of which he served in Australia. *See* William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. TIMES, Mar. 31, 2007, at A10. Hicks was eventually released on December 20, 2008. *See* Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. TIMES, Dec. 21, 2008, at 12.

177. Press Release, Human Rights Watch, US: Obama Expected to Order Guantanamo's Closure (Jan. 21, 2009), http://www.hrw.org.

178. *See supra* notes 41–63 and accompanying text.

179. *See supra* notes 56–59 and accompanying text.

Saudi Arabia, which initiated a large state-run rehabilitation program in 2004 in order to reform convicted terrorists.[180] The program emphasizes education and therapy over punitive incarceration, and it attempts to reintegrate former jihadists into society.[181] Rather than label jihadists as "religious fanatics or enemies of the state," the program views them as "alienated young men" who are in need of help, and it offers religious education, social interaction, and monetary incentives.[182] Although the program is relatively new, few graduates have gone on to commit further acts of terrorism.[183] Similar programs are underway in Egypt and Yemen, and other nations such as France have used national criminal laws to try former Guantanamo detainees.[184] No other nation, however, has followed the United States in using war crimes tribunals to prosecute those who are accused of MST.

If a state decided to try an individual for MST as a war crime, it would find itself on the wrong side of world opinion and with paltry support for the claim that international law proscribed material support for terrorism. As a result, it is likely that MST will not be prosecuted as a war crime in the future, and instead, states will increasingly

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180. *See* Katherine Zoepf, *Deprogramming Jihadists*, N.Y. TIMES MAG., Nov. 9, 2008, at 50.

181. *See id.* at 52.

182. *Id.*

183. *See id.* at 53. In January of 2009, two former Guantanamo detainees who had participated in the program announced that they had joined al Qaeda in Yemen. *See* Caryle Murphy, *Ex-Detainees Rejoin Al Qaeda*, CHRISTIAN SCI. MONITOR, Jan. 27, 2009, at 1. Despite the example of these former patients, the Saudi Arabian government noted that they represented an extreme minority of the 117 other Saudi Arabians who had been imprisoned at Guantanamo and later underwent treatment in a rehabilitation program. *Id.* Interestingly, this recidivism rate of less than 1% is in stark contrast to the apparently much higher rate where former detainees have not been rehabilitated. In May 2009, the Pentagon stated that 520 former Guantanamo prisoners have "returned to the fight," not including 43 others "under suspicion of being involved in extremist activities." *Id.* The exact number is unclear; according to the Pentagon report, only 29 former detainees have allegedly gone on to commit acts of terrorism, although 74 others are suspected of recidivism. *See* Elisabeth Bumiller, *1 in 7 Detainees Rejoined Jihad, Pentagon Finds*, N.Y. TIMES, May 21, 2009, at A1. More recent studies indicate that the recidivism rate is close to 20%. *See* Elisabeth Bumiller, *Many Ex-Detainees Said to Be Engaged in Terror*, N.Y. Times, Jan. 7, 2010 (citing a Pentagon report that "concludes that of some 560 detainees transferred abroad . . . about one in five has engaged in, or is suspected of engaging in, terrorism or militant activity"). This is a higher percentage than the one in seven recidivism rate that the Pentagon had estimated in its May 2009 report. *See id.* As of January 2009, there are an estimated 198 detainees who remain at Guantanamo, while 560 detainees have been released or transferred abroad. *Id.* The true number of former detainees who have rejoined the fight is unknown; civil liberties groups pilloried the original May 2009 Pentagon report's inexact methods of estimating recidivism. *See id.* (noting that the May report "identified only 29 [suspects] by name" and "provided no way of authenticating the 45 unidentified former detainees").

184. *See* Zoepf, *supra* note 180, at 53; *France Convicts 5 Former Guantánamo Inmates*, N.Y. TIMES, Dec. 20, 2007, at A17.

turn to the national courts and civil rehabilitation programs in order to deal with those who commit or support acts of terrorism.

B. The Impact of United States v. Hamdan *in the United States*

Hamdan's conviction has had little permanent effect in the United States as a precedent for war crimes prosecutions. Because his conviction came near the end of the long, slow disintegration of the Guantanamo tribunal system, it is likely to serve only as a reminder of the legal difficulties inherent in creating an entirely new judicial system to prosecute a crime of questionable legality.

The system of war crimes tribunals at Guantanamo had already suffered severe setbacks before Hamdan was tried and convicted. Improper pressure on prosecutors from Brigadier General Thomas W. Hartmann, the senior military officer responsible for initiating cases against detainees, resulted in a judicial order that barred him from involvement in Hamdan's case.[185] Critical procedural questions were left unresolved, leading to months of delays in several cases.[186] Most troubling, the long incarceration and harsh treatment of the detainees by the United States raised serious questions about their mental fitness to stand trial, further weakening the legitimacy of the system.[187] The frequent delays and procedural errors severely tarnished the system in the eyes of many in the United States and abroad, which resulted in calls to close Guantanamo and to scrap the war crimes tribunal system.[188] After his election in November 2008, President Obama made ending the tribunals a top priority of his new Administration.[189]

In addition to growing political resistance to the approach taken by the Bush Administration in the "war on terror," U.S. courts consistently rejected claims that Guantanamo stood apart from the rest of

185. *See* William Glaberson, *Judge's Guantánamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, at 26.

186. *See* William Glaberson, *5 Charged in 9/11 Attacks Seek to Plead Guilty*, N.Y. TIMES, Dec. 9, 2008, at A1.

187. *See* William Glaberson, *U.S. Detainee Says He'll Boycott His Trial*, N.Y. TIMES, Apr. 11, 2008, at A18; William Glaberson, *Detainee's Mental Health Is Latest Legal Battle*, N.Y. TIMES, Apr. 26, 2008, at A1.

188. *See, e.g.*, *Bending the Rules*, ECONOMIST, July 19, 2008, at 9 ("Guantánamo Bay became a symbol of legal abuse, maltreatment and torture from the moment the first orange-clad inmates stumbled in with their shackles, blindfolds and earmuffs in early 2002.").

189. *See* Peter Finn, *Guantanamo Closure Called Obama Priority*, WASH. POST, Nov. 12, 2008, at A1. However, the Obama Administration has backed away from plans to completely shutter Guantanamo and has begun to consider alterations in the legal system in order to accommodate at least some prosecutions. *See* William Glaberson, *Vowing More Rights for Accused, Obama Retains Tribunal System*, N.Y. TIMES, May 16, 2009, at A1.

the American justice system. In the landmark case *Boumediene v. Bush*, the Supreme Court held that an MCA provision denying detainees the right to petition for habeas corpus was unconstitutional.[190] In the ensuing flood of habeas petitions filed in federal court by representatives for the detainees, the tribunal system suffered irreparable damage as court after court ruled that the government had insufficient evidence to continue to hold the detainees as enemy combatants.[191] Since the ruling in *Boumediene*, at least twenty-four detainees have been granted habeas relief and released from Guantanamo.[192]

Immediately after taking office, President Obama declared his intention to close Guantanamo within a year and signed an executive order for an extensive review of the military tribunal system.[193] While Obama has not directly repudiated the use of military commissions, he indicated that the detainees would be tried in federal court within the United States under existing federal criminal laws.[194] Even if President Obama chooses to continue military commissions, they would be conducted under the auspices of the Uniform Code of Military Justice, which does not include MST as a triable offense.[195] In either event, it is clear that the system, as previously conceived, is a dead letter, and MST is unlikely to be prosecuted as a war crime by the United States.

VI. CONCLUSION

MST had an extraordinarily short run as a triable war crime and it is unlikely to be resurrected in the near future as a criminal offense against the laws for war. The contemplated closure of Guantanamo by President Obama and the prospect of the incorporation of the remaining detainees into the regularly constituted criminal justice system mark the end of MST as a war crime for the foreseeable future.

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190. 128 S. Ct. 2229 (2008).

191. *See* William Glaberson, *Judge Declares Five Detainees Held Illegally*, N.Y. TIMES, Nov. 21, 2008, at A1; *see also* William Glaberson, *Rulings of Improper Detentions in Cuba As the Bush Era Closes*, N.Y. TIMES, Jan. 19, 2009, at A1.

192. Glaberson, *Rulings of Improper Detentions in Cuba As the Bush Era Closes*, *supra* note 191, at A1.

193. *See* Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009); Mark Mazzetti & William Glaberson, *Obama Will Shut Guantánamo Site and C.I.A. Prisons*, N.Y. TIMES, Jan. 22, 2009, at A1. This decision has proved difficult to implement during the ensuing year, and as of this writing the ultimate fate of the prison remains unknown. *See* Peter Baker & Charlie Savage, *Terror Attempt May Hinder Plans to Close Guantanamo*, N.Y. TIMES, Jan. 1, 2010 ("The task of determining what to do with the detainees held at Guantanamo has already proved so daunting that Mr. Obama is poised to miss his self-imposed one-year deadline for shuttering the prison by Jan. 22.").

194. *See* Mazzetti & Glaberson, *supra* note 193.

195. *See id.*; *see also* Glaberson, *supra* note 189.

The tribunal's failure to recognize the legal deficiencies of the MST charge is representative of the larger failure to ground the tribunal system in sound international law and U.S. legal precedent.

Hamdan's conviction is likely to have little effect on the development of MST as a war crime under international law. Rather than serving as the basis for the prosecution of a new kind of war crime, *Hamdan* may serve as an example of the limits on the military commissions system's ability to prosecute ill-defined and specious offenses against the laws of war. The Guantanamo system as a whole may also come to be seen as the ignominious end of the state-backed war crimes tribunal model, and it may ultimately instead increase international support for a centralized and clearly defined international criminal system—such as the International Criminal Court—that is properly equipped to handle true international crimes.

In the end, Hamdan's conviction for MST may be seen as the supreme irony of the military commissions at Guantanamo. First held up proudly as a "vindication for the system" over a hardened terrorist who was guilty of a heinous war crime, Hamdan's conviction instead has come to represent the use of a legally questionable system to prosecute a legally questionable crime, simply to find "[o]ne poorly educated Yemeni . . . guilty of supporting terrorism by driving Osama bin Laden."[196] The failure of the Guantanamo system may ultimately yield a better and more robust international war crimes system by drawing attention to the cautionary tale of Hamdan, ensuring that only the most reprehensible conduct based on a solid proscription under international law is prosecuted as a war crime.

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196. *See* Glaberson, *supra* note 36.

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