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WAR CRIMINAL OR JUST PLAIN FELON? WHETHER PROVIDING MATERIAL SUPPORT FOR TERRORISM VIOLATES THE LAWS OF WAR AND IS THUS PUNISHABLE BY MILITARY COMMISSION

T. Jack Morse*

INTRODUCTION

On a winter day in Kandahar, Afghanistan, around February of 1996, a young Yemeni national named Salim Ahmed Hamdan, in his mid-twenties at the time, entered the employment of an Islamic jihadist by the name of Usama bin Laden.¹ For the next five years, Hamdan, who had never progressed past the fourth grade in school,² would serve as bin Laden's driver, transporting him in a Toyota pick-up truck to various destinations within Afghanistan.³ Occasionally, it seems, he also transported weapons,⁴ and from time to time Hamdan served as one of bin Laden's body guards as well.⁵ In return for his services, Hamdan earned approximately \$200 a month.⁶ He did not join al Qaeda, bin Laden's terrorist organization, nor did he join the

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1. Charge Sheet at 5, *United States v. Hamdan*, Office of Military Commissions (Apr. 5, 2007), available at http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf; Lucile Malandain, *First War Crimes Trial Since WWII to Begin at Guantanamo*, SYDNEY MORNING HERALD, July 21, 2008, <http://news.smh.com.au/world/first-war-crimes-trial-since-ww-ii-to-begin-at-guantanamo-20080721-3ija.html>.

2. Jerry Markon & Josh White, *Bin Laden Driver Gets 5 1/2 Years; U.S. Sought 30*, WASH. POST, Aug. 7, 2008, at A01; Sahr Muhammedally, *The Hamdan War Crimes Trial: An Illusion of Justice*, HUFFINGTON POST, Aug. 6, 2008, http://www.huffingtonpost.com/sahr-muhammedally/the-hamdan-war-crimes-tri_b_117325.html.

3. Charge Sheet, *supra* note 1, at 5; William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1 [hereinafter Glaberson, *Panel Convicts*]; *Profile: Salim Hamdan*, BBC NEWS, Aug. 6, 2008, <http://news.bbc.co.uk/2/hi/americas/7546107.stm>.

4. Charge Sheet, *supra* note 1, at 5.

5. *Id.*; Suzanne Goldenberg, *US Military Convicts Man Who Drove Bin Laden of Supporting Terrorism*, IRISH TIMES, Aug. 8, 2008, available at 2008 WLNR 14713341.

6. Goldenberg, *supra* note 5, at 12; Reuters, *Bin Laden Driver Jailed for Supporting Terrorism*, IRISH TIMES, Aug. 8, 2008, <http://www.irishtimes.com/newspaper/breaking/2008/0807/breaking6.htm>; *Profile: Salim Hamdan*, *supra* note 3.

Afghan military force known as the Taliban.⁷ Neither did Hamdan participate in belligerent acts toward the United States or its allies.⁸

In November 2001, however, Hamdan's employment abruptly ended when Afghan militia forces detained him at a road block and hastily handed him over to the United States military.⁹ Hamdan had no passengers with him,¹⁰ was not engaged in any hostilities,¹¹ and offered no resistance.¹² Nevertheless, early in the summer of 2002, the military deposited Hamdan at the United States Naval Base in Guantanamo Bay, Cuba.¹³ He left a wife and two daughters in Afghanistan.¹⁴ Nearly five years later, after a number of related legal battles regarding issues such as habeas corpus and the legitimacy of United States military commissions,¹⁵ the United States government, on May 10, 2007, charged Hamdan with providing material support for terrorism in violation of 10 U.S.C. § 950v(b)(25) and conspiracy to commit various terrorist acts in violation of 10 U.S.C. § 950v(b)(28).¹⁶ Both offenses fall under the 2006 Military Commissions Act (MCA), which Congress passed "[t]o authorize trial by military commission for violations of the law of war."¹⁷ The MCA was later augmented by the Manual for Military Commissions,

7. Defense Motion to Dismiss for Lack of Personal Jurisdiction at 1–3, *United States v. Hamdan* (Oct. 1, 2004), available at <http://www.defenselink.mil/news/Oct2004/d20041007lack.pdf>.

8. *Id.* at 1.

9. *Hamdan v. Rumsfeld*, 548 U.S. 557, 566 (2006); William Glaberson, *Lawyer Suggests Detainee Aided U.S. in Afghanistan*, N.Y. TIMES, Aug. 7, 2008, at A12; Human Rights First, *The Case of Salim Ahmed Hamdan*, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_hamdan.htm (last visited Apr. 18, 2010); *Profile: Salim Hamdan*, *supra* note 3.

10. Defense Motion to Dismiss for Lack of Personal Jurisdiction, *supra* note 7, at 3.

11. See On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction at 4, *United States v. Hamdan* (Dec. 19, 2007), available at <http://www.defenselink.mil/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf>.

12. See *id.*

13. *Hamdan*, 548 U.S. at 566; Human Rights First, *supra* note 9; *Profile: Salim Hamdan*, *supra* note 3.

14. *Profile: Salim Hamdan*, *supra* note 3.

15. *Boumediene v. Bush*, 128 S. Ct. 2229, 2262 (2008); *Hamdan*, 548 U.S. at 595; Malandain, *supra* note 1.

16. Charge Sheet, *supra* note 1, at 3–4; Human Rights First, *supra* note 9.

17. Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2600 (2006); see Sean Riordan, *Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006*, 23 TOURO L. REV. 575, 602 (2007); see also David Weissbrodt, *Fair Trials? The Manual for Military Commissions in Light of Common Article 3 and Other International Law*, 26 LAW & INEQ. 353, 353 (2008).

published in January of 2007, to govern the commission proceedings.¹⁸

In August 2008, a military commission established for the express purpose of trying Hamdan acquitted him of the conspiracy charge but convicted him of providing material support for terrorism.¹⁹ Hamdan, deemed an “unlawful enemy combatant” by a separate tribunal in 2007,²⁰ was the first²¹ unlawful enemy combatant captured in the United States’ “war on terror” to face a trial since 2001, when the Guantanamo Bay prison opened.²² The trial was also the United States’ first war crimes tribunal since World War II.²³ Another aspect of the proceedings distinguished the trial, as well: unlike previous defendants prosecuted for providing material support under United States domestic law, the government convicted Hamdan of providing

18. U.S. DEP’T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS II-1 (2007), available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf>; Weissbrodt, *supra* note 17, at 378 (noting that the Manual for Military Commissions establishes guidelines for trials of “unlawful enemy combatants” detained at Guantanamo Bay, Cuba and at other detention sites operated by the United States).

19. Glaberson, *Panel Convicts*, *supra* note 3; Markon & White, *supra* note 2; *Hamdan Sentenced by Military Commission*, AMNESTY INT’L, Aug. 8, 2008, <http://www.amnesty.org/en/news-and-updates/news/hamdan-sentenced-military-commission-20080808>. Information regarding certain aspects of the trial is not allowed to be published, released or disclosed, and the court’s opinion has not been made public. See *Observing Guantánamo’s Military Commission Hearings (Part 2)*, AMNESTY INT’L, Aug. 6, 2008, <http://www.amnesty.org/en/news-and-updates/observing-guantanamos-military-commission-hearings-part-2-20080806>.

20. Human Rights First, *supra* note 9; see Weissbrodt, *supra* note 17, at 378 (noting that the Combatant Status Review Tribunal process determines unlawful enemy combatant status).

21. The United States government indicted Australian national David Hicks for providing material support for terrorism in March of 2007; Hicks was the first suspected terrorist to face prosecution under the Manual for Military Commissions, enacted in January of 2007, in accordance with the Military Commissions Act. Daniel Graeber, *Australian David Hicks Charged with War Crimes*, FOREIGN POL’Y ASS’N, Mar. 7, 2007, <http://warcrimes.foreignpolicyblogs.com/2007/03/07/australian-david-hicks-charged-with-war-crimes>. However, Hicks pleaded guilty at a hearing before his military commission began. Malandain, *supra* note 1. The United States held him for five years without trial before he confessed that he provided material support for terrorism. *Id.* The admission was part of an agreement that allowed him to return to Australia, where he served the rest of his sentence. *Id.*

22. Malandain, *supra* note 1.

23. Neil A. Lewis, *First War-Crimes Case Opens at Guantánamo Base*, N.Y. TIMES, Aug. 25, 2004, at A14; Markon & White, *supra* note 2; Eric Umansky, *Was Hamdan’s Chauffeur Really a War Crime?*, PROPUBLICA, Aug. 7, 2008, <http://www.propublica.org/article/was-hamdans-chauffeur-really-a-war-crime-807>.

material support for terrorism as a war crime,²⁴ thus allegedly making him eligible for trial by military commission.²⁵

However, one may have difficulty finding material support of terrorism—or material support for any other crime—categorized as a war crime outside the United States,²⁶ and, arguably, providing material support for terrorism was not considered a war crime within the United States until the passage of the MCA in 2006.²⁷ The United States has had the legal authority to punish aiders and abettors of domestic offenses for years²⁸ and has had material support laws regarding terrorism on the books since the mid-1990s;²⁹ however, the MCA elevated such a violation to the level of “war crime”—which has significant implications for the accused.³⁰ Defendants charged with war crimes, such as Hamdan, may be subject to military commissions or tribunals absent the same protections available to defendants tried by courts established according to Article III of the United States Constitution. Defendants tried via military commission

24. Umansky, *supra* note 23.

25. 10 U.S.C. § 950v(b)(25)(A) (2006); *see* Hamdan v. Rumsfeld, 548 U.S. 557, 597–98 (2006); Derek Jinks, *September 11 and the Laws of War*, 28 YALE J. INT’L L. 1, 4 (2003) (citing Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001)); Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW., Mar. 2002, at 19, 20, 26.

26. *See* Weissbrodt, *supra* note 17, at 364 (“[T]he [Military Commissions Act] adds new crimes to those previously unknown in international law.”); Glaberson, *Panel Convicts*, *supra* note 3; Daniel Graeber, *Hamdan Sentenced*, FOREIGN POL’Y ASS’N, Aug. 7, 2008, <http://warcrimes.foreignpolicyblogs.com/2008/08/07/hamdan-sentenced> (reporting that though providing material support for terrorism is “not considered a war crime outside the United States, Congress in 2006 . . . amended military code to include such a charge”).

27. Umansky, *supra* note 23 (reporting that material support for terrorism “was first labeled a war crime by the controversial Military Commissions Act of 2006”).

28. 18 U.S.C. § 2(a) (2006) (“Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.”).

29. Umansky, *supra* note 23; *see* 18 U.S.C. § 832(a) (2006) (“Whoever, within the United States or subject to the jurisdiction of the United States, willfully participates in or knowingly provides material support or resources . . . to a nuclear weapons program or other weapons of mass destruction program of a foreign terrorist power, or attempts or conspires to do so, shall be imprisoned for not more than 20 years.”); 18 U.S.C. § 2339B(a)(1) (2006) (“Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both . . .”).

30. *See* MuhammedAlly, *supra* note 2 (“[T]he Bush administration has changed the rhetoric in order to prosecute terrorism from a military rather than criminal approach, thereby giving the government the flexibility to use deadly force and detention powers typically not available in a law enforcement framework.”).

do not even receive the procedural rights granted to defendants tried by courts-martial.³¹

Thus, the question arises: in light of the Military Commissions Act and the military tribunal convicting Hamdan of providing material support for terrorism,³² is providing material support for terrorism legitimately categorized as a war crime, for which the United States may try a defendant by military tribunal, or should it exclusively be considered a crime under domestic law, thus allowing Hamdan to be tried in a court permitting more procedural protections? War crimes and other criminal acts typically become violations of international law based on either treaties binding the nations in question or on customary practice within the international community.³³ More specifically, a “war crime” involves an action “that violates international laws governing the conduct of international armed conflicts;”³⁴ thus, a government’s unilateral identification of a specific act as a violation of the law of war does not actually lift the act in question to the level of “war crime.”³⁵ How a given crime is classified also largely determines the type of court in which a defendant may be tried.³⁶

By analyzing the above considerations, this Note addresses the legitimacy of classifying material support of terrorism as a war crime and, in light of that analysis, examines the proper type of court that should try this kind of defendant. This Note argues that the United States government may not legitimately classify material support of

31. See Military Commissions Act of 2006, 10 U.S.C. § 949a (2006); *Whelchel v. McDonald*, 340 U.S. 122, 127 (1950); MacDonnell, *supra* note 25, at 32; MuhammedAlly, *supra* note 2 (“The military commission rules, unlike those in federal civilian courts and the court-martial system, allow for evidence obtained under coercive means to be admitted [under certain circumstances].”).

32. Glaberson, *Panel Convicts*, *supra* note 3.

33. See Rome Statute of the International Criminal Court art. 21, July 17, 1998, 2187 U.N.T.S. 3; Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1031; BURNS H. WESTON, RICHARD A. FALK, HILARY CHARLESWORTH & ANDREW L. STRAUSS, *INTERNATIONAL LAW AND WORLD ORDER* 81 (Thomson/West 2006) (1980) (noting that though Article 38 applies to the International Court of Justice it also defines the “legal authority . . . throughout the international system”).

34. BLACK’S LAW DICTIONARY 1614 (8th ed. 2004) (also noting that examples of war crimes include “killing of hostages, abuse of civilians in occupied territories, abuse of prisoners of war, and devastation that is not justified by military necessity”; “material support” is not listed).

35. See *id.*

36. See 10 U.S.C. § 950v(b) (2006).

terrorism as a war crime and that the United States therefore improperly tried Hamdan by military commission.³⁷ Part I reviews the background and history of material support and military commissions.³⁸ Part II analyzes both material support for terrorism and the use of military commissions in light of the relevant factors.³⁹ Part III contends that material support for terrorism is not a war crime and that defendants who have not committed war crimes should not be subjected to military commissions.⁴⁰

I. BACKGROUND

A. Overview Regarding the Criminalization of Material Support of Terrorism Within the United States (and the Lack Thereof Elsewhere)

The United States first passed laws criminalizing the provision of material support for foreign terrorist organizations in 1993; those laws included extraterritorial application to reach alien defendants detained abroad, such as Hamdan.⁴¹ In 2001, after the terrorist attacks of September 11, Congress passed the USA PATRIOT Act, which broadened the definition of “material support” as well as “terrorism” to include domestic acts.⁴² The United States has prosecuted numerous defendants under these federal criminal laws,⁴³ and the

37. See discussion *infra* Part III.

38. See discussion *infra* Part I.

39. See discussion *infra* Part II.

40. See discussion *infra* Part III.

41. 18 U.S.C. § 2339B(d) (2006); Ruling on Motion to Dismiss (Ex Post Facto) at 3, *United States v. Hamdan* (July 14, 2008), available at <http://howappealing.law.com/HamdanRulingMotionsToDismissExPostFacto.pdf>.

42. USA PATRIOT Act, Pub. L. No. 107-56, §§ 802, 805, 115 Stat. 272 (2001); *Part B: Increasing Government's Ability to Prosecute Acts that Support Terrorism*, DUKE L., CIV. LIBERTIES ONLINE, <http://www.law.duke.edu/publiclaw/civil/index.php?action=showtopic&topicid=11> (last visited Oct. 27, 2009) (“Section 805 . . . expands the definition of the crime of giving of material support . . .”).

43. MuhammedAlly, *supra* note 2; see, e.g., *United States v. Chandia*, 514 F.3d 365, 369 (4th Cir. 2008) (affirming the conviction of the defendant on three counts of providing material support to terrorists or terrorist organizations in violation of 18 U.S.C. §§ 2339A and 2339B); *United States v. Afshari*, 426 F.3d 1150, 1152–53 (9th Cir. 2005) (upholding the constitutionality of the indictment charge against the defendant and others under 18 U.S.C. § 2339B for “knowingly and willfully” conspiring to provide material support to the Mujahedin-e Khalq (MEK), a designated terrorist organization); *United States v. Taleb-Jedi*, 566 F. Supp. 2d 157, 160 (E.D.N.Y. 2008) (denying the defendant’s motion to dismiss after the defendant, Zeinab Taleb-Jedi, was charged in a one-count

government could have tried Hamdan under these same laws in federal court as well.⁴⁴ However, in 2006 the United States categorized material support of terrorism as a war crime with Congress's passage of the Military Commissions Act (MCA), codified in Title 10 of the United States Code.⁴⁵ By charging Hamdan with violations of the MCA rather than violations of domestic law, the United States government lifted Hamdan from the realm of Article III federal courts, where defendants facing violations of material support laws had been tried in the past,⁴⁶ and deposited him into a military commission lacking certain procedural and other protections.⁴⁷ Military commissions, for example, may allow hearsay evidence and deposed testimony that is inadmissible in Article III courts or even in military courts-martial.⁴⁸ In addition, commissions may allow the prosecution to hide the identity of the defendant's accusers.⁴⁹

Long before terrorism became the international hue and cry of today, however, the United States government was prosecuting defendants for offering material support to other endeavors deemed criminal—and it maintained that it did so with a nod of approval from the international community.⁵⁰ According to an 1894 congressional bill, “rebels” during the American Civil War that had been captured and charged with furnishing the enemy with arms and provisions, among other contraband, could face capital punishment per “the laws

indictment with providing material support to a designated foreign terrorist organization in violation of 18 U.S.C. § 2339B).

44. Human Rights Watch, *Questions and Answers on Hamdan v. Rumsfeld*, <http://www.hrw.org/english/docs/2006/06/23/usdom13616.htm> (last visited Apr. 18, 2010); MuhammedAlly, *supra* note 2.

45. Military Commissions Act of 2006, Pub. L. No. 109-366, § 950v(b)(25), 120 Stat. 2600, 2630 (2006) (codified at 10 U.S.C. § 950v(b)(25) (2006)); Umansky, *supra* note 23.

46. MuhammedAlly, *supra* note 2.

47. MacDonnell, *supra* note 25, at 32; MuhammedAlly, *supra* note 2.

48. MacDonnell, *supra* note 25, at 32. Compare 10 U.S.C. § 949a(b)(2)(E)(i) (2006), with FED. R. EVID. 802.

49. Compare U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . .”), with *The United States v. the Driver*, N.Y. TIMES, Aug. 10, 2008, at WK9 (reporting that Hamdan’s tribunal was “marked by secret testimony by secret witnesses”).

50. Ruling on Motion to Dismiss, *supra* note 41, at 4 (citing H.R. DOC. NO. 55-65, 234 (1894)).

of war in every civilized country.”⁵¹ William Winthrop, a United States Army colonel during the same war, also wrote that those persons offering support to unlawful combatants were “liable to be shot, imprisoned, or banished, either summarily where their guilt was clear or upon trial and conviction by a military commission.”⁵²

Regardless of whether United States government practice during the waning years of the nineteenth century was indicative of international law norms,⁵³ today the United States is unique in that it defines material support for terrorism as a war crime.⁵⁴ The international community has by and large vehemently condemned terrorism, and though various United Nations resolutions and other provisions require states to criminalize it,⁵⁵ no such requirements regarding material support of terrorism exist.⁵⁶ Indeed, the provision of material support for terrorism is not listed as an offense in an international treaty or in any other source defining the laws of war.⁵⁷

B. Overview Regarding the Use (and Non-use) of Military Commissions and Other Tribunals Within the United States

Numerous procedural differences exist between military commissions, or tribunals, and Article III courts,⁵⁸ and significant

51. *Id.*

52. *Id.* (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 784 (2d ed. 1920)).

53. *See Hamdan v. Rumsfeld*, 548 U.S. 557, 596 n.27 (2006) (noting that military commissions established during the Civil War “operated as both martial law or military government tribunals and law-of-war commissions” that tried both ordinary and war crimes; thus, the “Civil War precedents must therefore be considered with caution”).

54. Ruling on Motion to Dismiss, *supra* note 41, at 3; Graeber, *supra* note 26.

55. Ruling on Motion to Dismiss, *supra* note 41, at 3 (specifically mentioning United Nations Security Council Resolutions 1189 and 1373); EDWARD M. WISE, ELLEN S. PODGOR & ROGER S. CLARK, *INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS* 209 (2d ed. 2004) (listing eleven anti-terrorism treaties).

56. Ruling on Motion to Dismiss, *supra* note 41, at 3. Treaties that define offenses within the law of war do not list material support of terrorism as a war crime. *Id.* These treaties include the Hague Conventions, the Rome Statute of the International Criminal Court, the Statute for the International Criminal Tribunal for the Former Yugoslavia, the Statute for the International Criminal Tribunal for Rwanda, and the Statute for the Special Court for Sierra Leone. *Id.*

57. *Id.* at 5 (noting that the United States government conceded this point).

58. *See Whelchel v. McDonald*, 340 U.S. 122, 127 (1950) (“[T]he right to trial by jury guaranteed by the Sixth Amendment is not applicable to trials by courts-martial or military commissions.”); *Ex parte Quirin*, 317 U.S. 1, 24 (1942) (noting that petitioners, who were members of the German military to be tried before a military tribunal after they were captured on United States soil, sought a trial in the civil

procedural differences also arise between military commissions and courts-martial,⁵⁹ both of which the United States has used since its founding.⁶⁰ In addition to exercising jurisdiction over members of the United States military, courts-martial, which allow more procedural protections than military commissions,⁶¹ may exercise jurisdiction over “any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war” and violations of the law of war.⁶² Jurisdiction regarding military commissions has in the past been more difficult to ascertain, however, because until the passage of the MCA jurisdiction for military commissions had not been determined by statute.⁶³

Historically, the United States has used and recognized three types of military commissions: martial law courts, military government courts, and war courts.⁶⁴ Within this last category, which is likely the only category applicable to Hamdan,⁶⁵ the government may use military commissions to try defendants who have violated a law of war,⁶⁶ including unlawful enemy combatants.⁶⁷ But for reasons set

courts “with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses” rather than face trial by military commission, which did not offer such protections); MuhammedAlly, *supra* note 2 (“[M]ilitary commission rules, unlike those in federal civilian courts and the court-martial system, allow for evidence obtained under coercive means to be admitted provided that the evidence is reliable and is in the interest of justice.”).

59. MacDonnell, *supra* note 25, at 19, 32 (noting that there are “substantial differences” that exist between military commissions and courts-martial and that the Manual for Courts-Martial “placed restrictions on the use of hearsay evidence and deposed testimony; military commissions were not bound by these restrictions” (citing *In re Yamashita*, 327 U.S. 1, 20–21 (1946))); MuhammedAlly, *supra* note 2.

60. MacDonnell, *supra* note 25, at 19 (noting that though courts-martial and military commissions exist for different purposes, both courts-martial and military commissions have existed since the beginning of the United States).

61. *Loving v. United States*, 517 U.S. 748, 768 (1996) (noting that Congress was “confident in the procedural protections” of the Uniform Code of Military Justice, and thus gave to courts-martial jurisdiction regarding the crime of murder); MacDonnell, *supra* note 25, at 32.

62. MacDonnell, *supra* note 25, at 20.

63. Military Commissions Act of 2006, 10 U.S.C. § 948d (2006); MacDonnell, *supra* note 25, at 26.

64. *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–96 (2006); MacDonnell, *supra* note 25, at 26 (“Customary international law, Supreme Court precedent, and U.S. history indicate that three distinct types of military commissions have been used: martial law courts, military government courts, and war courts.”).

65. *Hamdan*, 548 U.S. at 563 (“Of the three sorts of military commissions used historically, the law-of-war type used in *Quirin* and other cases is the only model available to try Hamdan.”).

66. *Id.* at 606 (noting that military commissions convened as war courts grew from the “need to dispense swift justice, often in the form of execution, to illegal belligerents captured on the battlefield”);

forth below, even this type of military commission does not apply to Hamdan.⁶⁸

II. ANALYSIS

A. Defining War Crimes

1. Treaties and Statutes Indicative of War Crimes⁶⁹

a. The Charter of the International Military Tribunal at Nuremberg

Modern war crimes are primarily based on precedents set by the Nuremberg Trial, at which the Allied Powers⁷⁰ prosecuted German leaders for crimes committed during the Second World War.⁷¹ The Charter of the Nuremberg Tribunal specifically lists crimes against peace, war crimes, and crimes against humanity as offenses falling within its jurisdiction.⁷² The charter defines war crimes as “violations of the laws or customs of war” and lists several examples of such breaches, including the murder of civilians and the mistreatment of

MacDonnell, *supra* note 25, at 20 (“Military commissions are a recognized method of trying those who violate the law of war”); *id.* at 26 (“[W]ar courts are established by military commanders strictly for the purpose of trying violations of the laws of war.”).

67. *Hamdan*, 548 U.S. at 596 n.27 (“[C]ommissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war.”); *Ex parte Quirin*, 317 U.S. 1, 31 (1942) (“Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals *for acts which render their belligerency unlawful*.” (emphasis added)).

68. See discussion *infra* Part III.

69. In the court’s Ruling on the Motion to Dismiss, *United States v. Hamdan*, the opinion lists the Hague Conventions, the Rome Statute of the International Criminal Court, and the International Criminal Tribunals for Rwanda, Sierra Leone and the former Yugoslavia as those treaties or statutes that define the law of war. Section II.A of this Note adds to that list the Nuremberg Charter; Section II.B addresses the Hague Conventions. Ruling on Motion to Dismiss, *supra* note 41, at 3.

70. The Allied Powers were the nations aligned against the Axis Powers during World War II. *World War II*, 12 THE NEW ENCYCLOPÆDIA BRITANNICA 758 (15th ed. 1992).

71. Frederick K. Cox International Law Center, War Crimes Research Portal, http://law.case.edu/War-Crimes-Research-Portal/res_gd.asp (last visited Oct. 27, 2009).

72. Charter of the International Military Tribunal art. 6, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279.

prisoners of war.⁷³ Although the charter notes that the list of war crimes is not intended to be exhaustive,⁷⁴ prosecutors at Nuremberg never charged any defendant with providing material support of any crime, including terrorism.⁷⁵

b. Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia (ICTY)

The ICTY was established in 1993 to address atrocities of the Slobodan Milosevic regime⁷⁶ and serves as “the first judicial affirmation of international criminality and individual responsibility for violations of international humanitarian law since Nuremberg.”⁷⁷ Article 3 of the statute gives the tribunal jurisdiction over “[v]iolations of the laws or customs of war” and, while not proffering an exhaustive list of such offenses, it does offer examples such as “wanton destruction of cities” and “employment of poisonous weapons.”⁷⁸ Material support for terrorism or any other crime, however, is not listed.⁷⁹

73. *Id.* (“[V]iolations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.”).

74. *Id.*

75. The Nuremberg Trials: Indictments, <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html> (last visited Apr. 18, 2010) (listing war crimes indictments as “the more ‘traditional’ violations of the law of war including treatment of prisoners of war, slave labor, and use of outlaw[ed] weapons”).

76. *See* Statute of the International Tribunal art. 1, May 25, 1993, 32 I.L.M. 1192 [hereinafter ICTY Statute].

77. WESTON ET AL., *supra* note 33, at 210.

78. ICTY Statute, *supra* note 76, art. 3.

79. *Id.*

c. Statute for the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (ICTR)

The United Nations Security Council created the ICTR in the aftermath of atrocities committed in Rwanda during the early 1990s.⁸⁰ The statute establishing the tribunal does not mention war crimes specifically; however, Article 4 grants the power to prosecute “serious violations” of the Geneva Conventions’ Article 3,⁸¹ which is common to all four of the 1949 conventions and addresses armed conflict not of an international character.⁸² The Rome Statute, discussed below, classifies such violations as war crimes.⁸³ These crimes include torture and the taking of hostages, but they do not include providing material support.⁸⁴

d. Rome Statute of the International Criminal Court (ICC)

Based on its ad hoc predecessors ICTY and ICTR,⁸⁵ sixty ratifying countries established the ICC in 2002⁸⁶ to try “the most serious crimes of international concern.”⁸⁷ Article 8 grants the court jurisdiction over war crimes and provides a comprehensive list of covered offenses.⁸⁸ These crimes include the improper use of a flag of truce, pillaging a town, rape, and grave breaches of the Geneva

80. Statute for the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda, S.C. Res. 955, art. 1, U.N. Doc. S/RES/508 (Nov. 8, 1994), available at <http://www.un.org/icttr/english/Resolutions/955e.htm> [hereinafter ICTR Statute].

81. *Id.* art. 4.

82. WISE ET AL., *supra* note 55, at 813 (“Common Article 3, which appears in each of the four Geneva Conventions, applies in cases of ‘armed conflict not of an international character.’”).

83. Rome Statute of the International Criminal Court, *supra* note 33, art. 8.

84. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 31 [hereinafter Geneva Convention No. I].

85. WESTON ET AL., *supra* note 33, at 4.

86. Coalition for the International Criminal Court, History of the ICC, <http://www.iccnw.org/?mod=icchistory> (last visited Apr. 18, 2010).

87. Rome Statute of the International Criminal Court, *supra* note 33, art. 1.

88. *Id.* art. 8.

Conventions.⁸⁹ Neither the Rome Statute nor the Geneva Conventions, however, mention material support.⁹⁰

e. Statute of the Special Court for Sierra Leone

The United Nations and Sierra Leone's government established the Special Court to try individuals responsible for violations of international humanitarian law committed in Sierra Leone after November 1996.⁹¹ The court's statute grants jurisdiction over crimes against humanity, violations of Article 3 common to the Geneva Conventions, and other serious violations of international humanitarian law.⁹² Such breaches include acts of terrorism, murder, and the use of child soldiers. Material support, however, is not included.⁹³

2. Customary International Law as Indicative of War Crimes

Customary international law is that which develops from the customary practice of states or countries where such practices are accepted as legally binding.⁹⁴ It is a principal source of law for the international system⁹⁵ and was used to help prosecute German Nazi leaders after World War II.⁹⁶ Evidence of state practice that leads to custom includes treaties, policy statements, state documents,

89. *Id.*

90. *Id.*; Geneva Convention No. I, *supra* note 84; 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.

91. Special Court for Sierra Leone, <http://www.sc-sl.org/> (last visited Apr. 18, 2010).

92. Statute of the Special Court for Sierra Leone arts. 2–4, Aug. 14, 2000, 2178 U.N.T.S. 138, 145.

93. *Id.*

94. BLACK'S LAW DICTIONARY 835 (8th ed. 2004); WESTON ET AL., *supra* note 33, at 106; WISE ET AL., *supra* note 55, at 37 ("The practice of States is the conclusive determinant in the creation of international law . . ."); Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional Yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313, 319 (2007) ("Customary international law comprises practices and customs that States view as obligatory and that a preponderance of States accept and view as obligatory in a uniform and consistent fashion.").

95. BLACK'S LAW DICTIONARY 835 (8th ed. 2004).

96. WESTON ET AL., *supra* note 33, at 106.

legislation, and United Nations resolutions.⁹⁷ Regarding war crimes, Hague Convention IV of 1907 comprises the basic tenets of the rules of land warfare, and though no provisions of the text actually use the term “war crime,” scholars and jurists generally consider the convention to be the fundamental document that expresses what is allowed and what is forbidden within the customary laws of war.⁹⁸ Although the convention formally prohibits acts such as pillaging, the text does not mention material support.⁹⁹

Other sources indicative of customary law also fail to allude to the provision of material support as a war crime.¹⁰⁰ Although in general treaties are technically binding only on signatories,¹⁰¹ they may nonetheless reflect and give rise to customary law.¹⁰² However, no treaty that addresses war crimes lists “material support.”¹⁰³ The Nuremberg Charter, which specifically addresses violations of the “customs of war,” does not list material support;¹⁰⁴ such principles of Nuremberg have since been confirmed as indicative of custom, as

97. *Id.* at 109, 138; see JENNIFER ELSEA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS 6 (2001), available at <http://www.au.af.mil/au/awc/awcgate/crs/rl31191.pdf> (“Sources of the law of war include customary principles and rules of international law, international agreements, judicial decisions by both national and international tribunals, national manuals of military law, scholarly treatises, and resolutions of various international bodies. Customary principles of international law apply universally.”).

98. WISE ET AL., *supra* note 55, at 812 (“The Regulations attached to Hague Convention IV of 1907 still constitute the basic statement of the rules of land warfare. These are now generally regarded as amounting to rules of customary international law.”); *Judgement: The Law Relating to War Crimes and Crimes Against Humanity*, YALE L. SCH., AVALON PROJECT, 2008, <http://avalon.law.yale.edu/int/judlawre.asp> (“[B]y 1939 these rules laid down in the [Hague] Convention [of 1907] were recognised by all civilised nations, and were regarded as being declaratory of the laws and customs of war . . .”).

99. Hague Convention No. IV Respecting the Laws and Customs of War on Land art. 47, Oct. 18, 1907, U.S.T.S. 539, 36 Stat. 2277.

100. Ruling on Motion to Dismiss, *supra* note 41, at 3; JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS, THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 12 (2007), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (noting that defining “material support for terrorism” [as a war crime] does not appear to be supported by historical precedent”).

101. WESTON ET AL., *supra* note 33, at 86 (citing Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331).

102. *Id.* at 137; ELSEA, *supra* note 97, at 6 (“Treaties bind only those parties to them, unless they are seen to codify *jus cogens* principles, that is, have attained the common acceptance of nations.”).

103. Ruling on Motion to Dismiss, *supra* note 41, at 3.

104. Charter of the International Military Tribunal, *supra* note 72, art. 6.

evidenced by their adoption by the United Nations International Law Commission.¹⁰⁵ A United Nations Special Rapporteur went so far as to conclude that providing material support for terrorism goes “beyond offences under the law of war,”¹⁰⁶ and even a congressional research service report has found that defining material support of terrorism as a war crime “does not appear to be supported by historical precedent.”¹⁰⁷ Additionally, the United States’ own War Crimes Act does not list material support as a war crime nor is its definition of “war crime” broad enough to include material support.¹⁰⁸

B. Finding the Appropriate Court: Military Commission, Court-Martial, or Article III Court?

1. Procedural Protections

The United States government uses three types of military commissions for three different situations.¹⁰⁹ Military commissions are used as (1) martial law courts, which serve as substitutes for civilian courts at times and in places where martial law has been declared and military forces have displaced the civil government; (2) military government courts, which are usually established outside the United States as part of a provisional military government controlling occupied enemy territory or territory regained from an enemy where

105. WESTON ET AL., *supra* note 33, at 153.

106. Ruling on Motion to Dismiss, *supra* note 41, at 3 (quoting *Report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism*, 12, U.N. Doc. A/HRC/6/17/Add.3 (Nov. 22, 2007)).

107. *Id.* (quoting ELSEA, *supra* note 100, at 12).

108. 18 U.S.C. § 2441(c) (2006) (defining “war crime” as any conduct “(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party; (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907; (3) which constitutes a grave breach of common Article 3 . . . when committed in the context of and in association with an armed conflict not of an international character; or (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians”).

109. *Hamdan v. Rumsfeld*, 548 U.S. 557, 595–96 (2006); MacDonnell, *supra* note 25, at 26.

a civilian government is not functioning; and (3) war courts, which military commanders use during a time of war to try enemies who have violated the laws of war.¹¹⁰

Article III of the United States Constitution, which serves as the foundation for the civilian court system and provides guarantees such as jury trials for criminal defendants, does not apply to courts-martial or military commissions.¹¹¹ And the Uniform Code of Military Justice (UCMJ), which governs courts-martial, does not necessarily apply to military commissions. Indeed, the MCA expressly states that the UCMJ does not apply to military commissions except where the MCA says otherwise.¹¹² The MCA also specifically exempts military commissions from UCMJ Articles 10, 31, and 32 (regarding speedy trials, warnings against self-incrimination, and pretrial investigations, respectively).¹¹³ Additionally, other procedural protections may be less stringent in military commissions.¹¹⁴ For example, according to Military Commission Order No. 1, which the Bush administration issued in March 2002 and amended in 2005,¹¹⁵ a defendant can be tried for the same charge twice as long as the first final verdict was not approved by the president or secretary of defense.¹¹⁶ Courts-

110. *Hamdan*, 548 U.S. at 595–96; Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249, 250 (2002) (“[Military commissions] have been used for three basic purposes: to try enemy belligerents for violations of the laws of war; to administer justice in territory occupied by the United States; and to replace civilian courts where martial law has been declared.”); MacDonnell, *supra* note 25, at 26.

111. See U.S. CONST. art. III, § 2, cl. 3; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 576 (2007).

112. Military Commissions Act of 2006, 10 U.S.C. § 948(b) (2006); ELSEA, *supra* note 100, at 6; see Center for Constitutional Rights, Fact Sheet: Military Commissions, <http://ccrjustice.org/learn-more/faqs/factsheet:-military-commissions> (last visited Apr. 18, 2010).

113. ELSEA, *supra* note 100, at 6; Center for Constitutional Rights, *supra* note 112 (“In addition to the jurisdiction-stripping provisions . . . , the MCA authorized the creation of military commissions with procedures deviating from the traditional rules of the Uniform Code of Military Justice (UCMJ). Among other shortcomings, the MCA rejects the right to a speedy trial, allows a trial to continue in the absence of the accused, delegates the procedure for appointing military judges to the discretion of the Secretary of Defense, allows for the introduction of coerced evidence at hearings, permits the introduction of hearsay and evidence obtained without a warrant, and denies the accused full access to exculpatory evidence.”).

114. ELSEA, *supra* note 100, at 6; see *Hamdan*, 548 U.S. at 567 (noting that the procedures adopted to try Hamdan in an earlier military commission did not allow the defendant “to see and hear the evidence against him”).

115. ELSEA, *supra* note 100, at 3.

116. *Id.* at 35.

martial, however, offer greater protections against such double jeopardy by mandating that a defendant cannot be tried a second time for a crime once the prosecution has introduced evidence at trial.¹¹⁷ Courts-martial and civilian courts also offer hearsay and other evidentiary¹¹⁸ rules that are friendlier to defendants.¹¹⁹

2. Jurisdiction

a. Article III Courts

Regarding cases that involve an international component, domestic civilian courts may exercise jurisdiction based on one of the following five principles: (1) nationality, where the offender is a national of the prosecuting country; (2) territorial, where a crime occurs in or affects the prosecuting country; (3) protective, where a crime affects a state's vital interests, governmental integrity, or security; (4) passive personality, where the victim of a crime is a national of the prosecuting state; and (5) universality, which involves crimes against international order.¹²⁰ The United States Congress routinely passes legislation with extraterritorial application based on one or more of these principles.¹²¹

b. Courts-Martial

Defendants subject to courts-martial include members of the armed forces, prisoners of war in military custody, civilian employees accompanying the military during a declared war or contingency

117. *Id.*

118. *Id.* at 23 ("Supporters of the use of military commissions to try suspected terrorists have viewed the possibility of employing evidentiary standards that vary from those used in federal courts or in military courts-martial as a significant advantage over those courts.").

119. *Id.* at 27, 28 ("In contrast to the relatively restrictive rule applied in courts-martial, where hearsay is not admissible except as permitted by a lengthy set of exceptions, the military commission rules provide that hearsay is admissible on the same basis as any other form of evidence except as provided by these rules or an act of Congress. The rules do not set forth any prohibitions with respect to hearsay evidence." (emphasis in original)).

120. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987); WISE ET AL., *supra* note 55, at 84–105.

121. *See generally* WISE ET AL., *supra* note 55, at 84–105. *See, e.g.*, 18 U.S.C. § 2339B (2006).

operation, lawful enemy combatants¹²² who violate the laws of war, and “persons within an area leased by or otherwise reserved or acquired for the use of the United States.”¹²³ Defendants “subject to military tribunal jurisdiction under the law of war” may also face a court-martial.¹²⁴ Additionally, courts-martial have jurisdiction over “[a]ny offenses made punishable by the UCMJ” as well as “offenses subject to trial by military tribunal under the law of war.”¹²⁵

c. *Military Commissions*

According to the MCA, military tribunals may exercise jurisdiction over any alien unlawful combatant, defined as either “a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents,”¹²⁶ or a person who has been determined to be an unlawful enemy combatant for other reasons by certain tribunals.¹²⁷ The MCA also grants military commissions jurisdiction over “any offense made punishable by [the MCA] or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.”¹²⁸ Such offenses, according to the MCA, include murder of protected persons, attacking civilians, pillaging, taking hostages, employing poison or similar weapons, torture, improperly using a flag of truce, rape, and providing material support for terrorism.¹²⁹ Accordingly, the MCA indicates that a military commission has personal jurisdiction over a defendant, such as Hamdan, who has “materially supported hostilities against the United

122. “Lawful enemy combatants” is defined as “(A) a member of the regular forces of a State party engaged in hostilities against the United States; (B) a member of a militia, volunteer corps, or organized resistance movement belonging to a State party engaged in such hostilities, which are under responsible command, wear a fixed distinctive sign recognizable at a distance, carry their arms openly, and abide by the law of war; or (C) a member of a regular armed force who professes allegiance to a government engaged in such hostilities, but not recognized by the United States.” 10 U.S.C. § 948a(2) (2006).

123. *Id.* § 802(a)(12).

124. *Id.* § 818; ELSEA, *supra* note 100, at 43.

125. ELSEA, *supra* note 100, at 44 (referencing 10 U.S.C. § 818).

126. 10 U.S.C. § 948a.

127. *Id.* § 948d(c); ELSEA, *supra* note 100, at 43.

128. 10 U.S.C. § 948d(a); ELSEA, *supra* note 100, at 44.

129. ELSEA, *supra* note 100, at 44.

States,”¹³⁰ even though such an act does not violate international law.¹³¹

However, historically, the jurisdiction of military commissions established as war courts has been limited to trying war crimes.¹³² In *Hamdan v. Rumsfeld*, the Supreme Court listed four preconditions for a military tribunal “of the type convened to try Hamdan”¹³³ to gain jurisdiction: (1) except where authorized by statute, the commission can only assume jurisdiction of offenses “committed within the field of the command of the convening commander;”¹³⁴ (2) the offense must have occurred within the timeframe of the war in question;¹³⁵ (3) jurisdiction exists only for defendants of the enemy’s army “who have been guilty of illegitimate warfare or other offences in violation of the laws of war;”¹³⁶ and (4) only two kinds of offenses may be tried: violations of the laws of war “cognizable by military tribunals only” and “[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of War.”¹³⁷

III. PROPOSAL

A. Material Support for Terrorism is Not a War Crime

Because treaties, statutes, and other sources of customary international law do not categorize material support as a war crime, the United States may not legitimately classify material support for terrorism as a war crime. No treaties or conventions that define the laws of war or their violations mention material support—including those accords the United States signed and even helped draft, such as

130. On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, *supra* note 11, at 5.

131. See discussion *infra* Part III.A.

132. *Hamdan v. Rumsfeld*, 548 U.S. 557, 596 (2006); Stephen Young, *United States Military Commissions: A Quick Guide to Available Resources*, LLRX.COM, Mar. 1, 2002, <http://www.llrx.com/features/military.htm>.

133. *Hamdan*, 548 U.S. at 597.

134. *Id.* (quoting WINTHROP, *supra* note 52, at 836).

135. *Id.* (quoting WINTHROP, *supra* note 52, at 837).

136. *Id.* at 598 (quoting WINTHROP, *supra* note 52, at 838).

137. *Id.* (quoting WINTHROP, *supra* note 52, at 839 (alteration in original)).

the Geneva Conventions and the Charter of the International Military Tribunal at Nuremberg.¹³⁸ Moreover, “material support for terrorism” does not arise in other international documents indicative of customary international law that define war crimes—including the Hague Conventions¹³⁹ and the United States’ own War Crimes Act.¹⁴⁰

Material support for terrorism simply has not slipped into the international lexicon of war crimes—and the United States may not independently pencil it in. The government readily recognizes the need to comply with international law, as it attempts to justify its classification of material support as a war crime as one that comports with international law.¹⁴¹ The government does not merely contend that it can regard whatever it likes as a violation of the laws of war; it instead argues that material support of terrorism is indeed an offense “against the law of nations.”¹⁴² As counsel for the prosecution in Hamdan’s case has conceded, however, no international treaties recognize it as such.¹⁴³

The absence of material support from the canons of international war crimes and the weight international law carries within the United States dictate that material support be excluded from the United States’ designations of war crimes, as well. Though some scholars have argued that international law should not become part of U.S. domestic law,¹⁴⁴ the Supreme Court has emphasized the role international law plays within the United States,¹⁴⁵ and the Founding

138. See discussion *supra* Part II.

139. See generally Hague Convention No. IV, *supra* note 99.

140. War Crimes Act, 18 U.S.C. § 2441(c) (2006).

141. Ruling on Motion to Dismiss, *supra* note 41, at 5 (arguing that conduct, such as material support of terrorism, which is criminalized by the MCA, “has long been recognized as a violation of the law of war”).

142. *Id.*

143. *Id.* (“The Government concedes that . . . the offense of ‘providing material support for terrorism’ does not appear in any international treaty or list of enumerated offenses . . .”).

144. John O. McGinnis & Ilya Somin, *Should International Law Be Part of Our Law?*, 59 STAN. L. REV. 1175, 1178 (2007) (“We conclude that the low quality of the political processes generating international law provides a strong argument against allowing raw international law to become part of domestic law in any respect.”).

145. The Paquete Habana, 175 U.S. 677, 700 (1900) (“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.”).

Fathers also considered the “law of nations” to be binding domestically.¹⁴⁶ Thus, there was “simply no intimation that Congress could avoid executing or violate the law of nations,”¹⁴⁷ and in 1793 Chief Justice John Jay noted that “the laws of the United States . . . includes the customary ‘law of nations.’”¹⁴⁸ Today, the Restatement of the Foreign Relations Law of the United States recognizes that “[m]atters arising under customary international law also arise under ‘the laws of the United States,’ since international law is ‘part of our law’ . . . and is federal law.”¹⁴⁹

B. Hamdan and Other Defendants Who Have Not Committed Crimes in Violation of the Law of War Should Not be Tried by Military Commissions

Because the United States has not declared martial law and Hamdan was not held in occupied enemy territory, the only type of military tribunal that might be applicable to Hamdan is the third type, in which war courts may be used to discipline enemies who violate the laws of war.¹⁵⁰ But even this category should not apply to Hamdan because material support of terrorism is not a violation of the laws of war.¹⁵¹

Nonetheless, the MCA attempts to take measures that would allow military commissions to exercise jurisdiction over defendants, such as Hamdan, for acts other than those crimes internationally

146. Jordan J. Paust, *In Their Own Words: Affirmations of the Founders, Framers, and Early Judiciary Concerning the Binding Nature of the Customary Law of Nations*, 14 U.C. DAVIS J. INT’L L. & POL’Y 205, 208 (2008) (“The understanding of the Founders and Framers that all persons are bound by the law of nations provides an important basis for recognition that the United States Congress, the executive branch, and the states are also bound by the law of nations.”).

147. *Id.* at 218.

148. *Id.* at 232 (quoting *Henfield’s Case*, 11 F. Cas. 1099, 1101 (C.C.D. Pa. 1793) (No. 6360)).

149. *Id.* at 238 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 111 (1987)).

150. *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006). In regard to a prior military commission convened to try Hamdan, the Supreme Court noted that since “Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available” to try Hamdan. *Id.*

151. MacDonnell, *supra* note 25, at 26 (regarding the three categories of military commissions); see discussion *supra* Part III.A.

recognized as war crimes.¹⁵² For example, the MCA specifically grants military commissions authority to try unlawful enemy combatants for providing material support for terrorism.¹⁵³ MCA provisions that expand the jurisdiction of commissions beyond war crimes are unconstitutional, however, and overstep international law norms as well as United States precedent that limit military commissions to trying only violations of the laws of war.¹⁵⁴

The U.S. Constitution does not expressly grant authority to establish military tribunals;¹⁵⁵ however, according to Article I, Section 8, Congress has the power to “define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations.”¹⁵⁶ Thus, in regard to military tribunals, Congress’s power to establish jurisdiction is constitutionally limited to crimes against international law,¹⁵⁷ such as war crimes. Accordingly, the United States has constitutionally used military commissions in the past to try defendants for such violations.¹⁵⁸ In regard to Hamdan, however, the government has charged him with material support of terrorism, which is not an offence against the law of nations.¹⁵⁹ Therefore, any MCA provision that allows Hamdan to be tried via military commission for material support is unconstitutional.

The MCA’s provisions that allow commissions to try crimes other than violations of the laws of war are also improper in light of United

152. ELSEA, *supra* note 100, at 44.

153. *Id.*

154. *See Hamdan*, 548 U.S. at 597–98; ELSEA, *supra* note 97, at 16 (“A military commission consists of a panel of military officers convened by military authority to try enemy belligerents on charges of a violation of the law of war.”); discussion *supra* Part III.A.

155. ELSEA, *supra* note 97, at 17 (“There is no express language in the Constitution and very little mention in the legislative authorities cited that clearly authorizes military tribunals . . .”). *See generally* U.S. CONST.

156. U.S. CONST. art. I, § 8, cl. 10.

157. *Ex parte Quirin*, 317 U.S. 1, 28 (1942) (noting that in regard to tribunals established to try German saboteurs, “Congress has explicitly provided, *so far as it may constitutionally do so*, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases” and that Congress has exercised its authority to punish offenses “against the law of nations by sanctioning, *within constitutional limitations*, the jurisdiction of military commissions to try persons for offenses” that violate the law of war (emphasis added)).

158. *Id.* at 27 (noting that the Articles of War recognize the military commission “as an appropriate tribunal for the trial and punishment of offenses against the law of war not originally tried by court martial”).

159. *See* discussion *supra* Part III.A.

States precedent. In *ex parte Quirin*, the Supreme Court noted that unlawful combatants are “subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.”¹⁶⁰ In listing potential defendants and the crimes that would make them eligible for such a tribunal, the Court mentions the “spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information” and the “enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property.”¹⁶¹ The Court does not mention defendants who provide material support.¹⁶²

Sixty-four years after the Supreme Court decided *Quirin*, the Court noted in *Hamdan v. Rumsfeld* that *Quirin* “represents the high-water mark of military power to try enemy combatants,”¹⁶³ a mark the MCA certainly surpasses with its “unprecedented and unchecked authority to the Executive Branch to label people ‘unlawful enemy combatants,’ including U.S. citizens.”¹⁶⁴ And even though Congress passed the MCA in response to the Court’s *Hamdan* decision,¹⁶⁵ the MCA pays no heed to the preconditions the Court deemed necessary for a commission to establish jurisdiction. Though the MCA may meet the first two conditions, the third, which dictates that war courts only try enemies “guilty of illegitimate warfare or other offences in violation of the laws of war,”¹⁶⁶ creates an insurmountable obstacle for the MCA because material support (a crime the MCA purports to punish via commission) does not violate the laws of war.¹⁶⁷ The MCA also falls short of meeting the fourth element because material support for terrorism, punishable in the United States under domestic

160. *Quirin*, 317 U.S. at 31 (emphasis added).

161. *Id.*

162. *Id.*

163. *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006).

164. Human Rights First, Questions and Answers About the Military Commissions Act of 2006, http://www.humanrightsfirst.org/us_law/etn/ca3/hrf-ca3-102406.html.

165. ELSEA, *supra* note 100, at 6 (“In response to the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006 . . . to grant the President express authority to convene military commissions to prosecute those fitting the definition under the MCA of ‘alien unlawful enemy combatants.’”).

166. *Hamdan*, 548 U.S. at 597–98.

167. See discussion *supra* Part III.A.

law in Article III courts,¹⁶⁸ is not a violation “cognizable by military tribunals only.”¹⁶⁹ Such precedent indicates that the government may only use military commissions to prosecute war crimes—even if the MCA says otherwise.

The MCA also violates international norms. Though the Act specifically claims to comply with Geneva Conventions Common Article 3,¹⁷⁰ which prohibits “[t]he passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples,”¹⁷¹ the MCA fails to provide such guarantees due to its dearth of procedural protections.¹⁷² It is these very protections—absent from the MCA—that defendants such as Hamdan are entitled to, for they are not war criminals.¹⁷³ As Hamdan’s own counsel observed:

To give the government the power to haul someone before a military tribunal on the basis of literally no concrete evidence that states a violation of the laws of war is dangerous and wrong. If the government finds defendants who acted in ways that violated the laws of war, such as the Nazi [s]aboteurs [in *ex parte Quirin*¹⁷⁴], it would be one thing. But this case, alleging vague

168. See 18 U.S.C. § 2339B(a)(1) (2006).

169. *Hamdan*, 548 U.S. at 598 (quoting WINTHROP, *supra* note 52, at 839).

170. William C. Peters, *Reykjavik Revisited—A Mostly Informal Essay of Long Wars, Two Presidents, and Three Branches of Government*, 13 NEW ENG. J. INT’L COMP. L. 294, 323 (2007) (“The Military Commissions Act also clarifies that the special military tribunals established by its terms are regularly constituted courts for purposes of common Article 3 of the Geneva Conventions of 1949.” (citing Pub. L. No. 109-366, § 3, 120 Stat. 2600 (2006), codified at 10 U.S.C. § 948b(f) (“A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”))).

171. Geneva Convention No. I, *supra* note 84, art. 3.

172. See discussion *supra* Part II.B.1.

173. See discussion *supra* Part III.A.

174. Jesselyn A. Radack, *You Say Defendant, I Say Combatant: Opportunistic Treatment of Terrorism Suspects Held in the United States and the Need for Due Process*, 29 N.Y.U. REV. L. & SOC. CHANGE 525, 531 (2005) (“In *Ex parte Quirin*, German soldiers, later nicknamed by history the ‘Nazi saboteurs,’ smuggled themselves into the United States to blow up industrial plants.”).

facts to support a vague offense, is as far from the Nazi saboteurs as one can possibly be.¹⁷⁵

Conversely, either a court-martial or an Article III federal court—both of which provide the procedural protections needed when trying a defendant who is not accused of committing a war crime—have the appropriate jurisdiction needed to try Hamdan. Hamdan himself concedes that a court-martial has authority to try him.¹⁷⁶ An Article III court could also exercise jurisdiction based either on the territorial principle, under which jurisdiction extends to crimes occurring in or affecting the prosecuting country, or on the protective principle, which provides for jurisdiction over crimes affecting a state’s vital interests, governmental integrity, or security.¹⁷⁷ Additionally, 18 U.S.C. § 2339B, which makes material support of terrorism a violation of domestic law, specifically grants extraterritorial jurisdiction in situations where the defendant is “brought into or found in the United States;” where the offense “affects interstate . . . commerce;” or where the defendant “aids or abets any person over whom jurisdiction exists”¹⁷⁸

CONCLUSION

More than a century has passed since the Hague Conventions of 1907 set forth the basic rules and regulations of land warfare, rules that have today become the basis on which the international community defines, recognizes, and punishes crimes of war.¹⁷⁹ Since that time, international tribunals have punished war crimes—violent, ghastly crimes—in the wake of a world war as well as vicious conflicts in Rwanda, Sierra Leone, the Balkans, and elsewhere.¹⁸⁰

175. Defense Motion to Dismiss for Lack of Personal Jurisdiction, *supra* note 7, at 5.

176. Hamdan v. Rumsfeld, 548 U.S. 557, 567 (2006).

177. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 402 (1987). *See generally* WISE ET AL., *supra* note 55, at 84–88, 91–98.

178. 18 U.S.C. § 2339B(d) (2006).

179. WISE ET AL., *supra* note 55, at 812; *Judgement: The Law Relating to War Crimes and Crimes Against Humanity*, *supra* note 98. *See generally* Hague Convention No. IV, *supra* note 99.

180. *See* discussion *supra* Part II.

These crimes include the murder of civilians¹⁸¹ and the wanton destruction of entire cities.¹⁸² They include pillaging, rape,¹⁸³ and torture.¹⁸⁴ These are crimes for which perpetrators are not granted the procedural niceties available in domestic courts.¹⁸⁵ These crimes do not include driving a truck.¹⁸⁶ They do not include material support for terrorism.¹⁸⁷ They do not include material support for anything.¹⁸⁸

When Salim Ahmed Hamdan was apprehended, he was alone.¹⁸⁹ He was not in a firefight.¹⁹⁰ He did not engage his detainers with violence.¹⁹¹ He was simply picked up at a routine check point.¹⁹² Undeniably, he supported an international terrorist organization and for that the United States government may punish him.¹⁹³ But he is not a war criminal.¹⁹⁴ He committed no war crimes.¹⁹⁵ And he, like so many other defendants like him, is entitled to confront the witnesses against him.¹⁹⁶ He is entitled to procedural protections.¹⁹⁷ He is entitled to a proper court, not a military tribunal.¹⁹⁸

181. Charter of the International Military Tribunal, *supra* note 72, art. 6.

182. ICTY Statute, *supra* note 76, art. 3.

183. Rome Statute of the International Criminal Court, *supra* note 33, art. 8.

184. Geneva Convention No. I, *supra* note 84, art. 3.

185. See discussion *supra* Part II.

186. *Id.*

187. *Id.*

188. *Id.*

189. Defense Motion to Dismiss for Lack of Personal Jurisdiction, *supra* note 7, at 3; see On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, *supra* note 11, at 4.

190. See On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, *supra* note 11, at 4.

191. See *id.*

192. *Id.*

193. 18 U.S.C. § 2339B(a) (2006).

194. See discussion *supra* Parts II.A, III.A.

195. *Id.*

196. See discussion *supra* Part III.B.

197. *Id.*

198. *Id.*