UNITED STATES OF AMERICA v. KHALID SHEIKH MUHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ‘ATTASH, RAMZI BIN AL SHIBH, ALI ABDUL AZIZ ALI, AND MUSTAFA AHMED ADAM AL-HAWSAWI	D-050 **REPLY TO** **Government’s Response to** **Defense Motion** **to Dismiss Charge One** **for Lack of Subject Matter Jurisdiction** 4 December 2008

1. **Timeliness:** This Reply is timely filed pursuant to the Commission’s Order entered 26 November 2008 (Special Request for Extension of Time in Which to File Replies)[1].

2. **Overview:**

a. The government is fundamentally wrong when it suggests that structural limitations on the power of Congress, such as the prohibition on *ex post facto* laws, is inapplicable to alleged alien enemy combatants. The *Ex Post Facto* Clause is an important element of the separation of powers regime established by the Founding fathers, and its application is not dependent on the identity of the accused.

b. The law of war does not recognize conspiracy as a separate offense. The Supreme Court’s military commission cases, including *Ex Parte Quirin*, 317 U.S. 1 (1942) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), do not recognize conspiracy as a violation of the law of war. The Civil War authorities are at best ambiguous, but Winthrop suggests that conspiracy is not an

[1] Mr. Mohammed and Mr. Ali, through standby counsel, reserve the right to join this pleading at a later time after they have had adequate opportunity to consult with counsel.

Mr. Bin ‘Attash reserves his right to join this motion at a later time, once he is able to fully consider it in his primary language of Arabic. Due to the inability of the contracted linguists to accomplish the necessary translations, as explained in Defense’s Special Request for Relief D-047, Mr. Bin ‘Attash is unable to review the material and make an informed decision in a timely fashion such that he can represent himself before this court.

Mr. bin al Shibh joins in this motion provisionally. In so joining, he does not waive any argument or motion relating to the pending question of his competency to stand trial.

offense cognizable in the 19th Century law-of-war commissions. And the international authorities, including the International Military Tribunal at Nuremberg and the International Criminal Tribunal for the Former Yugoslavia, positively reject conspiracy as an independent crime under the law of war.

2. **Reply Argument: The Charge of Conspiracy must be dismissed because the Military Commission lacks jurisdiction to hear it.**

In D-050, the accused moved to dismiss Charge One, Conspiracy, on the basis that this Commission lacks subject matter jurisdiction to hear it. The accused argued that conspiracy is not an independent crime under the law of war, and that any retroactive jurisdiction the Military Commissions Act ("MCA") might convey would violate the *Ex Post Facto* Clause. In its Response, the government advances two propositions: that conspiracy is independently punishable under the law of war, and that the *Ex Post Facto* Clause does not limit Congress power to pass retroactive legislation with respect to the accused. Neither of these claims withstands careful scrutiny.

a. The *Ex Post Facto* Clause limits Congress' power to pass retroactive criminal legislation.

(1) In D-059 Joint Defense Motion for Appropriate Relief on Behalf of All Accused Requesting that the Commission Treat the Constitution and Bill of Rights as Governing Law in These Proceedings, the accused explained in detail why the Constitution governs the actions of the United States when it acts as a prosecutor in a tribunal it has convened. This Reply incorporates the authorities cited in that Motion and its associated Reply, and will not repeat them here. A few points specifically relating to the *Ex Post Facto* Clause bear mentioning, however.

(2) The government relies on *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008), as authority that the accused possess no constitutional rights. Government's Response to Joint Defense Motion to Dismiss Charge I for Lack of Subject Matter Jurisdiction ("Response") at 3-4. Judge Robertson, the author of that opinion, would not seem to agree with this sweeping proposition. In his conclusion, Judge Robertson wrote:

> The eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially. But Article III judges do not have a monopoly on justice, or on constitutional learning. A real judge is presiding over the pretrial proceedings in Hamdan's case and will preside over the trial. The questions of whether Hamdan is being tried *ex post facto* for new offenses, whether and for what purposes coerced testimony will be received in evidence, and whether and for what purpose hearsay evidence will be received, are of particular sensitivity. If the Military Commission judge gets it wrong, his error may be corrected [on appeal] . . . .

Hamdan, 565 F. Supp. 2d at 137. Rather than ignore *ex post facto* considerations, Judge Robertson flagged them as being of special concern. The court did not hold that constitutional considerations, specifically including the prohibition on *ex post facto* laws, were irrelevant, but rather that this Commission was the proper forum to address them.

(3) The government asserts that the *Ex Post Facto* Clause "at bottom, concern[s] individual rights, rather than the separation of powers concerns raised by *Boumediene* and *Hamdi*." Response at 6. The government is incorrect. As the Supreme Court has explained, "The *ex post facto* prohibition also upholds the separation of powers by confining the legislature to penal decisions with prospective effect and the judiciary and executive to applications of existing penal

[2] The *Ex Post Facto* Clause is a fundamental check on the power of the legislature in our system of checks and balances: *ex post facto* laws, like bills of attainder, are ancient legislative abuses the Founding Fathers denied Congress the power to enact.

(4) Finally, it bears noting that the government does not deny that the conspiracy provision of the MCA is an *ex post facto* law. The government does not contest the arguments of the accused that the MCA is penal, that application of the MCA to the accused would be retroactive, or that retroactive application of the MCA would disadvantage the accused. Instead, the government claims that it should be allowed to pass *ex post facto* laws, which have been long denounced as "generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, *Commentaries on the Constitution* § 1398 (5th ed. 1981). Violation of such first principles is not consistent with a sound system of justice.

b. The law of war does not recognize conspiracy as an independent offense.

(1) In an attempt to establish conspiracy as a freestanding offense under the law of war, the government clings to the few slim reeds four justices of the Supreme Court considered and rejected in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). These authorities will not bear the weight the government gives them, and in most cases prove that the law of war does not recognize conspiracy to commit a war crime as an independent offense.

Quirin

[2] A legal anecdote demonstrates the force of this principle. In 1804, counsel argued to the Supreme Court that the prohibition on *ex post facto* laws was critical to the separation of powers between the judicial and legislative branches. *Ogden v. Blackledge*, 2 Cranch 272, 277 (1804). The opinion states that when counsel advanced that argument, "The court stopped the counsel, observing that it was unnecessary to argue that point." *Id.*

(2) The government accuses the defense of "fail[ing] to mention that the accused in *Quirin* were charged with and convicted before a military commission of conspiracy." Response at 8 n.2. In fact, the accused relied on the position of the *Hamdan* plurality, "That the defendants in *Quirin* were charged with conspiracy is not persuasive, since the Court declined to address whether the offense actually qualified as a violation of the law of law—let alone one triable by military commission." *Hamdan*, 548 U.S. at 605 (plurality), *cited in* D-050 Joint Defense Motion to Dismiss Charge I for Lack of Subject Matter Jurisdiction ("Motion") at 8.

(3) It is true that the *Quirin* defendants were charged with and convicted of conspiracy, 317 U.S. at 23, but this fact does not support the government's thesis that conspiracy is a violation of the law of war. In its opinion, the Court addressed only the first charge—violation of the law of war. The Court held that, "Specification 1 of the First charge is sufficient to charge all the petitioners with the offense of unlawful belligerency, trial of which is within the jurisdiction of the Commission, and the admitted facts affirmatively show that the charge is not merely colorable or without foundation." *Id.* at 36. The Court stressed that the petitioners in *Quirin* were "charged with being enemies who, with the purpose of destroying war materials and utilities, entered or after entry remained in our territory without uniform—an offense against the law of war. *We hold only that those particular acts constitute an offense against the law of war* which the Constitution authorizes to be tried by military commission." *Id.* at 46 (emphasis added). By limiting its holding to the first charge, the Court did not rule on the fourth charge, the charge of conspiracy. In fact, the Court made explicit its refusal to address charges beyond the first: "Since the specification of Charge I set forth a violation of the law of war, we have no occasion to pass on the adequacy of the second specification of Charge I, or to construe the 81st and 82nd Articles of War for the purpose of ascertaining whether the specifications under

[3]

(4) After reviewing the reasoning of *Quirin*, the *Hamdan* plurality concluded, "If anything, *Quirin* supports Hamdan's argument that conspiracy is not a violation of the law of war. Not only did the Court pointedly omit any discussion of the conspiracy charge, but its analysis of Charge I placed special emphasis on the *completion* of an offense; it took seriously the saboteurs' argument that there can be no violation of a law of war—at least not one triable by military commission—without the actual commission of or an attempt to commit a 'hostile and warlike act.'" *Hamdan*, 548 U.S. at 606-07.

(5) Moreover, the Supreme Court's decision to ignore the conspiracy charge in *Quirin* neatly follows a pattern of the Court's other law-of-war decisions. In *Ex Parte Milligan*, 71 U.S. 2 (1886), *In re Yamashita*, 327 U.S. 1 (1946), and *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2002), the facts of each case would have allowed the Court to reason that conspiracy was a violation of the law of nations. Instead, the Court ignored conspiracy as a basis for its decision and relied on other legal theories. Despite numerous opportunities, the Supreme Court has never recognized conspiracy as a violation of the law of war.

The Civil War authorities

(6) Without acknowledging the analysis of Winthrop's treatise by the accused, Motion at 5, or the *Hamdan* plurality, 548 U.S. at 608, the government claims that that Winthrop "further emphasize[s] that conspiracy has long been established as a violation of the law of war."

[3] *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956), cited in the Response at 8 & n.2, follows exactly the same pattern. The government alleged a conspiracy, but the Tenth Circuit relied on the completed acts of entering U.S. territory surreptitiously and discarding their uniforms for hostile purposes as the offense of unlawful belligerency. *Id.* at 431-32. The Tenth Circuit, like the Supreme Court, did not recognize conspiracy as a violation of the law of war.

Response at 8 (citing Col. William Winthrop, *Military Law and Precedents* 839 & n.5 (2d ed. 1920) (hereafter "Winthrop")). A review of the cited portion of Winthrop's explanation of the law of military commissions reveals that he did not consider conspiracy to be a violation of the law of war.

(7) Winthrop explains that in the Civil War (as opposed to the Mexican War), commanders combined the functions of trying violations of the law of war and trying civil offenses when civil courts were not available into a single court, called a military commission. Winthrop at 833, 839. Winthrop identified four classes of persons subject to trial under the combined military commission's jurisdiction: "(1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offenses in violation of the laws of war; (2) Inhabitants of enemy's county occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; (4) Officers and soldiers of our own army, or persons serving with it in the field, who, in time of war, become chargeable with crimes or offenses not cognizable, or triable, by the criminal courts or under the Articles of War." *Id.* at 838.

(8) The first class of persons Winthrop identifies is relevant here, as it is most similar to the alleged status of the accused. Winthrop explains, "Of the first class are persons in the military service of the enemy who have been guilty of any of the descriptions of offences specified under a previous Title as violations of the laws of war; —as those, for example, who have assumed the role of the spy, or have taken part in guerilla raids, or the killing, robbery, &c., of defenceless [sic] persons or prisoners of war, or have come within our lines to recruit soldiers or for other unauthorized purpose, or have violated a flag of truce or committed other act of treachery or perfidy, or, as paroled prisoners of war, have violated their parole." *Id.* at 838. None of Winthrop's examples of violations of the law of war involved inchoate crimes; certainly, he did

not list conspirators as an example of this class of offender. Like the Court in *Quirin*, Winthrop placed special emphasis on "the actual commission of or an attempt to commit a 'hostile and warlike act.'" *Hamdan*, 548 U.S. at 606-07 (plurality) (discussing *Quirin*, 317 U.S. at 46).

(9) Rather than including conspiracy as a violation of the law of war, Winthrop intentionally excludes conspiracy as an offense triable by a military commission exercising its law-of-war jurisdiction. At the page cited by the government (839), Winthrop establishes three classes of offenses triable by the combined military commissions of the Civil War. These categories are: "(1) Crimes and statutory offenses cognizable by State or U.S. courts, and which would properly be tried by such courts if open and acting; (2) Violations of the laws and usages of war cognizable by military tribunals only; (3) Breaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war." Winthrop at 839. In the next paragraph, Winthrop lists "criminal conspiracies" (with an accompanying footnote) as "offences of the *first* class," i.e., civil crimes tried by military commission because the civil courts were closed. *Id.* Winthrop goes on in another paragraph to describe offenses of the second class, "offences in violation of the laws and usages of war," and "excludes conspiracy of any kind from his own list of offenses against the law of war." *Hamdan*, 548 U.S. at 608 (citing Winthrop at 839-40). Later, Winthrop made this distinction explicit: at least in law-of-war cases, "the jurisdiction of the military commissions should be restricted to cases of offence consisting in *overt acts*, *i.e.*, in unlawful commissions or actual attempts to commit, and not in intentions merely." Winthrop at 841.

(10) The government's citation to Howland fares no better. *See* Response at 8 n.4. Howland does list "conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy" as a law-of-war offense. Charles Roscoe Howland, *Digest of Opinions of the*

Judge Advocates General of the Army 1071 (1912). "But while the records of cases that Howland cites following his list of offenses against the law of war support inclusion of the other offenses mentioned, they provide no support for the inclusion of conspiracy as a violation of the law of war." *Hamdan*, 548 U.S. at 607-08.

(11) Neither does Attorney General Speed's Civil War era opinion regarding the assassination of Abraham Lincoln address the current status of conspiracy under the law of war. *See* Response at 8-9 (citing *Military Commissions*, 11 Op. Atty. Gen. 297, 312 (1865)). In the cited passage, Attorney General Speed wrote only that it is a violation of the war of war to be an irregular guerilla, without uniform or privilege of belligerency. This obvious and unanimously acknowledged principle, *Quirin*, 317 U.S. at 36 & n.12, does not demonstrate that a conspiracy to violate the law of war is recognized under international legal principles.

FM27-10

(12) The government also suggests that FM27-10, *The Law of Land Warfare* (1956), establishes conspiracy as a violation of the law of war. Section 500 of *The Law of Land Warfare* states, "Conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable." This sentence does not address the real question, however: whether conspiracy is an independent crime or a theory of liability. Complicity, for example, is a theory of liability for the substantive crime. *See Scales v. United States*, 367 U.S. 203, 225 & n.17 (1961). Conspiracy, in U.S. civilian law, is both a crime in itself and a theory of liability. *See Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946) (theory of liability); *Clune v. United States*, 159 U.S. 590, 126-27 (independent crime); *see also, e.g.*, *United States v. Lothian*, 976 F.2d 1257, 1262 (9th Cir. 1992) (both). Section 500 does not state whether conspiracy is punishable for the substantive offense

(like accomplice liability) or as an independent inchoate crime (like a solicitation). It certainly does not establish that conspiracy to violate the law of war is punishable as an independent offense.

Nuremberg

(13) The government's superficial treatment of the International Military Tribunal at Nuremberg ("IMT") betrays a fundamental lack of understanding of international law. *See* Response at 10 & nn. 8-9. It is true that the London Charter, which established the IMT, provided for an independent crime of conspiracy.[4] Charter of the International Military Tribunal, Art. 6, *in* 1 *Trial of the Major War Criminals before the International Military*

[4] Article 6 of the London Charter provided:

> The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.
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> The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:
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> (a) Crimes against peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;
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> (b) War crimes: namely, violations of the laws or customs of war. Such violations 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;
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> (c) Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.
>
> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Charter of the International Military Tribunal, Art. 6, *in* 1 *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg*, 14 November 1945-1 October 1946 10, 11 (1947).

Tribunal: Nuremberg, 14 November 1945-1 October 1946 10, 11 (1947). But after indicting defendants for conspiracy,[5] the IMT repudiated and abandoned conspiracy as an independent crime under the law of war in any context outside the waging of aggressive war.

(14) Although Count One of the Indictment charged conspiracy to commit crimes against peace, crimes against humanity, and war crimes, in its final Judgment, the IMT construed the Count One conspiracy only to apply to the conspiracy to wage aggressive war.[6] In fact, despite

[5] Count One of the Indictment, which was lengthy, included a "Statement of the Offense":

> All the defendants, with divers other persons, during a period of years preceding 8 May 1945, participated as leaders, organizers, instigators, or accomplices in the formulation or execution of a common plan or conspiracy to commit, or which involved the commission of, Crimes against Peace, War Crimes, and Crimes against Humanity, as defined in the Charter of this Tribunal, and, in accordance with the provisions of the Charter, are individually responsible for their own acts and for all acts committed by any persons in the execution of such plan or conspiracy. The common plan or conspiracy embraced the commission of Crimes against Peace, in that the defendants planned, prepared, initiated, and waged wars of aggression, which were also wars in violation of international treaties, agreements, or assurances. In the development and course of the common plan or conspiracy it came to embrace the commission of War Crimes, in that it contemplated, and the defendants determined upon and carried out, ruthless wars against countries and populations, in violation of the rules and customs of war, including as typical and systematic means by which the wars were prosecuted, murder, ill-treatment, deportation for slave labor and for other purposes of civilian populations of occupied territories, murder and ill-treatment of prisoners of war and of persons on the high seas, the taking and killing of hostages, the plunder of public and private property, the indiscriminate destruction of cities, towns, and villages, and devastation not justified by military necessity. The common plan or conspiracy contemplated and came to embrace as typical and systematic means, and the defendants determined upon and committed, Crimes against Humanity, both within Germany and within occupied territories, including murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations before and during the war, and persecutions on political, racial, or religious grounds, in execution of the plan for preparing and prosecuting aggressive or illegal wars, many of such acts and persecutions being violations of the domestic laws of the countries where perpetrated.

Indictment ¶ III, *in* 1 *Trial of the Major War Criminals before the International Military Tribunal: Nuremberg*, 14 November 1945-1 October 1946 27, 29 (1947).

[6] The IMT wrote, "Planning and preparation are essential to the making of war. In the opinion of the Tribunal aggressive war is a crime under international law. The Charter defines this offense as planning, preparation, initiation or waging of a war of aggression "*or* participation in a common plan or conspiracy for the accomplishment

the text of the London Charter, the IMT rejected the view that Article 6 even authorized a conviction for conspiracy other than the conspiracy to wage aggressive war:

> Count One, however, charges not only the conspiracy to commit aggressive war, but also to commit war crimes and crimes against humanity. But the Charter does not define as a separate crime any conspiracy except the one to commit acts of aggressive war. Article 6 of the Charter provides: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." In the opinion of the Tribunal these words do not add a new and separate crime to those already listed. The words are designed to establish the responsibility of persons participating in a common plan. The Tribunal will therefore disregard the charges in Count One that the defendants conspired to commit war crimes and crimes against humanity, and will consider only the common plan to prepare, initiate and wage aggressive war.

The Nurnberg Trial, 6 F.R.D. at 112.

(15) After the IMT prosecutions concluded, the United States continued to prosecute Nazi violators of international law under the auspices of Control Council Law No. 10. These tribunals, relying on the law determined by the IMT, rejected the view that international law recognized a separate crime of conspiracy. In the *Trial of Josef Altstötter and Others*, for example, the tribunal rejected the prosecution's argument for a freestanding crime of conspiracy

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... of the foregoing." The Indictment follows this distinction. Count One charges the common plan or conspiracy. Count Two charges the planning and waging of war. The same evidence has been introduced to support both counts. We shall therefore discuss both counts together, as they are in substance the same." *The Nurnberg Trial*, 6 F.R.D. 69, 111 (1947).

"on the grounds that the Tribunal were [sic] bound by the provisions of Law No. 10 and of the Charter of the International Military Tribunal which do not define conspiracy to commit a war crime or a crime against humanity as a separate substantive crime." VI *Law Reports of Trials of War Criminals* 1, 109-10 (United Nationas War Crimes Commission ed., 1948).

(16) The United Nations later ratified the IMT view that international law punished only conspiracies to wage aggressive war. Principle VI of the *Principles of International Law Recognized in the Charter of the Nüremberg Tribunal and in the Judgment of the Tribunal*, U.N. GAOR, 5th Sess., Supp. No. 12, U.N. Doc A/1316 (1950), recognized the crime of conspiracy to commit aggressive war or war in violation of treaty, but pointedly omitted any crime of conspiracy to commit war crimes or crimes against humanity.

(17) The government's claim that the jurisprudence of the IMT recognizes conspiracy as an independent crime is completely without merit. As the *Hamdan* plurality explained, "The International Military Tribunal at Nuremberg, over the prosecution's objections, pointedly refused to recognize as a violation of the law of war conspiracy to commit war crimes, and convicted only Hitler's most senior associates of conspiracy to wage aggressive war." 548 U.S. at 610-11. The government only cites the text of Article 6 of the London Charter without considering any of the extensive treatment and rejection of the crime of conspiracy to commit war crimes by the IMT and related tribunals.

ICTY

(18) The government claims that the International Criminal Tribunal for the Former Yugoslavia ("ICTY") "has found that joining an enterprise of persons who share a common criminal purpose is and has been an offense under customary international law." Response at 9. This statement is simply false: the ICTY has recognized joint criminal enterprise ("JCE") as a

theory of liability for substantive crimes, but has *rejected* conspiracy as an offense under customary international law. JCE differs from the crime of conspiracy in two critical ways: (1) conspiracy can be an independent crime, whereas JCE is solely a theory of liability; and (2) conspiracy is an inchoate crime, whereas JCE is a basis of liability for completed crimes.

(19) The government cites *Prosecutor v. Tadić*, No. IT-94-1-AR72 (ICTY Appeals Chamber, Oct. 2, 1995), *reprinted at* 35 I.L.M. 32 (1996), in support of its argument that international law recognizes conspiracy as an independent offense. Response at 9 n.5. The 1995 *Tadić* opinion cited by the government was an interlocutory appeal solely on the issue of the ICTY jurisdiction; it does not address the doctrines of conspiracy or enterprise liability at all.

(20) No doubt the government had in mind the final appeal on the merits, *Prosecutor v. Tadić*, No. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999), *reprinted at* 38 I.L.M. 1518 (1999), but that opinion refutes rather than supports its position. In the *Tadić* appeal on the merits, the ICTY Appeals Chamber held that "the notion of common design *as a form of accomplice liability* is firmly established in customary international law and in addition is upheld, albeit implicitly, in the Statute of the International Tribunal." ¶ 220 (emphasis added). Citing the *Tadić* appeal on the merits, the *Hamdan* plurality explained that the ICTY, "drawing on Nuremberg precedents, has adopted a 'joint criminal enterprise' theory of liability, but that is a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own." *Hamdan*, 548 U.S. 611 n.40.

(21) After *Tadić*, the ICTY Appeals Chamber came to refer to this form of liability as "joint criminal enterprise." The ICTY has continued to maintain, however, that JCE is "a form of liability" rather than an independent crime. *Prosecutor v. Krnojelac*, No. IT-97-25 (ICTY Appeals Chamber, Sept. 17, 2003). In fact, in *Prosecutor v. Milutinović*, No. IT-99-27-AR72 ¶

14 (ICTY Appeals Chamber, May 21, 2003),[7] the defendants advanced an interlocutory appeal on the basis that JCE liability was essentially conspiracy liability, which is not cognizable under international law. The ICTY rejected the defendants' argument, explaining that, "Criminal liability pursuant to a joint criminal enterprise is not a liability for mere membership or for conspiring to commit crimes, but a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise, a different matter." *Id.* ¶ 26. In *Milutinović*, the ICTY distinguished conspiracy from JCE on both important grounds: that conspiracy could be a freestanding crime but JCE could not, and that JCE required the commission of a crime whereas conspiracy is an inchoate crime.

(22) As the chief U.S. negotiator in the U.N. talks over the International Criminal Court and former U.S. Ambassador at Large for War Crimes Issues has explained, "In their many judgments the ICTY and ICTR have held that with respect to war crimes, a charge of joint criminal enterprise associated with an actionable war crime—rather than adjudicating a stand-alone charge of conspiracy to commit war crimes—is the proper reasoning for establishing individual criminal responsibility for war crimes." David Scheffer, *Why Hamdan Is Right About Conspiracy Liability*, The Jurist (March 30, 2006). The ICTY has rejected the exact arguments the government advances here.

The Define & Punish Clause

(23) The government argues that conspiracy is an offense against the law of war because Congress stated that the MCA codifies prior offenses rather than establishing new ones.

[7] The government misspells the defendant's name in this case as "Mulitonovic." Response at 9 n.5. This Reply and the government's Response are referring to the same case. The government also cites a case as "*Prosecutor v. Kristic*, No. IT-98-33 (ICTY Appeals Chamber 2001)." *Prosecutor v. Krstić*, No. IT-98-33, has a Trial Chamber judgment on 2 August 2001 and an Appeals Chamber judgment on 19 April 2004; the defense could not locate an Appeals Chamber decision in 2001. Both *Krstić* opinions merely apply the JCE theory of liability as developed in other ICTY jurisprudence, without any suggestion of finding *Krstić* guilty of an independent crime of conspiracy.

Response at 10. Even the *Quirin* Court, at "the high-water mark of military power to try enemy combatants for war crimes," *Hamdan*, 548 U.S. at 597, did not suggest that Congress could define and punish crimes as violation of the law of war which were not actually prohibited by that independent body of international law. The Court in *Quirin* explained that in the exercise of its Define and Punish Clause powers, Congress could and did "incorporate[] by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war and which may constitutionally be included within that jurisdiction." 317 U.S. at 30. But *Quirin* also established a threshold inquiry: "whether any of the acts charged is an offense against the law of war cognizable before a military tribunal." 317 U.S. at 29. If, as the government suggests, an offense becomes a violation of the law of war simply because Congress says so, Quirin's threshold question would be irrelevant. Expanding on this question, the *Quirin* Court went so far as to assume that there are acts some writers on international law consider to be violations of the law of war "which would not be triable by military tribunal here . . . because they are not recognized by our courts as violations of the law of war." *Id.* at 29. If the government were correct, the Court would need only to inquire whether Congress prohibited the actions at issue, not whether they were a violation of the law of nations.

(24) The view in *Quirin* that an offense must violate the independent law of war despite Congress' powers under the Define and Punish Clause later found expression in *In re Yamashita*, 327 U.S. 1 (1946), decided just four years later. The Court in *Yamashita* explained succinctly, "Neither Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war." *Id.* at 13. The fact that Congress says that an offense is a violation of the law of war simply does not make it so.

(25) In addition, Congress' powers under the Define and Punish Clause do not excuse it from the restrictions of the *Ex Post Facto* Clause. "Congress and the President," noted the *Quirin* Court, "possess no power not derived from the Constitution." 317 U.S. at 25. The Court went on to explain that, "Congress . . . has thus exercised its authority to define and punish offenses against the law of nations by sanctioning, *within constitutional limitations*, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals." *Id.* at 28 (emphasis added). Even in the context of military commissions, the Court maintained the fundamental principle that Congress' power under the Define and Punish Clause, like its power under the Commerce and other Clauses, is subject to constitutional limitations.

c. Conclusion

The crimes charged against the accused are terrible, and occasioned a national legal crisis, in addition to their many other effects. The government asks this Commission to compound that crisis by abandoning the hard-won structure of our constitutional framework, as well as the carefully constructed international consensus on the prosecution of war crimes. This Commission should decline the government's disastrous invitation, and dismiss Count One for lack of subject matter jurisdiction.

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Respectfully submitted,

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