

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY

UNITED STATES OF AMERICA

v.

ABD AL-RAHIM HUSSEIN MUHAMMED
ABDU AL-NASHIRI

AE048

**DEFENSE RENEWED MOTION TO
DISMISS THE CHARGE OF
CONSPIRACY**

January 11, 2013

- 1. Timeliness:** This request is filed within the timeframe established by Rule for Military Commission (R.M.C.) 905.
- 2. Relief Requested:** The Defense respectfully requests the withdrawal and dismissal of the conspiracy charge and specifications in this case.
- 3. Overview:**

The D.C. Circuit held that for an offense committed prior to 2006 to be triable by military commission, it must have been an offense under the law of war. *United States v. Hamdan*, 696 F.3d 1238 (D.C. Cir. 2012) (“*Hamdan II*”). The Court further held that “The ‘law of war’ ... is the international law of war.” *Id.* at 1248-50. The dispositive question is therefore whether the offense charged “is an international-law war crime.” *Id.* On two separate occasions, including before this Commission, the government has conceded that “history reflects a lack of international consensus for treating the standalone offense of conspiracy as a war crime as a matter of customary international law[.]” *United States v. Nashiri*, AE046A, Government Response to Defense Motion to Dismiss for Lack of Lack of [sic] Jurisdiction over the Charge of Conspiracy, at 21-22 (26 March 2012). The government further conceded in the D.C. Circuit that *Hamdan II* compelled the vacatur of conspiracy convictions because it was not a war crime under international law. Subsequently, the government asked the Convening Authority to

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withdraw the charge of conspiracy from the case of *United States v. Mohammed*. Having conceded that it cannot carry its jurisdictional burden, conspiracy must be dismissed.

4. Burden of Proof and Persuasion: Because this motion challenges the jurisdiction of the Commission, the government bears the burden of demonstrating that jurisdiction over the accused is lawful by a preponderance of the evidence. R.M.C. 905(c)(2)(B).

5. Statement of Facts:

The Court of Military Commission Review (“CMCR”) affirmed the conviction of Salim Hamdan for material support for terrorism on the ground that this offense was analogous to various international, historical and foreign legal doctrines and that diverting their prosecution to a military commission was consistent with the political branches “broad discretion when acting during an ongoing conflict in the areas of war powers, foreign relations, and aliens.” *United States v. Hamdan*, 801 F.Supp.2d 1247, 1264 (C.M.C.R. 2011). The CMCR then affirmed the conviction of Ali Hamza al Bahlul for conspiracy on the basis of the same legal rationale. *United States v. Bahlul*, 820 F.Supp.2d 1141, 1172 (C.M.C.R. 2011).

Before this Commission and the D.C. Circuit, the government abandoned the CMCR’s reasoning and argued that while these offenses were not crimes under international law, these charges should nevertheless be sustained as part of the “U.S. common law of war.” *United States v. Nashiri*, AE046A, Gov’t Resp. to Defense Motion to Dismiss for Lack of Lack of [sic] Jurisdiction over the Charge of Conspiracy, at 21-22 (26 March 2012) (“[H]istory reflects a lack of international consensus for treating the standalone offense of conspiracy as a war crime as a matter of customary international law[.]”); *see also United States v. Hamdan*, Case No. 11-1257, Brief for the Government, at 22-47 (D.C. Cir., 17 January 2012); *United States v. Bahlul*, Case

No. 11-1324, Brief for the Government, at 50-57 (D.C. Cir., 16 May 2012). This Commission accepted this argument and sustained the validity of the conspiracy charge in this case.

On 16 October 2012, the D.C. Circuit rejected the government's arguments and the reasoning of the CMCR. *Hamdan II*, 696 F.3d at 1252. The Court held, in relevant part, that to “avoid the prospect of an *Ex Post Facto* Clause violation here, we interpret the Military Commissions Act of 2006 so that it does not authorize retroactive prosecution for conduct committed before enactment of that Act unless the conduct was already prohibited under existing U.S. law as a war crime triable by military commission.” *Id.* at 1248.

The only U.S. laws pertaining to commission jurisdiction prior to the 2006 Act were 10 U.S.C. §§ 821, 902 & 904. *Hamdan II*, 696 F.3d at 1245. Sections 902 & 904 made spying and aiding the enemy triable by military commission. Section 821 conferred commission jurisdiction over crimes grounded in that subpart of international law known as the laws of war. The D.C. Circuit held that because international law did not treat material support offenses as war crimes, the commission had no jurisdiction over them. *Id.* at 1248.

For a military commission to have jurisdiction over pre-2006 offenses, therefore, they must be “international-law of war crimes.” *Hamdan II*, 696 F.3d at 1249. While there are certain “well-defined prohibitions at the core” of international law, “the imprecision of customary international law calls for signification caution by U.S. courts before permitting civil or criminal liability premised on violation of such a vague prohibition.” *Id.* at 1250 n.10. The D.C. Circuit reaffirmed the continuing validity of the standard relied on by the Supreme Court in prior military commission cases, such that the offense charged be “firmly grounded in international law.” *Id.* (citing *Hamdan v. Rumsfeld*, 548 U.S. 557, 602-03 & n.34, 605 (2006) (plurality op.)); *see also In re Yamashita*, 327 U.S. 1, 14 (1946); *Ex parte Quirin*, 317 U.S. 1, 28 (1942).

In finding that material support offenses fail this standard, the D.C. Circuit relied upon the usual sources of international law. *Hamdan II*, 696 F.3d at 1250. It found that “neither the major conventions on the law of war nor prominent modern international tribunals nor leading international-law experts have identified material support for terrorism as a war crime. Perhaps most telling, before this case, no person has ever been tried by an international-law war crimes tribunal for material support for terrorism.” *Id.* at 1251.

The D.C. Circuit also took care to abjure reliance on sources that only provided “at best murky guidance” as to what the international law of war criminalized at the times relevant to the allegations. *Hamdan II*, 696 F.3d at 1252. These included a “few isolated precedents from the Civil War era,” which the Court rejected as bare analogies, as anachronistic conflations of martial law with the law of war, and as failing to establish that an offense was “a war crime under international law of war as of 1996 to 2001.” *Id.* Likewise, the Court declined to extend by analogy extant international law offenses, because they prohibit “different conduct, impose[] different *mens rea* requirements, and entail[] different causation standards than” the offenses actually charged. *Id.*

Lastly, the D.C. Circuit suggested that the floor for criminal liability should at least be no lower than the threshold a plaintiff in an Alien Tort Statute case must meet to show that a norm of customary international law is firmly grounded enough to be civilly actionable. *Hamdan II*, 696 F.3d at 1250 n.10 (citing *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724-38 (2004)); *see also Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 781 (D.C. Cir. 1984) (Edwards, J., concurring) (the Alien Tort Statute covers “a handful of heinous actions—each of which violates definable, universal and obligatory norms”).

On 9 January 2013, the government filed supplemental briefing in the D.C. Circuit on the effect of *Hamdan II* to the charges of conspiracy and solicitation in the *Bahlul* case. *United States v. Bahlul*, Case No. 11-1324, Supplemental Brief for the Government (D.C. Cir., 9 January 2013). The government submitted that “[a]lthough the *Hamdan II* Court did not address whether the inchoate conspiracy and solicitation counts on which Bahlul was also convicted constituted violations of the international law of war, the government acknowledged in its opening brief that neither conspiracy nor solicitation has attained international recognition at this time as an offense under customary international law. . . . In view of that acknowledgment, and given the decision in *Hamdan II* that, for conduct predating the enactment of the 2006 MCA, only violations of the international law of war and pre-existing statutory offenses, such as spying and aiding the enemy, are subject to trial by military commission, this Court must reverse Bahlul’s conspiracy and solicitation convictions.” *Id.* at 2-3.

That same day, the government asked the convening authority to withdraw the conspiracy charge from the case of *United States v. Mohammed, et al.* In a press release, the government indicated that the “withdrawal and dismissal of the conspiracy charge removes an issue that would otherwise generate uncertainty and delay resulting from prolonged litigation in the ongoing capital prosecution[.]” Chief Prosecutor Recommends Withdrawal of One of Eight Charges Against Alleged 9/11 Co-Conspirators: Confirms Trial of Remaining Seven Charges in Capital Case (9 January 2013)(Attachment A). In an interview the following day, BG Martins stated that “My decision to recommend withdrawal of the stand-alone conspiracy charge in the 9/11 case was based on factors within my purview and I made that decision to seek to eliminate a source of uncertainty, legal risk and distraction to follow the clear path to sustainable charges

provided by the *Hamdan* opinion.” The Lawfare Podcast Episode #23: Brig. Gen. Mark Martins on His Decision to Drop Standalone Conspiracy Charges Against 9/11 Defendants.¹

6. Argument:

The Defense again moves this Commission to dismiss the charge of conspiracy. As the government acknowledges, a charge of conspiracy for pre-2006 conduct cannot be reconciled with the controlling law of the D.C. Circuit. Mr. Al-Nashiri will not reiterate the grounds on which he challenged conspiracy’s viability, or lack thereof, as a war crime under international law. He would rather incorporate by reference the arguments put forward in AE048 and AE050. Collectively the sources cited therein show that, like material support, “neither the major conventions on the law of war nor prominent modern international tribunals nor leading international-law experts have” recognize conspiracy. *Hamdan II*, 696 F.3d at 1251.

The only thing the Defense would add is that this conclusion is confirmed by the sources on which the D.C. Circuit relied in making the same finding about material support. The treatise the D.C. Circuit relied upon in *Hamdan II*, for example, specifically states that “[s]ome of the crimes listed [in the MCA] are without a doubt part of the laws and customs of war. However, there is little evidence that some of the other crimes listed within the said chapter, such as terrorism, providing material support for terrorism, and conspiracy, may be considered as part of the laws and customs of war.” Andrea Bianchi & Yasmin Naqvi, *International Humanitarian Law and Terrorism* 243-47 (2011).

Likewise, a search of cases under the Alien Tort Statute decided after *Sosa* further shows that federal courts have either held or taken for granted that claims for conspiracies are not

¹ Available at <http://www.lawfareblog.com/2013/01/the-lawfare-podcast-episode-23-brig-gen-mark-martins-on-his-decision-to-drop-standalone-conspiracy-charges-against-911-defendants/>

independently actionable under international law. *See, e.g., Liu Bo Shan v. China Const. Bank Corp.*, 421 Fed.Appx. 89, 94 n.6 (2d Cir. 2011); *Presbyterian Church of Sudan v. Talisman Energy*, 582 F.3d 244, 260 (2d. Cir 2009); *In re Chiquita Brands Intern., Inc.*, 792 F.Supp.2d 1301, 1340-41 (S.D.Fla. 2011); *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1108 (C.D.Cal. 2010); *Abecassis v. Wyatt*, 704 F.Supp.2d 623, 652 n.20 (S.D.Tex. 2010); *In re South African Apartheid Litigation*, 617 F.Supp.2d 228, 263 (S.D.N.Y. 2009).

Taken together, international law sources demonstrate that conspiracy is not firmly established as a war crime even today. The government is correct to have conceded this fact and this Commission should not allow it to bring anymore “uncertainty” and “legal risk” into this capital prosecution than it is willing to accept in the September 11th case.

7. **Oral Argument:** The defense requests oral argument on this motion.
8. **Witnesses:** None.
9. **Conference with Opposing Counsel:** The government objects to the motion to withdraw and dismiss the Conspiracy charge.
10. **List of Attachments:**
 - A. Chief Prosecutor Recommends Withdrawal of One of Eight Charges Against Alleged 9/11 Co-Conspirators: Confirms Trial of Remaining Seven Charges in Capital Case (9 January 2013)(Attachment A).

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CERTIFICATE OF SERVICE

I certify that on the day of filing I electronically filed the forgoing document with the Clerk of the Court and served the foregoing on all counsel of record by e-mail this 11th day of January 2013.

/s/ Stephen Reyes
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ATTACHMENT

A

Chief Prosecutor Recommends Withdrawal of One of Eight Charges Against Alleged 9/11 Co-Conspirators: Confirms Trial of Remaining Seven Charges in Capital Case

Army Brig. Gen. Mark Martins, chief prosecutor, Office of Military Commissions, recommended and requested that the convening authority withdraw and dismiss one of the eight charges in the case of *United States v. Khalid Shaikh Mohammad, Walid Muhammad Salih Mubarak Bin 'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Ahmed Adam al Hawsawi*, while leaving the remaining seven charges intact.

The chief prosecutor recommended that the convening authority withdraw and dismiss the conspiracy charge in response to a recent U.S. federal appeals court decision that provided guidance for evaluating the permissibility of charging offenses for conduct occurring prior to 2006. The withdrawal and dismissal of the conspiracy charge would remove an issue that could otherwise generate uncertainty and delay resulting from prolonged litigation in the ongoing capital prosecution of the 9/11 attacks.

“There is a clear path forward for legally sustainable charges,” Martins said. “The remaining charges are well-established violations of the law of war and among the gravest forms of crime recognized by all civilized peoples. This action helps ensure the prosecution proceeds undeterred by legal challenge. The United States remains committed to accountability under law for all who terrorize and attack innocent civilians,” Martins added.

The seven remaining charges, currently pending before a military commission empowered to impose the death penalty, allege that the five accused are responsible for the planning and execution of the attacks of Sept. 11, 2001, in New York, Washington, D.C., and Shanksville, Pa., resulting in the killing of 2,976 people. Those charges consist of attacking civilians, attacking civilian objects, murder in violation of the law of war, destruction of property in violation of the law of war, hijacking aircraft, intentionally causing serious bodily injury, and terrorism. The convening authority had referred all of these charges for eventual joint trial last April, and the five accused were arraigned in Guantanamo Bay last May. Pre-trial motions hearings are continuing, and no trial date has yet been set by the military judge.

Last October, the U.S. Court of Appeals for the District of Columbia Circuit overturned the military commission conviction in 2008 of Salim Ahmed Hamdan on charges of providing material support for terrorism. In a unanimous decision, the appellate court ruled that the material support charge—involving actions by Hamdan as Usama bin Laden’s driver and bodyguard prior to November of 2001—was not “an international-law war crime” that Congress had enforced “at the time Hamdan engaged in the relevant conduct.” Hamdan, whose sentence to confinement has been completed, was already free in his home country of Yemen when the decision overturning his conviction was announced.

Based on the reasoning of the court in that case Martins determined that there was uncertainty about whether the courts would reach a similar conclusion as to the permissibility of charging conspiracy as a stand-alone offense involving pre-2006 conduct. He therefore recommended its withdrawal and dismissal “as a separate and standalone offense,” in a memorandum sent to the convening authority. Martins also noted, however, that the common plan and joint enterprise described in the 9/11 charges should be retained as a basis for holding Khalid Shaikh Mohammad and his four co-accused criminally liable for physical acts committed by the now-deceased 9/11 hijackers and other members of al Qaeda.

While the government will continue to challenge the court's decision in a separate case pending at the federal appellate court, the chief prosecutor nevertheless concluded that dismissal of the conspiracy charges would reduce potential risks in the prosecution of the 9/11 attacks and allow that case to move forward without unnecessary delay.

The charges are only allegations that the five accused have committed offenses punishable under the Military Commissions Act of 2009 and the law of war, and each accused is presumed innocent unless proven guilty beyond a reasonable doubt. Pursuant to the reforms in that Act, each accused has been provided defense counsel possessing specialized knowledge and experience in death penalty cases.