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# ***AL BAHLUL v. UNITED STATES: THE CONSPIRACY BEHIND THE CONSPIRACY OFFENSE IN U.S. MILITARY COMMISSIONS***

*Brianna Edwards\**

## I. INTRODUCTION

Approximately seven years after the tragic events on September 11, 2001, a U.S. military commission tried and convicted Ali Hamza Ahmad Suliman Al Bahlul (Al Bahlul) for his involvement in the preparation and planning of the terrorist attacks.<sup>1</sup> As Al Qaeda's lead propagandist and secretary of public relations, Al Bahlul assisted Osama bin Laden in recruiting jihadists, most notably two of the September 11 hijackers. For these reasons, military prosecutors charged Al Bahlul under the Military Commissions Act of 2006 (2006 MCA)<sup>2</sup> for conspiring to commit war crimes, providing material support for terrorism, and soliciting others to commit war crimes.<sup>3</sup> The military commission found him guilty of all three offenses and sentenced him to life imprisonment.<sup>4</sup>

After the United States Court of Military Commission Review (CMCR) affirmed his convictions and sentence, Al Bahlul appealed his convictions to the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit), arguing the military commission lacked jurisdiction to try the offenses because the crimes were not

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\* J.D. Candidate, May 2016, Loyola Law School, Los Angeles; B.A. Political Science, University of California, Irvine, June 2012. I would like to thank Professor David Glazier for sparking my interest in this fascinating area of law, and Professor Robert Brain for his continual guidance, support, and feedback on this Comment. I am also truly grateful to the editors and staffers of the *Loyola of Los Angeles Law Review* for their incredible work on this Issue. Finally, I would like to dedicate this Comment to my loving family for their endless support and encouragement, and without whom my education would not have been possible.

1. See *United States v. Al Bahlul (Al Bahlul I)*, 820 F. Supp. 2d 1141, 1156–57 (C.M.C.R. 2011).

2. Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600.

3. *Al Bahlul v. United States (Al Bahlul II)*, 767 F.3d 1, 7 (D.C. Cir. 2014).

4. *Id.* at 7–8.

recognized under the international laws of war when committed.<sup>5</sup> Upon en banc review, the D.C. Circuit applied the plain-error standard of review to Al Bahlul's jurisdictional challenge and affirmed his conspiracy conviction.<sup>6</sup> The majority reasoned it was "not obvious" that the statute conferring jurisdiction to military commissions was limited to international law of war offenses.<sup>7</sup> In doing so, the D.C. Circuit concluded "the historical practice of [U.S.] wartime tribunals [was] sufficient" to suggest that the military commission could try Al Bahlul for conspiracy to commit war crimes.<sup>8</sup>

The D.C. Circuit then correctly determined material support and solicitation were not traditionally triable by military commission and, as such, were not offenses at the time of Al Bahlul's conduct.<sup>9</sup> Therefore, it proceeded to vacate Al Bahlul's convictions for material support and solicitation, agreeing with his argument that both constituted plain *ex post facto* violations.<sup>10</sup>

This Comment argues the D.C. Circuit erred in upholding Al Bahlul's inchoate conspiracy conviction because such an offense is not recognized by the international laws of war and therefore not triable by military commission. Part II provides the factual and procedural background of Al Bahlul's case. Part III discusses the D.C. Circuit's majority opinion of the *Al Bahlul II* decision, as well as its reasoning in reaching its rulings. Part IV provides the historical framework and development of the law that is implicated in this decision. Part V examines the D.C. Circuit's error in affirming Al Bahlul's conspiracy conviction, particularly its failure to adequately consider its own reasoning from a recent decision as well as the congressional intent behind the 2006 MCA. Finally, Part VI summarizes the main points of this Comment's discussion.

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5. *Id.* at 8.

6. *Id.* at 5.

7. *Id.* at 24.

8. *Id.* at 27.

9. *Id.* at 29–31.

10. *Id.* at 31.

## II. STATEMENT OF THE CASE

A. *Factual Background of Al Bahlul's Case*

In the late 1990s, Al Bahlul left his native country of Yemen to join al Qaeda forces in Afghanistan, where he completed his military training and swore an oath of allegiance to Osama bin Laden.<sup>11</sup> Shortly after the al Qaeda members attacked the *U.S.S. Cole* on October 12, 2000, Al Bahlul, at the instruction of bin Laden, created and distributed a propaganda video that included footage of the bombings and called for a jihad against the United States.<sup>12</sup>

Bin Laden later promoted Al Bahlul to his personal assistant and secretary for public relations, a position in which Al Bahlul secured loyalty oaths from and prepared “martyr wills” for Mohamed Atta and Ziad al Jarrah, two of the September 11 hijackers.<sup>13</sup> Deemed “too important” to the cause to participate in the September 11 attacks, Al Bahlul evacuated al Qaeda’s Kandahar headquarters alongside bin Laden and other senior al Qaeda members in the days preceding the attacks.<sup>14</sup>

After September 11, Bin Laden instructed Al Bahlul to investigate and report the findings of the economic impact of the attacks.<sup>15</sup> However, in December 2001, Al Bahlul fled to Pakistan where he was eventually captured.<sup>16</sup> After being transferred into the custody of U.S. authorities, he was transported in early 2002 to the U.S. Naval Base at Guantánamo Bay, Cuba, where he has since been detained pursuant to the 2001 Authorization for Use of Military Force (AUMF).<sup>17</sup>

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11. *Id.* at 5.

12. *Id.* at 5–6.

13. *Id.* at 6.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*; see Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224 (2001) (authorizing the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”).

### B. Procedural History

Invoking his powers under the AUMF and Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821 (“Section 821”),<sup>18</sup> President Bush “establish[ed] military commissions to try ‘members of . . . al Qaida’ and others who ‘engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor.’”<sup>19</sup> In 2004, military prosecutors charged Al Bahlul with conspiracy to commit war crimes after President Bush deemed him eligible for trial by military commission.<sup>20</sup> Yet, those proceedings were stayed pending the Supreme Court determination of *Hamdan v. Rumsfeld*,<sup>21</sup> a case in which another detainee challenged the “lawfulness of his trial by military commission.”<sup>22</sup>

In *Hamdan I*, “the U.S. Supreme Court struck down the system of military commissions used by the Bush Administration to prosecute detainees at Guantánamo for alleged war crimes.”<sup>23</sup> Specifically, the Supreme Court found the military commission lacked power to try the detainee’s case “because its structure and procedures violate[d] both the UCMJ and Geneva Conventions.”<sup>24</sup> In response, Congress adopted the 2006 MCA, which codified thirty offenses triable by military commission and “conferred jurisdiction on military commissions to try [such offenses] . . . ‘when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.’”<sup>25</sup>

Approximately two years later, the charges against Al Bahlul were amended to embody three offenses set forth in the 2006 MCA: conspiracy to commit war crimes, providing material support for terrorism, and solicitation of others to commit war crimes.<sup>26</sup> Despite admitting to the factual allegations against him (except to the suggestion that he wore a suicide belt), Al Bahlul pleaded not guilty to the charges, “deny[ing] the legitimacy of the military

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18. See 10 U.S.C. § 821 (2000) (granting military commissions jurisdiction over “offenders or offenses that by statute or the law of war may be tried by military commission”).

19. *Al Bahlul II*, 767 F.3d at 6 (ellipsis in original).

20. *Id.*

21. (*Hamdan I*), 548 U.S. 557 (2006).

22. *Al Bahlul II*, 767 F.3d at 6.

23. James G. Vanzant, Note, *No Crime Without Law: War Crimes Material Support or Terrorism and the Ex Post Facto Principle*, 59 DEPAUL L. REV. 1053, 1057 (2010).

24. *Hamdan I*, 548 U.S. at 567.

25. *Al Bahlul II*, 767 F.3d at 6–7 (quoting 10 U.S.C. §§ 950t–950v (2006)).

26. *Id.* at 7.

commission.”<sup>27</sup> Having “waived all pretrial motions, asked no questions during voir dire, made no objections to prosecution evidence, presented no defense and declined to make opening and closing statements,” the military commission convicted Al Bahlul of all three offenses and sentenced him to confinement for life.<sup>28</sup> The CMCR affirmed Al Bahlul’s conviction and sentence, following which he appealed to the D.C. Circuit.<sup>29</sup>

While Al Bahlul’s petition for appeal was pending, the D.C. Circuit, in another case, “interpret[ed] the [2006 MCA] 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.”<sup>30</sup> In *Hamdan II*, the court vacated Hamdan’s conviction for material support for terrorism because it was not a preexisting offense triable by military commission.<sup>31</sup> Shortly after, “the Government conceded that *Hamdan II*’s reasoning required vacatur of all three of Bahlul’s convictions.”<sup>32</sup> In light of that concession, the D.C. Circuit vacated Al Bahlul’s convictions.<sup>33</sup> However, the Government later petitioned for a rehearing en banc, which the D.C. Circuit granted.<sup>34</sup>

### III. DISPOSITION OF THE COURT

In this appeal, Al Bahlul requested the court to interpret the 2006 MCA as “mak[ing] triable by military commission only those crimes that were recognized under the international law of war when committed.”<sup>35</sup> Additionally, he argued “law of war” as set forth in Section 821 implies *international* law of war.<sup>36</sup>

Judge Karen LeCraft Henderson, writing for the majority of the court, adopted the “plain error” standard in reviewing Al Bahlul’s convictions.<sup>37</sup> She determined Al Bahlul forfeited the arguments he

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27. *Id.*

28. *Id.*

29. *Id.* at 8.

30. *Hamdan v. United States (Hamdan II)*, 696 F.3d 1238, 1248 (D.C. Cir. 2012).

31. *Al Bahlul II*, 767 F.3d at 8.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 22–23.

37. *Id.* at 9–10.

raised on appeal because “he flatly refused to participate in the military commission proceedings and instructed his trial counsel not to present a substantive defense.”<sup>38</sup> Combined with the Government’s specific request for a plain error standard,<sup>39</sup> the majority concluded his convictions would be reviewed for plain error only.<sup>40</sup>

In examining Al Bahlul’s jurisdictional challenge to his conspiracy charge, the majority found *domestic* wartime precedent “provide[d] sufficient historical pedigree to sustain Bahlul’s conviction on plain-error review.”<sup>41</sup> In its domestic precedential analysis, the majority referred to the trial of the conspirators of the Abraham Lincoln assassination,<sup>42</sup> the prosecution of Nazi saboteurs who had entered the United States with the intent to destroy industrial facilities,<sup>43</sup> and the military order of General Douglas MacArthur during the Korean War which called for the prosecution by military commission of those accused of conspiracy to commit violations of the laws of war.<sup>44</sup> Despite acknowledging the overwhelming Supreme Court precedent that interprets Section 821 and its predecessors as conferring jurisdiction to military commissions over “international law of war” offenses,<sup>45</sup> Judge Henderson concluded “the historical practice of *our wartime tribunals* is sufficient to make it not ‘obvious’ that conspiracy was not traditionally triable by law-of-war military commission under section 821.”<sup>46</sup> Therefore, the majority affirmed Al Bahlul’s conviction for conspiracy to commit war crimes, but overturned his material support and solicitation convictions.<sup>47</sup>

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38. *Id.* at 10.

39. *Id.* at 11.

40. *Id.* at 10.

41. *Id.* at 24.

42. *Id.*

43. *Id.* at 26.

44. *Id.*

45. *See id.* at 22–23.

46. *Id.* at 27 (emphasis added).

47. *Id.* at 5.

#### IV. HISTORICAL FRAMEWORK AND DEVELOPMENT OF THE LAW

Historically, there are three situations in which military commissions have been used.<sup>48</sup> First, in times and areas of martial law, military commissions have been substituted for civilian courts.<sup>49</sup> Second, military commissions have been implemented as temporary institutions to try civilians in territories occupied by the U.S. military.<sup>50</sup> Lastly, and the type of commission at issue here, are those established “as an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.’”<sup>51</sup>

International law scholars argue the military commission that prosecuted Al Bahlul, “as [a] law-of-war tribunal[], [is] legally limited to prosecuting offenses recognized by the international law regulating armed conflict.”<sup>52</sup> As Judge Judith W. Rogers noted in her dissenting opinion, the majority deviated from seventy years of Supreme Court precedent, which has interpreted the “law of war” to mean the international law of war.<sup>53</sup> By relying solely on domestic precedent in its analysis, the court ignored overwhelming legal authority that strongly suggests the notion that “conspiracy” has never been and is not now an offense recognized in international law.<sup>54</sup>

##### *A. The Supreme Court’s Interpretation of Section 821’s “Law of War”*

Like Article 15 of the Articles of War (“Article 15”),<sup>55</sup> its predecessor, Section 821 grants jurisdiction to military commissions

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48. *Hamdan I*, 548 U.S. 557, 595 (2006).

49. *Id.*

50. *Id.* at 595–96.

51. *Id.* at 596 (quoting *Ex Parte Quirin*, 317 U.S. 1, 28–29 (1942)).

52. David Glazier, *The Misuse of History: Conspiracy and the Guantanamo Military Commissions*, 66 BAYLOR L. REV. 295, 301 (2014); see Brief for International Law Scholars as Amici Curiae Supporting Petitioner, *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (No. 11-1324), 2014 WL 3437485.

53. *Al Bahlul II*, 767 F.3d 1, 37 (D.C. Cir. 2014) (Rogers, J., concurring in part and dissenting in part).

54. See *id.* at 39.

55. See *Ex Parte Quirin*, 317 U.S. at 27 (stating “Article 15 declares that ‘the provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . or other military tribunals of concurrent jurisdiction in respect of



over “offenders or offenses that by statute or by the law of war may be tried by military commission.”<sup>56</sup> When military prosecutors charged Al Bahlul, only two offenses provided by statute existed: spying and aiding the enemy.<sup>57</sup> Military prosecutors did not charge Al Bahlul with these statutory offenses.<sup>58</sup> Therefore, the military commission “had jurisdiction only over violations triable by military commission under the *law of war*.”<sup>59</sup>

For an offense “[t]o come within the ‘law of war’ under Section 821, [it] must constitute *both* a violation of the international law of war *and* a violation of the law of war as traditionally recognized in U.S. military commissions.”<sup>60</sup> Since the aftermath of World War II, the Supreme Court has adopted and reaffirmed this particular definition of “law of war.”

First, in 1942 the Supreme Court interpreted the law of war, as set forth in Article 15, “as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals.”<sup>61</sup> In *Quirin*, four German petitioners were charged with various violations of the laws of war for entering the United States with the intent to destroy war industries and facilities as ordered by the German High Command.<sup>62</sup> In determining whether the president had authority to order that the petitioners be tried by military commission, the Court stated a charge falls within the “law of war” under Article 15 if it “has been so recognized in practice *both here and abroad*, and has so generally been accepted as valid by authorities on international law.”<sup>63</sup>

Similarly, just a few years later in *In re Yamashita*, the Supreme Court intimated that “law of war” implies both domestic and international law in reviewing a military commission’s jurisdiction to prosecute a commander of the Japanese Imperial Army.<sup>64</sup> There, the

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offenders or offenses that by statute or by the law of war may be triable by such military commissions”).

56. 10 U.S.C. § 821 (2000).

57. *Al Bahlul II*, 767 F.3d at 37 (Rogers, J., concurring in part and dissenting in part) (citing 10 U.S.C. §§ 904, 906 (2000)).

58. *Id.*

59. *Id.* (emphasis added).

60. *Id.* at 42.

61. *Ex Parte Quirin*, 317 U.S. 1, 27–28 (1942).

62. *Id.* at 21–23.

63. *Id.* at 35 (emphasis added).

64. *See generally In re Yamashita*, 327 U.S. 1, 5–6 (1946).

Court “looked to the violations of the law of war ‘recognized in international law’ and consulted the Hague Conventions and Geneva Conventions.”<sup>65</sup> Specifically, the *Yamashita* Court concluded that by referencing the law of war, Article 15 “adopted the system of military common law applied by military tribunals” which is “defined and supplemented by the Hague Convention.”<sup>66</sup>

Last, and most recently, in 2006 the Supreme Court in *Hamdan I* concluded Section 821 “conditions the President’s use of military commissions on compliance not only with the American common law of war, but also with . . . the ‘rules and precepts of the law of nations.’”<sup>67</sup> Additionally, the Court noted that an act constitutes a law of war offense if by “universal agreement and practice” it is recognized as such *both* domestically and internationally.<sup>68</sup>

### B. International Law and the Conspiracy Offense

The D.C. Circuit affirmed Al Bahlul’s conspiracy conviction despite the notion that “[m]ost law-of-war scholars (and four Supreme Court justices) agree that the Anglo-American concept of conspiracy as an inchoate offense . . . is not a recognized war crime under international law.”<sup>69</sup> In fact, the plurality in *Hamdan I* “unequivocally found that . . . there was no evidence that conspiracy had ever constituted a recognized offense under the customary laws of war.”<sup>70</sup>

There is an international law principle that provides “criminal guilt is personal, and that mass punishment should be avoided.”<sup>71</sup> International tribunals and treaty law have supported and strongly reinforced this principle by refusing to acknowledge conspiracy as a law of war offense.<sup>72</sup> First, conspiracy is an offense that is unique to Anglo-American law and, therefore, “is absent from all major law of

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65. *Al Bahlul II*, 767 F.3d at 37 (Rogers, J., concurring in part and dissenting in part) (quoting *Yamashita*, 327 U.S. at 14–16).

66. *Yamashita*, 327 U.S. at 8.

67. *Hamdan I*, 548 U.S. 557, 613 (2006) (quoting *Quirin*, 317 U.S. at 28).

68. *Id.* at 603 (quoting *Quirin*, 317 U.S. at 30).

69. Glazier, *supra* note 52, at 297.

70. Alexandra Link, *Trying Terrorism: Joint Criminal Enterprise, Material Support, and the Paradox of International Criminal Law*, 34 MICH. J. INT’L. L. 439, 440 (2013).

71. *Al Bahlul II*, 767 F.3d 1, 39 (D.C. Cir. 2014) (Rogers, J., concurring in part and dissenting in part) (internal quotations omitted).

72. *Id.*

war treaties, including the Geneva and Hague Conventions.”<sup>73</sup> Second, the crime of conspiracy has been explicitly rejected in international criminal tribunals,<sup>74</sup> most famously in the Nuremberg Trials,<sup>75</sup> because “[t]he charge is overbroad” and therefore has the potential to “assign criminal liability to persons who are not responsible for committing war crimes.”<sup>76</sup> Third, international statutes that define law of war offenses do not include conspiracy to commit those offenses, apart from the crime of genocide.<sup>77</sup> It is also important to note that in 1949 the United Nations War Crimes Commission pointedly referenced the fact that United States Military Tribunals “did ‘not recognize as a separate offence conspiracy to commit war crimes or crimes against humanity.’”<sup>78</sup> Accordingly, these international sources confirm conspiracy is not a recognizable violation of the law of war, and therefore cannot be prosecuted by a military commission.<sup>79</sup>

#### V. THE D.C. CIRCUIT ERRED IN AFFIRMING AL BAHLUL’S CONSPIRACY CONVICTION

In *Hamdan I*, the Supreme Court provided that “[a]t a minimum, the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense *against the law of war*.”<sup>80</sup> The D.C. Circuit not only departed from decades of Supreme Court precedent in upholding Al Bahlul’s conspiracy conviction, but also dispensed from its very own reasoning in recent decisions. For one, in 2012 the D.C. Circuit acknowledged in *Hamdan II* that “law of war” under Section 821 “has long been understood to mean the international law

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73. Brief for International Law Scholars as Amici Curiae Supporting Petitioner, *supra* note 52, at 2; see *Al Bahlul II*, 767 F.3d at 39 (Rogers, J., concurring in part and dissenting in part).

74. Brief for International Law Scholars as Amici Curiae Supporting Petitioner, *supra* note 52, at 2.

75. See *Hamdan I*, 548 U.S. 557, 610 (2005) (stating “[t]he 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”).

76. Brief for International Law Scholars as Amici Curiae Supporting Petitioner, *supra* note 52, at 2–3.

77. See *Al Bahlul II*, 767 F.3d at 40 (Rogers, J., concurring in part and dissenting in part).

78. Brief for International Law Scholars as Amici Curiae Supporting Petitioner, *supra* note 52, at 8 (quoting 15 WAR CRIMES COMM’N, UNITED NATIONS, LAW REPORTS OF THE TRIALS OF WAR CRIMINALS 90 (1949)).

79. *Hamdan I*, 548 U.S. at 610.

80. *Id.* at 603 (emphasis added).

of war.”<sup>81</sup> Additionally, in 2013 the D.C. Circuit affirmed its *Hamdan II* interpretation in *Ali v. United States*,<sup>82</sup> stating “we are mindful that ‘imposing liability on the basis of a violation of . . . ‘law of war’ generally must be based on norms *firmly* grounded in international law.”<sup>83</sup>

Despite these findings, the D.C. Circuit relied solely on domestic precedent in affirming Al Bahlul’s inchoate conspiracy conviction, “stretch[ing] the use of history beyond its credible limits.”<sup>84</sup> In doing so, the court failed to adequately consider its reasoning from the *Ali* decision, which was proffered by Al Bahlul’s counsel in support of his position. Furthermore, the majority’s sole reliance on domestic precedent deviated from Congress’s intent, as set forth in the 2006 MCA’s statement of purpose and intent. For these reasons, the D.C. Circuit erred in upholding Al Bahlul’s conspiracy conviction.

*A. Conspiracy to Commit Piracy Is Analogous to  
Conspiracy to Commit War Crimes*

Al Bahlul presented *Ali*, a case decided by the D.C. Circuit just a year prior, to the court in support of his position, arguing “[n]o court has ever suggested that there is a domestic body of common law crimes that can be applied extraterritorially and in the absence of any statutory mandate for their judicial creation.”<sup>85</sup>

In *Ali*, a U.S. grand jury indicted a Somali national under a federal statute for conspiracy to commit piracy.<sup>86</sup> *Ali*, the petitioner, was alleged to have participated in the capture of a merchant vessel on the high seas with the purpose to negotiate large sums of money

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81. *Hamdan II*, 696 F.3d 1238, 1245 (D.C. Cir. 2012).

82. 718 F.3d 929 (D.C. Cir. 2013).

83. *Id.* at 942 (quoting *Hamdan II*, 696 F.3d at 1250 n.10).

84. Glazier, *supra* note 52, at 297; *see id.* at 299 (stating “careful scrutiny of the historical record shows that it does not actually support the conclusion that past U.S. military commissions prosecuted inchoate conspiracies as a war crime”).

85. En Banc Reply Brief for Petitioner at 12, *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (No. 11-1324), 2013 WL 4036477.

86. 18 U.S.C. § 371 (2012) (“If two or more persons conspire to commit any offense against the United States . . . in any manner thereof or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned . . . or both.”).

as ransom from the vessel's owner.<sup>87</sup> In that decision, the D.C. Circuit affirmed the district court's dismissal of Ali's conspiracy to commit the piracy offense, concluding the district court lacked jurisdiction to prosecute him on that charge.<sup>88</sup> First, the D.C. Circuit agreed with the district court that the federal conspiracy statute did not apply extraterritorially.<sup>89</sup> Second, the court reasoned the international statute granting universal jurisdiction to domestic courts to try individuals for the offense of piracy did not include by its plain language the offense of *conspiracy* to commit piracy.<sup>90</sup> In affirming the dismissal of Ali's conspiracy charge, the D.C. Circuit stated, "[i]nternational law does not permit the government's abortive use of universal jurisdiction to charge Ali with conspiracy."<sup>91</sup>

In short, the D.C. Circuit determined that prosecuting Ali for conspiracy to commit piracy would be inconsistent with international law. Such reasoning is not only applicable to Al Bahlul's case, but should have resulted in the vacatur of his conspiracy conviction. Ironically, the case for vacating Al Bahlul's conspiracy charge is significantly stronger than the one for dismissing Ali's conspiracy charge. Historically, piracy has been considered a serious international offense to the extent that international statutes grant nation-states universal jurisdiction to prosecute anyone who commits the offense.<sup>92</sup> Despite this, the D.C. Circuit refused to extend such jurisdiction to encompass conspiracy to commit piracy.<sup>93</sup>

In *Al Bahlul II*, the court held the complete opposite of *Ali*, extending its jurisdiction to cover an offense that has repeatedly been rejected by international legal authorities, as well as by the Supreme

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87. *Ali*, 718 F.3d at 933. As a "pirate hostage negotiator," Ali secured a \$1.7 million ransom from the owners of the vessel to be given to the pirates (in which he received a \$16,500 share), as well as \$75,000 in "payment for his assistance." *Id.*

88. *Id.* at 942.

89. *Id.* at 941–42.

90. *Id.* at 942 ("UNCLOS's plain language does not include conspiracy to commit piracy."); see S.C. Res. 2020, U.N. Doc. S/RES/2020 (Nov. 22, 2011).

91. *Ali*, 718 F.3d at 942.

92. See Tara Helfman, *Marauders in the Courts: Why the Federal Courts Have Got the Problem of Maritime Piracy (Partly) Wrong*, 62 SYRACUSE L. REV. 53 (2012). "Piracy has aptly been described as 'the original [universal] jurisdiction crime.' . . . Under customary international law, any state may assert jurisdiction over a pirate because he is *hostis humani generis*, the enemy of all humankind, a judicial classification that has existed for millennia." *Id.* at 55–56; see generally Daniel A. Lavrisha, *Pirates Ye Be Warned: A Comparative Analysis of National Piracy Laws*, 42 U. TOL. L. REV. 255 (2010) (offering a comparative analysis of piracy laws, Lavrisha notes the commonality among nations of granting universal anti-piracy enforcement jurisdiction).

93. See generally *Ali*, 718 F.3d at 929.

Court.<sup>94</sup> It ignored the notion that law of war violations must be recognized “both here and abroad,”<sup>95</sup> and wrongfully interpreted the rare instances of domestic precedent as being enough to prosecute Al Bahlul for conspiracy to commit war crimes.<sup>96</sup> This alone suffices to illustrate the D.C. Circuit’s error in affirming Al Bahlul’s inchoate conspiracy conviction.

*B. The Purpose and Intent of the 2006 MCA*

As the D.C. Circuit stated in *Ali*, “an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”<sup>97</sup> The D.C. Circuit’s interpretation of the 2006 MCA as conferring jurisdiction to the military commission to try Al Bahlul for inchoate conspiracy is clearly inconsistent with the law of nations. However, it is not necessary to examine other possible constructions of the 2006 MCA because Congress unequivocally provided its intent in the 2006 MCA. Rather, the D.C. Circuit failed to adequately consider the statement of purpose and intent, which reads as follows:

(a) PURPOSE.—The provisions of this subchapter codify offenses that have *traditionally been triable* by military commissions. This chapter *does not establish new crimes* that did not exist before its enactment, but rather codifies those crimes for trial by military commission.

(b) EFFECT.—Because the provisions of this subchapter (including provisions that incorporate definitions in other provisions of law) are *declarative of existing law*, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter.<sup>98</sup>

As Judge Rogers stated, “[t]he reference in Congress’s plain and unequivocal statement of purpose to offenses that have *traditionally been triable* by military commissions, clearly indicates its intent to confine military commissions to their traditional role and jurisdiction.”<sup>99</sup> Therefore, the only thing left to determine is whether

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94. *See generally Al Bahlul II*, 767 F.3d 1 (D.C. Cir. 2014).

95. *Ex Parte Quirin*, 317 U.S. 1, 35–36 (1942).

96. *See Glazier, supra* note 52, at 299.

97. *Ali*, 718 F.3d at 935 (internal quotation marks omitted).

98. *Al Bahlul II*, 767 F.3d at 35–36 (Rogers, J., concurring in part and dissenting in part) (quoting 10 U.S.C. § 950p (2006)).

99. *Id.* at 36 (internal quotations omitted).

conspiracy is an offense against the law of war, which is a question of international law.<sup>100</sup> Because it has been established that conspiracy is not an offense recognized by international law of war, the D.C. Circuit departed from congressional intent by relying solely on domestic precedent in upholding Al Bahlul's conspiracy conviction.

### C. *The Implications of the Al Bahlul Decision*

Military commissions are essential institutions to the American justice system, particularly in times of war where individuals have great opportunity to commit war crimes and other law of war violations. However, there is great concern—and rightly so—over the use of Guantánamo Bay military commissions to prosecute individuals for acts of terrorism. Some have argued that Article III courts, which have tried five hundred terrorism-related cases since September 11, are better suited for the task.<sup>101</sup> The outcome of the *Al Bahlul II* decision clearly supports this argument.

As of August 2014, 122 detainees at Guantánamo Bay were being held pursuant to the AUMF, were awaiting transfer or trial, or were serving their sentences.<sup>102</sup> At that time, seven detainees had been convicted of similar charges to Al Bahlul,<sup>103</sup> while dozens of others had been recommended for prosecution or indefinite detention or both.<sup>104</sup> In light of the *Al Bahlul II* decision, David Hicks, who has already served his sentence after being convicted for providing material support for terrorism,<sup>105</sup> filed a motion to vacate his conviction.<sup>106</sup>

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100. See Brief for International Law Scholars as Amici Curiae Supporting Petitioner, *supra* note 52, at 14.

101. Laura Pitter, *13 Years on, Will 9/11 Ever Go to Trial?*, HUM. RTS. WATCH (Aug. 28, 2014), <http://www.hrw.org/news/2014/08/28/13-years-will-911-ever-go-trial>; see generally Steve Vladeck, *Why Article III Matters: A Reply to Peter Margulies on Al Bahlul*, LAWFARE (Sept. 30, 2014, 10:23 PM), <http://www.lawfareblog.com/2014/09/why-article-iii-matters-a-reply-to-peter-margulies-on-al-bahlul/>.

102. See *The Guantánamo Docket*, N.Y. TIMES, <http://projects.nytimes.com/Guantanamo/detainees> (last visited Jan. 28, 2015); *The Guantánamo Trials*, HUM. RTS. WATCH (Jan. 30, 2015, 4:40 AM), <http://www.hrw.org/features/guantanamo>.

103. *The Guantánamo Trials*, *supra* note 102.

104. *Guantánamo by the Numbers*, HUM. RTS. FIRST (last updated Mar. 27, 2015), <https://www.humanrightsfirst.org/sites/default/files/gtmo-by-the-numbers.pdf>.

105. *First Gitmo Conviction Invalidated By New Ruling, Attorneys Say*, CTR. FOR CONST. RTS. (Aug. 20, 2014), <http://ccrjustice.org/newsroom/press-releases/first-gitmo-conviction-invalidated-new-ruling-attorneys-say>; see *The Guantánamo Trials*, *supra* note 102.

106. *First Gitmo Conviction Invalidated By New Ruling, Attorneys Say*, *supra* note 105.

Thirteen years have passed since the dreadful attacks on September 11. The prolonged process of prosecuting Guantánamo detainees, coupled with its “tainted history,” continues to hamper the legitimacy of the judgments of the military commissions both domestically and abroad.<sup>107</sup> With verdicts and decisions periodically being overturned, there is great uncertainty in the prosecution of these individuals that may not have existed had they been tried by Article III courts. As Laura Pitter of the Human Rights Watch states, “[t]he al-Bahlul decision shows why creating a substandard system of justice, with new rules and charges never before contemplated by a US court, was always a bad idea.”<sup>108</sup> Using the Guantánamo commissions to try terrorism charges, she added, “is not worth the very real risk that verdicts may get overturned on appeal.”<sup>109</sup> In affirming the conspiracy charge, which has never been considered a law of war offense, and vacating material support and solicitation, *Al Bahlul* “dealt [another] major blow to the legitimacy of [the Guantánamo] military commissions.”<sup>110</sup>

## VI. CONCLUSION

Though it may have been difficult to exonerate Al Bahlul, the D.C. Circuit should have vacated his conspiracy conviction alongside his material support and solicitation convictions, because the United States, as a nation of laws, is built on the principle that “the rule of law . . . is preferable to that of any individual.”<sup>111</sup>

Prior to *Al Bahlul*, “no U.S. court has ever upheld the jurisdiction of a military tribunal to try an offense that *that* court believed to be a violation of the *domestic*—but not *international*—laws of war.”<sup>112</sup> As noted above, the majority opinion deviated from seventy years of Supreme Court precedent and international legal authority in affirming Al Bahlul’s conspiracy conviction. It also

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107. See Pitter, *supra* note 101.

108. *US: Court Undercuts Military Commissions’ Legitimacy*, HUM. RTS. WATCH (July 15, 2014), <http://www.hrw.org/news/2014/07/15/us-court-undercuts-military-commissions-legitimacy>.

109. *Id.*

110. *Id.*

111. RANDALL R. CURREN, *ARISTOTLE ON THE NECESSITY OF PUBLIC EDUCATION* 73 (2000) (quoting B. JOWETT, *THE POLITICS OF ARISTOTLE* 16 (1885) (c.384 B.C.E.)); see JAMES A. CURRY ET AL., *CONSTITUTIONAL GOVERNMENT: THE AMERICAN EXPERIENCE* 29 (5th ed. 2003).

112. Brief of the National Institute of Military Justice as Amici Curiae Supporting Petitioner, *Al Bahlul v. United States*, 767 F.3d 1 (D.C. Cir. 2014) (No. 11-1324).



departed from its very own reasoning in recent decisions, most notably *Ali* and *Hamdan II*. In ignoring the notion that law of war implies offenses recognized “both here and abroad,”<sup>113</sup> the D.C. Circuit upheld his conviction relying solely on domestic precedent in its law of war analysis. This error expanded the military commission’s jurisdiction to try conspiracy that, contrary to the majority’s opinion, has not been traditionally triable by military commission. Lastly, *Al Bahlul* highlights the concerns many share regarding the legitimacy of the military commissions and supports the argument that Article III courts are better suited to prosecute terrorism offenses.

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113. *Ex Parte Quirin*, 317 U.S. 1, 35–36 (1942).