CRIMINAL CONSPIRACY AND THE MILITARY COMMISSIONS ACT: TWO MINDS THAT MAY NEVER MEET

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"[C]onspiracy, that darling of the modern prosecutor's nursery."[1]

Good morning. I wish to thank my fellow panelists, the International Law Society, and the New York City Bar Association for hosting this excellent conference. It is important that we gather together to talk about the massive, and sometimes unintended, impact that recent changes in our approach to war and international law are currently having on the rule of law. I am honored to be here today. I come to this discussion as an old trial lawyer, criminal lawyer, and military lawyer. My comments arise from those disciplines, and my views have been formed in the crucible of my own practical and theoretical experiences, so I share them with you to give context to my comments.

We stand at a point in our history where customary international law, the law of war,[2] and criminal law—both domestic and international—are combining in ways that have not been planned, reviewed, or consciously implemented. The resulting chaos may have long-term implications and threatens the rule of law as currently defined by most modern democracies.[3] Military personnel take an oath to "support and defend the Constitution of the United States against all enemies foreign and domestic, and to bear true faith

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1. Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (ruling on defendants' appeal that the lower court erred in convicting defendants of violating and conspiring to violate the Harrison Narcotic Act).

2. My understanding of the Law of War is based in large part on the classes taught at the Judge Advocate General's School, United States Army, Charlottesville, Virginia, the ARMY FIELD MANUAL FOR THE LOW and the JUDGE ADVOCATE GENERAL'S SCHOOL, OPERATIONAL LAW HANDBOOK.

3. For an excellent discussion on the development of the Rule of Law, both historically and otherwise, see BRAIN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY (2004).

and allegiance to the same."[4] I view my comments today as a continued fulfillment of that oath as a retired officer and member the United States Army Judge Advocate General's Corps.

I am particularly concerned with recent changes in criminal law that were designed to assist in the war on terror, specifically, the modified definition of conspiracy found in the Military Commissions Order and subsequent Military Commissions Act. I am afraid this change will have a negative impact on the long-term viability of the rule of law in criminal justice systems. This danger is very real, and extends to both the domestic and international criminal justice arena. Others have commented on the dangers to the our Sixth Amendment right to confrontation and our Fourth Amendment right to privacy in the United States, but I speak today of changing the definition and element for conspiracy in the Military Commissions Act as to the intent and knowledge requirements and the potentially disastrous effect these changes could have to our concept of what constitutes an appropriate criminal justice system.

Conspiracy law has been designed to deter criminal activity by providing a prosecutor with the means to hold members of an illicit organization that engages solely in criminal activity accountable before the law. This is a necessary tool in any competent prosecutor's kit bag, but it can be subject to abuse. Accordingly, this area of the law has been subject to a great deal of scrutiny and debate because it has the potential to make "status" as a member of an organization an offense when the person who joined that organization did so with the requisite knowledge that the organization was in fact illicit. While this historical definition makes sense for domestic law, it is problematic when applied to the confrontations between nation states that result in armed conflict. One person's illicit organization is another group's religious faith, freedom fighter's association, or ethnic conclave. This difficulty extends to include armed conflict with non-nation state actors—a large part of the current global war on terror. Many of these organizations may have both illicit and licit purposes in light of their own societal mores, local law, and customs. Dealing with these concerns in the past caused the United States Government, the United States Military, and the International Criminal Tribunal for the former Yugoslavia to define conspiracy as a specific intent crime, either practically or statutorily. The only known exception dealt with crimes against humanity, a term of art that grew out of the Nuremberg tribunals. This ensures that the knowledge element is present before individuals can be indicted for conspiracy. If we are going to hold someone criminally liable for the acts committed by an organization to which they belong, they must have had the specific intent to join that organization and the knowledge of what that organization did.

4. 5 U.S.C. § 3331 (2007).

The original Military Commissions Order, and subsequent Military Commissions Act, charges conspiracy with a general intent *mens rea*. While the Military Order claims to merely restate already existing law, an examination of the International Criminal Tribunal for the former Yugoslavia, the law as stated by the Supreme Court of the United States, and the Uniform Code of Military Justice (UCMJ) reveals that in no other body of law from which the Order could have drawn the elements of conspiracy is there any discussion of conspiracy as a general intent crime. Each of these systems of criminal justice defines conspiracy as a specific intent crime. The Military Order created a new crime on November 16, 2001, when it defined conspiracy as a general intent crime.

We should consider existing United States law, the UCMJ, and the case law of the International Criminal Tribunal for the former Yugoslavia when contemplating how conspiracy has been defined and applied in situations analogous to the Global War on Terror. In each of these systems, the law defines conspiracy as a specific intent crime either directly or through application. This has enormous importance when considering the new "general intent" conspiracy statute present in the original Military Commission Order 2 and the subsequent Military Commissions Act passed by the United States Congress and signed by President George W. Bush. The Military Commissions Order defining conspiracy as a general intent crime, which claimed to "restate" already existing law, was passed on November 16, 2001. The Military Order created a new state of mind necessary to commit conspiracy, thereby redefining the statutory elements for conspiracy as applied to military commissions. Let us consider that order, which formed the basis for the subsequent Military Commissions Act, and then review conspiracy law as applied by the United States, the Military, and the International Criminal Tribunal for the former Yugoslavia so that we can understand the deleterious effect of this "redefining" of conspiracy by the Military Commissions Order and subsequent Military Commissions Act.

The Department of Defense Military Commission Instruction Number Two, passed on November 16, 2001 states, "[a]ll actions taken by the Accused that are necessary for completion of a crime must be performed with general intent."[5] Additionally, the Military Order specifies that conspiracy meet the following requirements:

> 1) The accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission or otherwise joined an enterprise of persons who shared a common criminal purpose that involved,

5. 32 C.F.R. § 11.4 (2003).

at least in part, the commission or intended commission of one or more substantive offenses triable by military commission;

2) The accused knew the unlawful purpose of the . . . enterprise and joined it willfully, that is, with the intent to further the unlawful purpose; and

3) One of the conspirators or enterprise members, during the existence of the agreement or enterprise, knowingly committed an overt act in order to accomplish some objective or purpose of the agreement or enterprise.[6]

The *mens rea* necessary to accomplish the other three elements of conspiracy, as set forth by the Military Commission, is general intent.

While the UCMJ is silent as to the requisite *mens rea* for conspiracy in the article, when we review the language and application of both conspiracy and attempt under the UCMJ, it is clear that specific intent is necessary to commit conspiracy. The UCMJ states that attempted conspiracy is not an "offense" as used in definition of attempt as an act done with specific intent to commit the offense, amounting to more than mere preparation and tending to effect its commission.[7] When the person solicited agrees to participate in a concerted action with the person soliciting to commit a crime, then a conspiracy is formed. An attempt itself occurs on the very threshold of completion of the substantive crime. An attempt requires an overt act done with the specific intent to commit the offense.[8]

Closely read, this section says that there is no such crime as attempted conspiracy, but that there is only conspiracy. When specific intent is required for attempted conspiracy, that state of mind is also required for conspiracy. In *United States v. Shelton*, the court states that it is legally possible for a perpetrator to lack the premeditated design to kill and nonetheless have the specific intent to enter into a conspiracy to commit unpremeditated murder in violation of Article 118(2).[9] 10 U.S.C. § 880(a) notes that "[a]n act, done with specific intent to commit an offense . . . amounting to more than mere preparation and tending, even though failing, to effect its commission, is an attempt to commit that offense."[10] Since the UCMJ is silent as to what *mens rea* is specifically required for conspiracy, a synthesizing of both the laws for attempt and the laws for conspiracy, sections 880 and 881 of title 10, support the position that conspiracy is a specific intent crime under the Uniform Code

6. 32 C.F.R. § 11.6 (2003).

7. 10 U.S.C. § 880(80)(a); *see also* MCM, 1984, Part IV, para. 4(a)(a).

8. *Id.* at para. 4(c)(1).

9. United States v. Shelton, 62 M.J. 1, 11 (C.A.A.F. 2005).

10. 10 U.S.C. § 880 (2006).

of military justice. In *United States v. Owen*, the elements of attempted conspiracy to commit murder in connection with planned contract murder were found to be that the "accused solicited another to agree to procure the services of a contract killer; this was done with the specific intent to commit the murder of the intended victim; this amounted to more than mere preparation; and the act apparently tended to effect an agreement to commit the crime of murder."[11]

The United States Supreme Court defines conspiracy as a specific intent crime. "It is established that since the gravamen of the offense . . . is conspiracy, the prosecution must show that the offender acted with a specific intent to interfere with the federal rights in question."[12] Specific intent requires a more thorough inquiry into both the crime committed and into the state of mind of the alleged offender because for one to have specific intent, the alleged offender must intend to commit the primary offense with either or both knowledge or purpose that more consequences will result from that primary offense. General intent, by its very nature, has a much lower threshold of proof. Since conspiracy is a specific intent crime, requiring the intent to agree or conspire and the intent to commit the offense which is the object of the conspiracy. The specific intent to join with another person in the accomplishment of an unlawful purpose or a lawful purpose by unlawful means must exist.[13]

The International Criminal Tribunal for the former Yugoslavia (ICTY) states that conspiracy is a specific intent crime: "proof is required that whoever planned, instigated or ordered the commission of a crime possessed the criminal intent, that is, he directly or indirectly intended that the crime in question be committed."[14] The ICTY goes on to hold that: "an accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed."[15] The ICTY holds conspiracy to a higher standard of intent on the part of the perpetrator. Under the ICTY, a person charged with conspiracy must have had the requisite specific intent to commit the crime and any secondary effects that flow from that commission.[16] The ICTY found this definition of conspiracy necessary to effectively sort through the dirty business associated with a civil war and genocide. It is

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11. United States v. Owen, 47 M.J. 501, 501 (A. Ct. Crim. App. 1997); *see* 10 U.S.C. § 880(80), (934)(134).

12. Anderson v. United States, 417 U.S. 211, 223 (1974); *see also* United States v. Guest, 383 U.S. 745, 753–54 (1966); Screws v. United States, 325 U.S. 91 (1945).

13. United States v. Dadi, 235 F.3d 945, 950 (5th Cir. 2000); United States v. Barnett, 197 F.3d 138, 146 (5th Cir. 1999); United States v. Lage, 183 F.3d 374 (5th Cir. 1999).

14. Prosecutor v. Blaskic, Case No. IT-95-14-T, Judgment, ¶ 278 (Mar. 3, 2000).

15. Prosecutor v. Kordic & Cerkez, Case No. IT-95-14/2-T, Judgment, ¶ 386 (Feb. 26, 2001).

16. Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgment, ¶ 262 (Nov. 2, 2001).

interesting to note that the ICTY did not adopt a general intent definition for conspiracy even though they were faced with issues of genocide similar to that facing the Nuremberg tribunals after World War II.

The ICTY defines crimes against humanity in a way that requires specific intent for these types of crimes. "The requisite *mens rea* for crimes against humanity appears to be comprised by 1) the intent to commit the underlying offence, combined with 2) knowledge of the broader context in which that offence occurs."[17] The preexisting international laws of the ICTY concerning conspiracy appear to track with preexisting federal law and preexisting military law. Historically, conspiracy is a specific intent crime.

If conspiracy is considered as a crime against humanity, under current international law, not only would the alleged perpetrator have to possess specific intent, but he or she would also have to possess discriminatory intent. "The aider and abettor of persecution, as a 'special intent' crime, must not only have knowledge of the crime he is assisting or facilitating. He must also be aware that the crimes being assisted or supported are committed with a discriminatory intent."[18] Addressing this from a purely practical standpoint, the level of intent necessary to commit these crimes does not gradually move toward the lower threshold of proof. Rather, the standard hovers between specific intent and a commingling of such with discriminatory intent. The Military Commissions Order and subsequent Military Commissions Act do not restate preexisting law concerning conspiracy, regardless of whether the alleged source of that preexisting law is the United States Constitution, the UCMJ, or customary international law.

When the Military Commissions Order and subsequent Military Commissions Act changed the definition of conspiracy, they created an *ex post facto* issue when attempting to apply this new conspiracy law to misconduct that occurred before the law as enacted. The *ex post facto* effect for war crimes is not a new question of law for the United States and has previously been answered. After the Military Tribunals—which followed World War II—the U.S. Army Judge Advocate General's Corps published a report in 1953.[19] That report constitutes the historical knowledge of the Corps after having dealt with these issues. According to the 1953 United States Army Judge Advocate General Military Commissions Report, "[m]any occupation-security regulations merely re-state, still in very generalized form, duties which are placed upon an occupied population by international law, so that some of the same offenses previously mentioned as war crimes may then appear with designations more

17. Prosecutor v. Kupreskic, Case No. IT-95-16-T, Judgment, ¶ 556 (Jan. 14, 2000) (citing Prosecutor v. Tadic, Case No. IT-94-1-T, Judgment, ¶ 225 (May 7, 1997)).

18. Prosecutor v. Kvocka, Case No. IT-98-30/1-T, Judgment, ¶ 262 (Nov. 2, 2001).

19. 1953 JAGC Commissions Report at 26 (on file with author).

specifically adapted to the occupational situation."[20] The Commissions Report goes on to note that "[p]rosecution of crimes against humanity, at least on a mass scale, is not subject to the *ex post facto* doctrine familiar to national law."[21] The problem of whether *ex post facto* applies to international war crimes is addressed further: "[w]hile it has been stated that *ex post facto* doctrine is not applicable under international law, actual decisions usually have avoided that position."[22] The Commissions Report states that in order for a military court to deny the application of *ex post facto* doctrine, the crime in question must have been committed on a mass scale.[23] It may be assumed that "mass scale" refers to a conflict similar to the attempted eradication of Jewish persons by the Nazis.

There is a real danger in redefining conspiracy law to allow for general intent. It allows a state to prosecute an individual for membership in an organization, even when they did not know, or have reason to know, that the organization was involved in criminal activity. It destroys the line between illicit and licit behavior relied upon by when interpreting mens rea for conspiracy. Through this redefined conspiracy definition, individuals become criminally liable for acts they did not support and did not have knowledge of. It may fairly be said that this definition makes membership in a group a crime. While that may not be the intended effect, it is clearly the result of the new definition.

We should stop and think carefully before we decide as a matter of law that we cannot belong to an organization without becoming criminally liable for whatever that organization does. This idea flies directly in the face of certain cherished western notions of autonomy, individual expression, and our own constitutionally guaranteed freedom of association. I am not arguing for a protective blanket under which a terrorist may hide while committing nefarious deeds. But we must proceed carefully when redefining the laws upon which we rely for our own freedoms. The quote of Sir Thomas Moore in the play, "A Man for All Seasons," is applicable today.[24] If we cut down all the laws of the land to get at the devil of terrorism, what will we do when the law turns on us? I fear that we shall suffer for it—and that would be a victory for terrorism on a level that none of us should ever accept.

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20. *Id.*

21. *Id.*, citing KEENAN AND BROWN, CRIMES AGAINST INTERNATIONAL LAW 51, 54, 118 (1950).

22. *Id.* at 48.

23. *Id.*

24. *See* ROBERT BOLT, A MAN FOR ALL SEASONS (1963). "And when the last law was down, and the Devil turned 'round on you, where would you hide, Roper, the laws all being flat?"