

PROSECUTING A PRE-9/11 TERRORIST: THE LEGAL LIMITS OF MILITARY COMMISSIONS

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It is an interesting moment to step back and assess how the military commission trials have progressed in the thirteen years since the trials were originally conceived by presidential order in 2001.¹ I had the privilege of being among the first group of human rights monitors to visit Guantanamo Bay in 2004 to witness the opening hearings of an earlier generation of military commission trials, and I have watched the trials closely since then.²

Military commissions in their various forms have had multiple trips to the federal courts, including a trip to the Supreme Court in 2006.³ They have been the subject of two major pieces of federal legislation—the Military Commissions Act of 2006, and the Military Commissions Act of 2009, which have substantially revised the rules surrounding commission proceedings.⁴ Today, the commissions boast a truly distinguished chief prosecutor in General Mark Martins, who is an extraordinary lawyer, among other things. In many respects, the commissions are vastly fairer procedurally than they were when they were conceived in 2001 and 2002.⁵

Yet the central problem remains: The legal complexity of pursuing a novel system of military commission trials, or war crimes

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1. See Military Order of November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

2. *US holds first Guantanamo hearing*, BBC NEWS, July 31, 2004, <http://news.bbc.co.uk/2/hi/americas/3916987.stm> [<http://perma.cc/69T4-QERH>].

3. See *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

4. See Military Commissions Act of 2006, Pub. L. No. 109-336, 120 Stat. 2600; National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–614 (codified at 10 U.S.C. §§ 948a–950t (Supp. III 2010)) (Military Commissions Act of 2009 within).

5. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (holding detainees had right to challenge detention before impartial tribunal).

trials, has not diminished. The latest generation of military commission prosecutions features the newest generation of challenges, this time involving some of the most high-profile terrorism cases the military commissions have yet seen.

To illustrate this point, let us examine the *al-Nashiri* case, which is now pending before the courts.⁶ Al-Nashiri was charged with conduct that primarily occurred from 1996 to 2000, including, most significantly, his role in the October 2000 attack on the USS Cole, which killed seventeen U.S. sailors. The 2000 Cole bombing occurred eleven months before the attacks of September 11, 2001.⁷ It also occurred well before Congress passed the Authorization for Use of Military Force, which gave the President broad military authority to combat al Qaeda, the Taliban, and associated forces.⁸

Yet critically, the commissions' jurisdiction is limited by statute to offenses that occurred *during hostilities*.⁹ More specifically, offenses are triable by military commission only if the offense is committed "in the context of and associated with hostilities."¹⁰ "Hostilities" is defined by the Military Commissions Act (MCA) as any conflict subject to the international law of war.¹¹ The Congress, the President, and the courts all agree on the proposition that we have to analyze the commissions' legality in this critical respect under the international law of war.¹² Put simply then, a

6. *Al-Nashiri v. MacDonald*, 741 F.3d 1002 (9th Cir. 2013).

7. CNN Library, *USS Cole Bombing Fast Facts*, CNN, Sept. 18, 2013, <http://www.cnn.com/2013/09/18/world/meast/uss-cole-bombing-fast-facts/> [<http://perma.cc/8AEB-PXRZ>] (USS Cole bombing occurred on October 12, 2000).

8. See Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (AUMF passed September 18, 2001).

9. MANUAL FOR MILITARY COMMISSIONS at page II-3 (2010 ed.), <http://www.mc.mil/Portals/0/pdfs/2012ManualForMilitaryCommissions.pdf> [<http://perma.cc/6D8M-NH6A>].

10. 10 U.S.C. § 950p(c) (2012).

11. *Id.* § 948a(9).

12. Under the MCA, Congress defined the meaning of "hostilities" at the outset of the statute as "any conflict subject to the laws of war." *Id.* Courts tasked with interpreting this provision have uniformly (and consistent with Congress's manifest intent) concluded the "laws of war" is synonymous with the international law of war. See, e.g., *Al Bahlul v. United States*, 767 F.3d 1, 27 (D.C. Cir. 2014) (noting that the executive concedes that the offense of material support for terrorism under the MCA is not an international law-of-war offense); *Hamdan v. United States*, 696 F.3d 1238, 1245 (D.C. Cir. 2012), overturned on other grounds; *Al-*

key legal question presented in the al-Nashiri case is, “were we really at war with al Qaeda in 1996?” If not, then the commissions lack jurisdiction to prosecute al-Nashiri.

More broadly, al-Nashiri’s case presents one of another set of tests of the commissions’ ongoing viability. Consider the track record. Since their inception, there have been eight convictions in military commissions, six of which have been the result of guilty pleas.¹³ In the past year, a panel of the D.C. Circuit reversed one of those convictions on the grounds that the charging offense, material support for terrorism, was not a war crime at the time that it was committed.¹⁴ This aspect of the decision was recently upheld on appeal, bringing the total number of sustained convictions back to seven.¹⁵

Indeed, all of those cases and convictions involved charges of conspiracy as agreement or material support. In six of the eight cases, those were the only charges.¹⁶ If the D.C. Circuit holding stands, it would thus invalidate all or part of every military commission conviction so far, and preclude future prosecutions for material support, conspiracy, and such offenses, for any conduct that was committed prior to October 2006.¹⁷

Even the chief prosecutor has now said that the commissions will only ever prosecute about twenty defendants maximum.¹⁸ By comparison, in the decade following September 11th, the

Nashiri v. MacDonald, 2012 WL 1642306 at *1 (W.D.Wash. 2012); United States v. Hamdan, 801 F. Supp. 2d 1247, 1278 (C.M.C.R. 2011).

13. See *By the Numbers*, MIAMI HERALD (Sept. 19, 2014), <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article2163210.html> [<http://perma.cc/QN62-84LB>] (last updated Nov. 9, 2014) (David Hicks plea bargain; Salim Hamdan convicted; Ibrahim al Qosi plea bargain; Omar Khadr plea bargain; Noon Uthman Mohammad plea bargain; Majid Khan plea bargain; Ahmad al Darbi plea bargain).

14. See *Al Bahlul*, 767 F.3d at 27 (affirming D.C. Circuit panel conclusion that Hamdan defendant’s convictions for providing material support for terrorism and solicitation of others to commit war crimes must be vacated).

15. See *id.* at 27–29 (concluding that material support for terrorism was neither a war crime under international law nor an offense under any “domestic common law of war” at the time defendant’s subject acts were committed).

16. See *By the Numbers*, *supra* note 13.

17. See *Al Bahlul*, 767 F.3d at 27–29.

18. Carol Rosenberg, *Prosecutor: Court ruling cuts vision for Guantanamo war crimes trials*, MIAMI HERALD, June 16, 2013, <http://www.miamiherald.com/2013/06/16/3455042/prosecutor-court-ruling-cuts.html> [<http://perma.cc/6TYE-W2J5>] (numbering around 20 prisoners “who can be realistically prosecuted”).

federal criminal courts succeeded in prosecuting on the order of 300 jihadist-related terrorism cases, succeeding with an eighty-seven percent conviction rate.¹⁹ Note, this number excludes domestic terrorism cases and any other kind of terrorism that you might count.²⁰

The commissions have thus already faced some profound challenges to their viability. So how serious is this latest one, the al-Nashiri question? Can he be prosecuted for war crimes, for acts that were committed before most of us would have thought that the nation was at war? I argue quite possibly not. Let me address this in three steps.

The first is a preliminary point. Many might ask: “How could a court possibly determine when the war started, or, for that matter, when the war ends? Surely the existence of war—whether you call it armed conflict or ‘hostilities’—is a political question, or at least a question on which the Executive is entitled to near total deference?” I argue, in a paper forthcoming in the *Minnesota Law Review*, called “Law at the End of War,” that no, it is not a political question.²¹ First and foremost, these are questions in the military commission context of *statutory* interpretation. The Supreme Court has never, not once, rejected a statutory interpretation case on political question grounds.²²

Indeed, if you look at the typical pattern of post-war cases in U.S. history—post-Civil War, post-World War I, and so forth—you see a host of cases involving statutes with conditions of war attached to them.²³ That is, statutes that provide that they apply only for the duration of hostilities, or a similar phrase. Historically, the courts have approached these cases similarly—namely, as questions of statutory interpretation, in which the Court de-

19. TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011, CENTER ON LAW AND SECURITY, NEW YORK UNIVERSITY SCHOOL OF LAW 2 (2011).

20. *See id.*

21. *See* Deborah Pearlstein, *Law at the End of War* (Cardozo Sch. of Law, Jacob Burns Institute for Advanced Legal Studies, Faculty Research Paper No. 406, 2013), available at <http://www.cardozolawreview.com/content/Symposium/SSRN-id2334326.pdf> [<http://perma.cc/57ME-4TB4>].

22. *See* John M. Hagan, *From the XYZ Affair to the War on Terror: The Justiciability of Time of War*, 61 WASH. & LEE L. REV. 1327, 1336–44 (2004).

23. *See, e.g.*, *Commercial Trust Co. of New Jersey v. Miller*, 262 U.S. 51, 53 (1923); *Kahn v. Anderson*, 255 U.S. 1, 9 (1921); *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 153 (1919).

employs standard tools of statutory interpretation, including the text, the context, the legislative history, the purpose of the act, and so forth.²⁴ This approach has sometimes led courts to conclude that the war referenced in the statute continues—World War II, for example, continued for the purpose of one statute into the early 1950s.²⁵ It has likewise on occasion led courts to conclude that war is over for purposes of a given case.²⁶ Critically, the Court has at times reached this conclusion despite the executive’s vigorous argument that war continues for the purpose of, for example, the application of special wartime statutes involving criminal prosecution.²⁷

Finally, concluding that all such determinations do present a political question, or giving total deference to the executive, particularly in criminal cases, would be especially problematic. In the MCA, the question whether hostilities exist does not matter only because the commissions lack jurisdiction without them.²⁸ The existence of hostilities is also an element of every charging offense.²⁹ In other words, to find a defendant guilty of whatever he has been charged with, the government must establish that his act was committed during hostilities as a matter

24. See, e.g., *Koohi v. United States*, 976 F.2d 1328, 1333–34 (9th Cir. 1992), *cert. denied*, 508 U.S. 960; *United States v. Prospero*, 573 F. Supp. 2d 436, 442–49 (D. Mass. 2008); *Minns v. United States*, 974 F. Supp. 500, 506 (D. Md. 1997) (Persian Gulf War was “time of war” under FTCA notwithstanding lack of formal declaration of war), *aff’d*, 155 F.3d 445, *cert. denied*, 525 U.S. 1106.

25. See, e.g., *Ludecke v. Watkins*, 335 U.S. 160, 161–62, 169–70 (1948) (quoting 50 U.S.C. § 21).

26. *United States v. Sobell*, 314 F.2d 314, 325–29 (2d Cir. 1963) (determining when World War II ended for purposes of setting statutory sentence applicable “in time of war”).

27. *Lee v. Madigan*, 358 U.S. 228, 236 (1959) (“[W]e cannot readily assume that the earlier Congress used ‘in time of peace’ in Article 92 to deny soldiers or civilians the benefit of jury trials for capital offenses four years after all hostilities had ceased. To hold otherwise would be to make substantial rights turn on a fiction The meaning attributed to them is at war with common sense, destructive of civil rights, and unnecessary for realization of the balanced scheme promulgated by the Articles of War.”)

28. 10 U.S.C. § 950p(c) (2012). See *Hamdi v. Rumsfeld*, 542 U.S. 507, 518 (2004). Questions of jurisdiction, recall, are questions of law for the court. See, e.g., *Boumediene v. Bush*, 553 U.S. 723 (2008).

29. See, e.g., 28 U.S.C. § 2680(j) (2012). Statute applies only to “[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.”

of *fact*.³⁰ Under the Constitution, every element of a charging offense—every such fact—has to be proven to a jury beyond a reasonable doubt.³¹ An interpretation of a statute that would instruct a jury that the executive must automatically win on that element would raise enormous questions of legality under the Constitution.

How might al-Nashiri fare on the existence of hostilities question on the particular merits of his case? The MCA authorizes only those prosecutions involving offenses committed “in the context of and associated with hostilities,” as that term is defined under the international law of war.³² The law of war recognizes two kinds of “armed conflicts.”³³ One is the classic “international armed conflict,” the use of armed force by one state against another. The other kind, the kind that is at issue here, is a conflict between a state and non-state actor—the United States on one side and al Qaeda on the other.³⁴

The law of so-called “non-international armed conflicts,” governing conflicts between a state party and a party that is not a state, is relatively new in international law.³⁵ The legal recognition of non-international armed conflicts in modern form is about sixty years old, as opposed to six centuries old, give or take. The law of non-international armed conflict was primarily designed to provide humanitarian protection to those caught up in *internal* armed conflicts.³⁶ That is, the framers of the current

30. See *Hamdi*, 542 U.S. at 520 (holding that “[i]t is a clearly established principle of the law of war that detention may last no longer than active hostilities.”).

31. See *Patterson v. New York*, 432 U.S. 197, 204 (1977).

32. 10 U.S.C. § 950p(c) (2012).

33. Geneva Convention Relative to the Treatment of Prisoners of War arts. 2 and 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]. The Geneva Conventions recognize conflicts between two or more recognized international state actors and conflicts between a state actor and a non-state actor, or between two or more non-state actors. *Id.*

34. *Hamdan v. Rumsfeld*, 548 U.S. 557, 631 (2006) (citing Commentary on Additional Protocols to Geneva Conventions, 12 August 1949, 1351 (1987) (“[A] non-international armed conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other.”)). The language is meant to recognize armed conflicts “not of an international character occurring in the territory of one of the High Contracting Parties,” or civil wars and conflicts which do not include two international states. *Id.* at 629.

35. See Geneva III, arts. 2 and 3.

36. Geneva III, art. 3. Common Article 3 provides a baseline set of safeguards against torture and other cruel treatment for a broad set of protected persons. See

law had in mind particularly horrific *civil* wars, like the Spanish Civil War, as the model conflict to which the law would apply.³⁷

Their critical challenge, then—and they were quite clear in the history of the convention provisions that described what they meant by non-international armed conflict—was to distinguish an armed conflict, something that rose to the level of an internal *war*, from short-lived riots or criminal or terrorist violence taking place within the sovereign borders of a particular country.³⁸ The “war” level of conduct would be subject to international law, subject to international legal restrictions in the interest of humanitarian protection.³⁹ More sporadic acts of violence, terrorism, and so forth would remain within the traditional realm of sovereign discretion.⁴⁰ In other words, the state parties that ratified this idea of non-international armed conflict wanted expressly to exclude smaller acts of violence, because they wanted them to remain the sole province of states—which insisted that they would deal with sporadic criminal activity under domestic law, and not the province of international law.⁴¹

How, then, should one distinguish between sporadic acts of violence and “armed conflict” or war? As international war crime courts have since held, a two-part test now governs whether a non-international armed conflict exists.⁴² The first

Commentary on Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 3320, T.I.A.S. No. 3364 [hereinafter Geneva III Commentary].

37. See Geneva III, art. 3; Geneva III Commentary.

38. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287., at 35–36.

39. See Geneva III Commentary.

40. *Id.*

41. See, e.g., Geneva III Commentary (stating that paragraph four, which says the application of article III does not affect the legal status of the parties, addressed the countries’ fears that application of article III would limit their ability to suppress revolt by labeling the country a belligerent party).

42. See, e.g., Prosecutor v. Limaj, Case No. IT-03-66-T, Judgment, ¶ 84 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 30, 2005) (“[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”) (quoting Prosecutor v. Tadić, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Int’l Crim. Trib. For the Former Yugoslavia Oct. 2, 1995)); Prosecutor v. Dule, Case No. IT-94-1-T, Opinion and Judgment, ¶ 561 (Int’l Crim. Trib. For the Former Yugoslavia May 7, 1997).

part of the test requires that the non-state party must be an *organized* armed group.⁴³ In al-Nashiri's case, there is no question that even by 1996 al Qaeda was an enormously well-organized armed group.⁴⁴

The other requirement is that there be *protracted* armed violence—in other words, that it be possible to distinguish the level of violence common to sporadic criminal or terrorist activity, and the level of violence common to actual war.⁴⁵ To assess this, courts have used the number of deaths and injuries, displacement of families and refugees fleeing conflict, property destruction, types and volumes of armaments, methods of force, and whether or not the government has felt compelled to respond militarily or not, among other things—all as metrics for evaluating how sustained, how intense the level of violence is.⁴⁶

In the al-Nashiri case, the prosecution's argument is that by October 2000, the time of the Cole attack, there had been several relevant acts of violence already. Al Qaeda attacked the U.S. embassies in Kenya and Tanzania in 1998. The United States responded with single cruise missile strikes, one strike in Afghanistan, one strike in the Sudan. A year and a half later, al Qaeda attacked the USS Cole itself.⁴⁷ Now, a relatively small number of deaths and injuries does not necessarily indicate a lack of an armed conflict.⁴⁸ But during the primary pe-

43. *Limaj*, Case No. IT-03-66-T, ¶ 84.

44. See LAWRENCE WRIGHT, *THE LOOMING TOWER: AL-QAEDA AND THE ROAD TO 9/11*, at 131–34, 141–44 (2007).

45. See *Tadić*, Case No. IT-94-1-I, ¶ 70 (setting forth the two-part test); Sandesh Sivakumaran, *Identifying an Armed Conflict not of an International Character*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 363, 369–71 (Göran Sluiter & Carsten Stahn eds., 2009) (discussing the second element of the test).

46. *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgment, ¶ 40–49 (Int'l. Crim. Trib. for the Former Yugoslavia April 3, 2008) (discussing Trial Chamber cases interpreting the “intensity of the conflict” element and summarizing factors relevant to the “intensity of the conflict” inquiry).

47. See Government Response to Defense Motion to Dismiss Because The Convening Authority Exceeded His Power In Referring This Case To A Military Commission, at 4, *United States v. Al-Nashiri*, 13 Sept. 2012, [http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20\(AE104A\).pdf](http://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(AE104A).pdf) [<http://perma.cc/AN3B-NZ4X>].

48. See, e.g., *Abella v. Argentina*, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, OEA/Ser.L/V/II.95, doc. 7 rev., ¶ 1, 154–56 (1997) (engagement of Argentina's armed forces with forty-nine organized, armed militants that lasted

riod of al-Nashiri's indictment, the level of actual violence between the United States and al Qaeda amounted to two attacks in four years.⁴⁹

Indeed, the October 2000 attack on the USS Cole was met by the United States with only a law enforcement response.⁵⁰ Even after President Bush came into office and determined that al Qaeda was in fact responsible for those attacks, the determination was to send the FBI to Yemen to investigate, not to respond to those attacks with military force.⁵¹ Throughout that period, of course, none of the other metrics that international war crimes courts have looked to for identifying whether there is an armed conflict level of violence—territory captured, civilians in conflict zones, sustained military engagement—were present.⁵²

In part for these reasons, the International Committee of the Red Cross, the allies of the United States, and indeed most every other country in the world have all generally treated incidents of terrorism, particularly incidents not tied to territory by either the terrorist organization's national affiliation or its possession of land, or the specific geographic locus of its targets, as just the kind of sporadic violence the law of non-international armed conflict meant to exclude from its coverage.⁵³ Banditry,

thirty hours and resulted in casualties and property damage was considered an armed conflict under international law).

49. See generally Andrew Wander, *A history of terror: Al-Qaeda 1988–2008*, THE GUARDIAN (July 12, 2008), <http://www.theguardian.com/world/2008/jul/13/history.alqaida> [<http://perma.cc/4ZSW-WXM5>] (listing timeline of al Qaeda activity).

50. See, e.g., *The President's Radio Address*, 36 Weekly Comp. Pres. Doc. 2464, 2465 (Oct. 14, 2000) (containing President Clinton's remarks in response to the USS Cole bombing in which he stated that "even when America is not at war, the men and women of our military risk their lives every day" and that "[n]o one should think for a moment that the strength of our military is less important in times of peace").

51. See *The USS Cole Bombing*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/history/famous-cases/uss-cole> [<http://perma.cc/MMK7-C2TB>] (last visited Nov. 10, 2014).

52. See, e.g., Address Before a Joint Session of the Congress on the State of the Union, 1 PUB. PAPERS 129, 135–36 (Jan. 27, 2000) (President Clinton's State of the Union Address discussed the state of global affairs.).

53. See *Challenges for IHL – Terrorism: Overview*, INTERNATIONAL COMMITTEE OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/war-and-law/contemporary-challenges-for-ihl/terrorism/overview-terrorism.htm> [<http://perma.cc/A3P7-W4DS>] ("[m]ost of the measures taken by states and other to prevent or suppress acts of terrorism do not amount to an armed conflict in either the practical or legal sense").

short-lived insurrections, or terrorist activities generally do not rise to the level of war.⁵⁴

Now, in one sense, this is not new. The United States has been unique in the world in understanding that its conflict with al Qaeda is an armed conflict in international law terms for more than a decade.⁵⁵ None of our allies embrace that understanding.⁵⁶ At the same time, al-Nashiri's argument that we were not in an armed conflict in October 2000 is not a slam-dunk.⁵⁷ There are reasoned, non-frivolous arguments on the government's side. However, the uncertainty of the outcome is another indicator that it will be a long time before we see anything like justice done in the cases involving some of the most egregious acts of violence against the United States.

In light of the commissions' track record to date, al-Nashiri is yet another example of why the commissions' wisdom and legitimacy remain in continued question. There is a reason why the Bush administration, the Obama administration, and the world, beginning in Nuremberg, thought that the creation of war crimes and war crimes trials was an important idea. It was not that we lacked criminal law then. We had criminal law, and it would have been easier to just prosecute many of these cases under existing law. There is, however, a reason some people think that military commissions are appropriate, and the reason is very much a moral, philosophical view. The view is that there is some particular opprobrium that attaches to a war crime that does not attach to an ordinary crime.⁵⁸ There is something worse about a "war crime" than there is about 18 U.S.C. § 2332(b).

54. See Geneva III Commentary, *supra* note 36.

55. See, e.g., U.S. DEP'T OF JUSTICE, LAWFULNESS OF A LETHAL OPERATION DIRECTED AGAINST A U.S. CITIZEN WHO IS A SENIOR OPERATIONAL LEADER OF AL-QA'IDA OR AN ASSOCIATED FORCE 2-4 (2013), available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf [<http://perma.cc/P4KH-26MV>] (arguing that the United States is in an armed conflict and distinguishing *Tadić*).

56. See *Terrorism: The European Response*, Anti-Defamation League (June 2004), http://archive.adl.org/terror/tu/tu_0406_eu.html#/U9RXD2SiNAs [<http://perma.cc/QD33-YVV2>] (discussing European view that terrorism is a local, law enforcement issue, as opposed to a military issue).

57. See *Al-Nashiri v. MacDonald*, 741 F.3d 1002, 1005-06 (9th Cir. 2013) (recounting al-Nashiri's arguments in the section of the opinion discussing prior case history).

58. See *War Crimes*, PHILOSOPHY TALK (Sept. 12, 2006), <http://philosophytalk.org/shows/war-crimes-0> [<http://perma.cc/37J7-898K>] (summarizing discussion of how the concept of a "war crime" suggests that some crimes are worse than others).

There is something bad enough that the vast majority of the world's states—by treaty and customary international law—agree that this specific conduct is especially worthy of condemnation by the entire international community.

There is not anything like that degree of consensus in international law for conspiracy as agreement.⁵⁹ While conspiracy as agreement exists under our domestic law, it is not an offense that has existed in international law at all.⁶⁰ It was and remains a mistake to suggest that we can try such offenses in military commissions, under the unique imprimatur reserved for internationally recognized crimes of war.

59. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 610 (2006) (noting that though international war crimes tribunals have recognized conspiracy to commit genocide and common plan to wage aggressive war as violations of international law, conspiracy is generally not considered to be an international law crime).

60. See Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1101 (2009) (discussing how “[c]onspiracy is not considered an international crime” by a variety of groups, including many international and civil law jurisdictions and the International Criminal Court).