

<p>UNITED STATES OF AMERICA</p> <p style="text-align: center;">v.</p> <p>DAVID M. HICKS</p>	<p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p> <p>)</p>	<p style="text-align: center;"><b>DEFENSE REPLY ON MOTION TO DISMISS CHARGE 1 FOR FAILURE TO STATE AN OFFENSE TRIABLE BY MILITARY COMMISSION</b></p> <p style="text-align: center;"><b>26 October 2004</b></p>
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The Defense in the case of the *United States v. David M. Hicks* moves for dismissal of Charge 1 because it fails to state an offense triable by military commission, and states in support of this reply:

1. **Synopsis:** Charge 1, “conspiracy,” is not a not an offense within the jurisdiction of this military commission. In fact, “conspiracy” is not a valid offense under the law of war or international criminal law.
2. **Facts:** The question raised is a question of law.
3. **Discussion:**

MCI No. 2 represents an attempt to take the inchoate offense of conspiracy and improperly merge it with the theory of liability known as “common criminal purpose.”<sup>1</sup> This attempt to create a “super” conspiracy offense constitutes a dramatic departure from those offenses accepted internationally as falling within the ambit of the law of war. The accurate state of international law is that conspiracy is cognizable only in the context of a “conspiracy to commit genocide.” The theory of liability entitled “common criminal purpose” exists separately, and is not applicable in the context of a conspiracy. Neither theory of liability obtains here. As a result, Charge 1 must be dismissed.

### **Conspiracy to Commit Genocide is a Separate Offense**

In noting that “conspiracy to commit genocide” is a cognizable offense under international law, the prosecution does not state anything different than what Mr. Hicks did in his initial motion: “[m]oreover, under international law, there is no crime of conspiracy at all except in the context of genocide.”<sup>2</sup> Indeed, the prosecution’s resort to the genocide context – wholly

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<sup>1</sup> Also referred in international criminal tribunals as “joint criminal enterprise.”

<sup>2</sup> Among the international criminal law conventions of the last half century, the sole reference to conspiracy appears in connection to the international crime of genocide. The 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*, Article III (b), renders “conspiracy to commit genocide” punishable. Following the pattern of this convention, the other international instruments addressing conspiracy in the context of armed conflict do so only with regard to genocide. For example, the Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3) both criminalize conspiracy to commit genocide, using precisely the same language as the Genocide Convention. Indeed, the ICTR has issued numerous

inappropriate here – demonstrates the obvious: that conspiracy is *not* recognized as a valid offense under the law of war or by other international tribunals beyond the genocide context. Simply put, international courts have refused to expand the use of conspiracy in any other situation besides genocide, and the conspiracy offense listed in MCI No. 2 is likewise invalid.

### **Common Criminal Purpose is only a Theory of Liability**

The prosecution devotes several pages to the theory of “common criminal purpose” used in the ITCY. Yet the prosecution fails to confront the fact that MCI No.2 does not incorporate this theory of liability as enunciated in international criminal law in the context of prosecution of violations of the laws of war. The ICC statute, in Article 25, incorporates a common criminal purpose doctrine as a form of individual criminal responsibility, but not as a basis for an inchoate offense.<sup>3</sup> The ICTY has used “joint criminal enterprise” only as a theory of individual criminal responsibility.<sup>4</sup> Conversely, and critically, joint criminal enterprise (common criminal purpose) has never been charged as an inchoate offense. Similarly, the ICTR has used the common criminal purpose doctrine to find liability, but it does not comprise a separate inchoate offense.<sup>5</sup> Thus, MCI No. 2’s attempt to do so is without any support in the international arena.

Thus, even if “common criminal purpose” as used in the international criminal tribunals is a valid form of individual criminal liability in a particular case, it is nevertheless a theory distinct from conspiracy, and one that cannot be merged therewith somehow to provide a basis for an inchoate offense. Consequently, MCI No. 2’s attempt to transform “common criminal purpose” into an inchoate offense – contrary to all authority, including all holdings by the ICTY and ICTR – must be rejected.

### **The U.S. Offense of Conspiracy is not Internationally Accepted**

The common law crime of conspiracy does not exist under international criminal law generally, except in the case of genocide, the most aggravated of international crimes. This is because most civil law countries (in contrast to common law jurisdictions such as the United States and United Kingdom) do not recognize the crime of conspiracy in their domestic criminal law systems.<sup>6</sup> Instead, they focus on complicity, or participation, in an actual crime or attempt.<sup>7</sup>

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judgments related to the offense. It should be noted that the Statute of the International Criminal Court (1998) does not follow its *ad hoc* counterparts for the former Yugoslavia and Rwanda, as it makes no explicit reference to conspiracy of any kind.

<sup>3</sup> Article 25, 3. (d), In any way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
- (ii) Be made in the knowledge of the intention of the group to commit the crime.

<sup>4</sup> See, *Prosecutor v. Kvočka et al., Judgement*, Case No. IT-98-30/1, T.Ch. I, 2 Nov 2001

<sup>5</sup> *Kayishema and Ruzindana*, ICTR-95-01-0534 (Trial Chamber), May 21, 1999, para. 203-205.

<sup>6</sup> Cassese, “International Criminal Law,” Oxford UP, 2003, p. 191.

## World War II Trials

The prosecution's reliance on the trials held after the Second World War is similarly misplaced. Application of conspiracy to international crimes occurred most prominently in the war crimes trials following World War II. The inclusion of the notion of conspiracy in the charters of the various tribunals was the result of U.S. influence during the drafting processes, but even then conspiracy was recognized in only very limited fashion (and not to the extent that would sustain Charge 1 herein).<sup>8</sup> Article 6 of the Nuremberg Charter (1945) sets forth the three crimes within the jurisdiction of the International Military Tribunal: crimes against peace, crimes against humanity, and war crimes. The term "conspiracy" appeared only in the definition of the first: "...planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or *conspiracy* for the accomplishment of the foregoing." (Emphasis added).

A non-specific reference was also contained in the final sentence of article 6: "Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or *conspiracy* to commit any of the foregoing crimes are responsible for all the acts performed by any persons in execution of such plan." (Emphasis added).

In the IMT, the prosecution, in count one, attempted to charge the defendants with conspiracy to commit war crimes and crimes against humanity as well as the crime of waging aggressive war. In the Tribunal's judgement, it found that "the [IMT] charter **does not define as a separate crime any conspiracy** except the one to commit acts of aggressive war."<sup>9</sup> The tribunal **disregarded "the offences of conspiracy to commit war crimes** and crimes against humanity and will consider only the common plan to prepare, initiate, and wage aggressive war."<sup>10</sup> The principles set out in the Nuremberg Charter were confirmed as principles of international law by the UN General Assembly on December 11, 1946.<sup>11</sup>

Although the IMT captured the greater attention, most of the war crimes trials held following the war were conducted by the individual allies pursuant to Allied Control Council Law No. 10 (1945). That instrument, in Article II (d), mentioned conspiracy *per se* only with regard to crimes against peace.

The Charter of the International Military Tribunal for the Far East (1946), in Article 5, followed the Nuremberg precedent in citing conspiracy vis-à-vis crimes against peace (Article

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<sup>7</sup> Shabas, "An Introduction to the International Criminal Court," 2<sup>nd</sup> ed., Cambridge UP, p. 103.

<sup>8</sup> Bassiouni, "Introduction to International Criminal Law," Transnational Publishers, 2003, p. 8.

<sup>9</sup> IMT-Nuremberg transcript, first volume, p. 226.

<sup>10</sup> *Id.* at 226.

<sup>11</sup> Resolution Affirming the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. Doc. A/236 (1946).

5a), and also included it in the definition of the offense of crimes against humanity (Article 5c).<sup>12</sup> Tellingly, the Charter did not contain any offense of conspiring to commit war crimes.

### **Conspiracy is not followed in International Criminal Law**

Despite the references to conspiracy in the three aforementioned instruments, subsequent international criminal law conventions have not included conspiracy to commit such offenses. Instead, the sole references to conspiracy appear in connection to genocide. The 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article III (b), proscribes only “conspiracy to commit genocide” punishable. Following the pattern of this convention, the other international instruments addressing conspiracy in the context of armed conflict do so only with regard to genocide.

The Statutes of the International Tribunal for the Former Yugoslavia (1993) (Article 4.3) and the International Tribunal for Rwanda (1994) (Article 2.3) both criminalize conspiracy to commit genocide, using precisely the same language as the Genocide Convention. Indeed, the ICTR has issued numerous judgments with respect to the offense.<sup>13</sup> It should be noted that the Statute of the International Criminal Court (1998) does not follow its *ad hoc* counterparts for the former Yugoslavia and Rwanda, as it makes no explicit reference to conspiracy of any kind.

**Conclusion:** As demonstrated, the offense of conspiracy is clearly restricted in modern international criminal law practice to the offense of genocide, the most egregious international crime. The offense of conspiracy as set forth in MCI No.2 is not found in the statutes of the International Criminal Tribunal of Yugoslavia, International Criminal Tribunal for Rwanda or the International Criminal Court. MCI No. 2’s infusion of common criminal purpose into the common law notion of conspiracy is unavailing as well as a purported basis for an inchoate offense under the law of war.

4. Evidence: The testimony of expert witnesses.

5. Relief Requested: The defense requests Charge 1 be dismissed, and any and all references to “co-conspirator” be stricken from Charge 2.

6. The defense requests oral argument on this motion.

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<sup>12</sup> Crimes against peace: “Namely, the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”

Crimes against humanity: “Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated. Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan.”

<sup>13</sup> See, e.g., *Musema*, (Trial Chamber), January 27, 2000; *Ntakirutimana and Ntakirutimana*, (Trial Chamber), February 21, 2003; *Niyitegeka*, (Trial Chamber), May 16, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003; *Nahimana, Barayagwiza and Ngeze*, (Trial Chamber), December 3, 2003.

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