STUDENT NOTE

TRYING TERRORISM:
JOINT CRIMINAL ENTERPRISE, MATERIAL SUPPORT, AND THE PARADOX OF INTERNATIONAL CRIMINAL LAW

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In 2003, the United States commenced its first criminal proceedings against a handful of Guantanamo detainees. Rather than trying them before traditional federal courts, the United States chose to try them before military commissions for violations of the laws of war. One such detainee, Salim Ahmed Hamdan—known to the world as Osama bin Laden’s driver—challenged the government’s authority to subject him to trial by military commission on the charge of conspiracy, claiming both that the military commission trials violated the Geneva Conventions and that military commissions lacked subject-matter jurisdiction over charges of conspiracy, the only offense he was charged with. In doing so, Hamdan inextricably linked his and other detainees’ fates to international criminal law and set in motion nearly a decade’s long struggle by U.S. courts to resolve complex questions of congressional power under the U.S. Constitution, the bounds of the laws of war, and the contours of individual international criminal liability arising under them.

Three years later, in Hamdan v. Rumsfeld (Hamdan I), the U.S. Supreme Court agreed with Hamdan that the commissions violated the Geneva Conventions but came one vote short of also holding that conspiracy was not a recognized law-of-war offense (and thus outside the commissions’ subject-matter jurisdiction). Although Justice Kennedy declined to reach the question of the commission’s jurisdiction over conspiracy, finding it unnecessary for the disposition of the case, the plurality unequivocally found that, at least in the absence of statutory definition, there was no evidence that conspiracy had ever constituted a recognized offense under the customary laws of war.

Just four months later, Congress responded by exercising its constitutional authority to “define and punish ... offenses against the law of

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2. Id. at 567.
3. Id. The laws of war are also frequently referred to as the law of armed conflict or international humanitarian law, the latter of which is preferred in scholarly writing. I have chosen to refer here to the laws of war to underscore the distinction between war crimes and standard domestic criminality in hopes of alleviating some potential confusion.
4. Id. at 655 (Kennedy, J., concurring in part) (“I likewise see no need to address the validity of the conspiracy charge against Hamdan—an issue addressed at length in Part V of Justice Stevens’ opinion . . . .”).
5. Id. at 600 (plurality opinion) (“[T]he deficiencies in the time and place allegations underscore . . . the most serious defect of this charge: The offense it alleges is not triable by law-of-war military commission.”).
nations’ (the Define and Punish Clause) and enacted the Military Commission Act (MCA) of 2006. The MCA codified thirty-two offenses, including conspiracy and material support for terrorism, that would thereafter be subject to trial by military commission. In enacting the legislation, Congress provided that it was only codifying those offenses that had “traditionally been triable by military commission” and was “not establish[ing] new crimes.” Consequently, the MCA “does not preclude trial for offenses that occurred before the date of [its] enactment.” In what surely must have produced a sense of déjà vu, Hamdan came once again before the military commissions on charges of conspiracy as well as the newly established offense of providing material support for terrorism in United States v. Hamdan (Hamdan II). Once again, Hamdan contended that, irrespective of the new statutory provision, both of these effectively inchoate offenses were not violations of the customary international laws of war, and thus that the military commissions still lacked subject-matter jurisdiction. Parallel to his case, another detainee, Ali Hamza Ahmad Suliman Al Bahlul, made a nearly identical argument on appeal from nearly identical charges. In 2011, the Court of Military Commission Review (CMCR) unanimously

9. Id. § 950t(29).
10. Id. § 950t(25).
11. Id. The Military Commission Act (MCA) subjects those offenses to trial by military commission only when they are committed by “alien unlawful enemy combatants.” Id. § 948c. Separate statutes in the domestic criminal code govern similar offenses committed by U.S. citizens and make those offenses subject to traditional federal court jurisdiction. See, e.g., 18 U.S.C. § 2331 (2011).
13. Id.
16. Defense Motion to Dismiss for Lack of Subject Matter Jurisdiction over Ex Post Facto Charges at 1, Hamdan II, 801 F. Supp. 2d 1247 (No. 43439-0001).
17. Al Bahlul, 820 F. Supp. 2d at 1158. Al Bahlul, whose conduct primarily comprised making a public relations, or recruitment, video, is also charged with solicitation. Id. He is challenging this charge on First Amendment grounds as well, id., although that argument is not discussed in this Note.
rebuffed both defenses; both defendants in turn filed appeals with the D.C. Circuit Court of Appeals. In one unanimous and comparatively succinct opinion, a panel of the D.C. Circuit overturned Hamdan’s conviction for material support, finding that it was not a recognized international law-of-war offense; however, it avoided the constitutional questions by resting its holding on statutory restrictions on the commissions’ jurisdiction. Three months later, another panel, in a brief per curiam opinion, vacated both Al Bahlul’s material support and conspiracy convictions, finding that result compelled under their decision in Hamdan II. Although the government declined to directly appeal Hamdan II, it has since filed a petition for rehearing en banc in Al Bahlul in which it argues that Hamdan II should be reversed.

Although the degree of deference U.S. courts will ultimately grant Congress to define the laws of war under the Define and Punish Clause remains an open question, the CMCR has at least attempted to make an independent determination of international law rather than signing off on a blank check to Congress to create such crimes out of whole cloth. In contrast, the D.C. Circuit avoided the question and limited its cursory international law analysis to treaty law, adding no clarity to the matter despite reaching the opposite conclusion. Such interpretive struggles are not limited to the military commissions, nor are they rendered moot by the D.C. Circuit’s opinions. The D.C. Circuit’s statute-based holding appeared to invite prose-

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18. Id. at 1158–59; Hamdan II, 801 F. Supp. 2d at 1254. In both cases the CMCR sat en banc; thus, I refer to the CMCR as a singular entity throughout this Note rather than distinguishing the panels. Al Bahlul, 820 F. Supp. 2d at 1153; Hamdan II, 801 F. Supp. 2d at 1253.


25. Hamdan II, 696 F.3d at 1250–53. However, writing only for himself, Judge Kavanaugh explained in a footnote that he would find that Congress has substantial authority to define new crimes and subject them to military commission jurisdiction under its Article I, Section 8 powers, including its war powers, even where they had not crystallized in a customary international law offense. Id. at 1246, n.6.
cutions for material support for conduct arising after 2006.\textsuperscript{26} Moreover, assuming that the decisions are ultimately upheld, international law may well play a role in defining other theories of liability against detainees; indeed, the Chief Prosecutor, in announcing the withdrawal of inchoate conspiracy charges in \textit{United States v. Khalid Sheikh Mohammed} (the 9/11 case), reaffirmed that he did so while retaining conspiracy as a theory of liability for substantive offenses “in a manner that has been upheld in military law, federal law, and international law under the doctrine of ‘joint criminal enterprise’.”\textsuperscript{27} However, if the D.C. Circuit’s reasoning in \textit{Hamdan II} requires that any pre-2006 conduct prosecuted be a crime as a matter of international law,\textsuperscript{28} prosecutors could face challenges in some cases if they attempt to bring a conspiracy charge for particularly attenuated conduct on a theory of joint criminal enterprise (JCE). These persistent concerns, and the clearly intertwined nature of the war on terror and international criminal law, underscore the need for coherence in this arena.

In rendering this interpretive analysis, the courts confront a substantially more complex and ambiguous body of international law than in their earlier determinations of congressional authority under the Define and Punish Clause.\textsuperscript{29} In its \textit{Al Bahlul} and \textit{Hamdan II} opinions, the CMCR engaged in substantial analysis of a variety of dubious, if not outright inapposite, sources to hold that both conspiracy and material support are cognizable law-of-war violations and thus triable by military commission.\textsuperscript{30} On appeal, the D.C. Circuit avoided the issue.\textsuperscript{31} As the federal courts weed out those irrelevant sources, they will be left with primary recourse to international criminal law (ICL) in the form of the Rome Statute of the International Criminal Court (ICC),\textsuperscript{32} judgments by the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the tribunal’s theory of JCE.\textsuperscript{33}

\begin{itemize}
\item \textsuperscript{26} See \textit{id.} at 1241 n.1, 1246.
\item \textsuperscript{27} Wells Bennett, \textit{Chief Prosecutor Statement on This Week’s Hearing in the 9/11 Case}, \textit{Lawfare Blog} (Jan. 28, 2013, 3:26 PM), http://www.lawfareblog.com/2013/01/chief-prosecutor-statement-on-this-weeks-hearing-in-the-911-case/.
\item \textsuperscript{28} \textit{Hamdan II}, 696 F.3d at 1248 nn.8–9; \textit{id.} at 1248–49 (“The ‘law of war’ referenced in 10 U.S.C. § 821 is the international law of war.”).
\item \textsuperscript{29} See \textit{United States v. Arjona}, 120 U.S. 479, 484 (1887) (holding that counterfeiting was a recognized offense against the law of nations); United States v. Furlong, 18 U.S. (5 Wheat.) 184, 185 (1820) (holding that Congress had exceeded its authority by trying to statutorily define murder as piracy, the latter of which was a recognized offense against the law of nations).
\item \textsuperscript{31} \textit{Hamdan II}, 696 F.3d at 1250–53.
\item \textsuperscript{33} See discussion \textit{infra} Part II.A.
\end{itemize}
While the CMCR cited the ICTY’s jurisprudence and the Rome Statute as validating the cognizability of the material-support offense,\textsuperscript{34} neither the ICTY nor the ICC has ever exercised jurisdiction over “terrorism” per se, let alone inchoate offenses one step removed. Indeed, the delegates to the Rome Conference failed to agree on the inclusion of terrorism as a distinct offense, and an array of scholars have rejected any notion that “terrorism” as distinct from the traditional panoply of war crimes could fall within the ICC’s jurisdiction.\textsuperscript{35} In contrast, the D.C. Circuit made only conclusory reference to the absence of “material support” in international treaties and tribunal statutes, further commenting that it was not a recognized customary international law offense, nor had anyone ever been prosecuted for it, without citation.\textsuperscript{36} The paradoxical nature of the CMCR’s logic, the nature of the ICC and ICTY as two of the few valid and inescapable authorities on criminal liability for law-of-war violations, and the initial reference by all parties to the ICTY’s JCE theory of liability ensure that the federal courts will continue to contend with this issue.\textsuperscript{37} Additionally, three circuit courts of appeal have recently debated the respective authoritative status of the Rome Statute vis-à-vis the ICTY’s jurisprudence; they have split on the proper authority to accord these sources when interpreting customary international law norms.\textsuperscript{38} This split is indicative of the larger dilemma facing courts and scholars over what authority to grant this body of largely judge-made international criminal law that does not fit nicely within formal doctrinal parameters.

\textsuperscript{34} Al Bahlul, 820 F. Supp. 2d at 1210–14; Hamdan II, 801 F. Supp. 2d at 1284–88.

\textsuperscript{35} See, e.g., Eric Bales, Torturing the Rome Statute: The Attempt to Bring Guantamano’s Detainees Within the Jurisdiction of the International Criminal Court, 16 TULSA J. COMP. & INT’L L. 173, 185 (2009); Richard J. Goldstone & Janine Simpson, Evaluating the Role of the International Criminal Court As a Legal Response to Terrorism, 16 HARV. HUM. RTS. J. 13, 14 (2003); Thomas Weigend, The Universal Terrorist: The International Community Grappling with a Definition, 4 J. INT’L CRIM. JUST. 912, 914 (2006). Terrorism has historically undergone disparate national treatment and has frequently been addressed as a domestic criminal law matter, as in the case of the Irish Republic Army in Northern Ireland or Euskadi Ta Askatasuna in Spain. Consequently, there is no agreed-upon definition of terrorism, a primary reason for why it was not included, and indeed rejected, in the jurisdiction of the Rome Statute. Although terrorism, when understood as the prohibited targeting of the civilian population during an armed conflict, could be tried as a war crime, “ ‘[t]errorism’ is not a legal notion. It is much more a combination of policy goals, propaganda and violent acts—an amalgam of measures to achieve an objective.” Hans-Peter Gasser, Acts of Terror, “Terrorism” and International Humanitarian Law, 84 INT’L REV. RED CROSS 547, 552–54 (2002); see also ADRIAN GUELKE, THE AGE OF TERRORISM AND THE INTERNATIONAL POLITICAL SYSTEM 8 (1995); BRUCE HOFFMAN, INSIDE TERRORISM 13–14 (1999).

\textsuperscript{36} Hamdan II, 696 F.3d at 1250–53.

\textsuperscript{37} In fact, Justice Stevens for the plurality in Hamdan I appeared to reject a joint criminal enterprise liability (JCE) analogy to support the cognizability of a conspiracy charge. See Hamdan I, 548 U.S. 557, 611 n.40 (2006).

\textsuperscript{38} Aziz v. Alcolac, Inc., 658 F.3d 388, 400 (4th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11, 35 (D.C. Cir. 2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 259 (2d Cir. 2009); Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 276 (2d Cir. 2007) (per curiam), aff’d sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza, 553 U.S. 1028 (2008); see discussion infra Part IV.B.
The issue presented by Hamdan’s appeal—whether a recognized war criminal’s driver may be tried for war crimes on the theory that his driving contributed to the crimes—brings to the fore dilemmas posed by modern developments in international law. Defying public international law’s anachronistic statist origins and formal doctrine of sources, the last two decades have witnessed the rapid evolution of law driven not by states, but by international and nongovernmental organizations and international courts. This “judicialization” of international law is nowhere more evident than in ICL, a body of law that, in reality, has been almost wholly developed by international tribunals. Although rooted in a handful of mid-twentieth-century treaties elaborating the laws of war, much of the substance of ICL has been articulated, expanded, and, frankly, revolutionized by the ad hoc tribunals. Nevertheless, judge-made law remains formally anathema to an international legal system still governed by a statist doctrine of sources that rejects the ability of courts and judges to make law. Previously a matter of abstract theory for scholars, this paradox is rendered concrete by the cases of Hamdan, Al Bahlul, and other detainees whose futures appear to rely on the substantive and authoritative limitations placed on these juridical sources.

This Note will examine theoretical problems in ICL and public international law by evaluating the practical implications of applying ICL sources to find criminal liability outside the narrow confines of the international tribunals. It will examine the problems posed by the conflicting standards of the Rome Statute and ICTY jurisprudence as a matter of customary international law, the failure of U.S. courts to effectively confront the contextual and doctrinal analysis necessary to determine the limitations of these sources, and the proper application of these sources to the issues raised in Hamdan II and Al Bahlul. Viewing ICL through the lens of public

40. Shane Darcy & Joseph Powderly, Introduction to Judicial Creativity at the International Criminal Tribunals 1, 1–2 (Shane Darcy & Joseph Powderly eds., 2010); see Cohen, supra note 39, at 250–51.
41. Cohen, supra note 39, at 251.
43. See Danner, supra note 42, at 46; Darcy & Powderly, supra note 40, at 1–2, 32. References to the ad hoc tribunals are to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Importantly, the ICTY and ICTR share an Appeals Chamber. International Criminal Tribunal for Rwanda (ICTR), Project on Int’l Cts. & Tribunals, http://www.pict-pcti.org/courts/ICTR.html (last visited Jan. 27, 2013).
44. See infra Part IV.D.
45. See Brief for the United States at 23–24, 38–39, Al Bahlul v. United States, No. 11-1324 (D.C. Cir. May 16, 2012) [hereinafter Brief for the United States in Al Bahlul], 2012 WL
international law’s doctrine of sources highlights the challenges inherent to such an analysis and underscores the tangible consequences of leaving these challenges unaddressed in the cases of Hamdan and Al Bahlul.46 Although this Note is driven principally from a review of (and concern with) U.S. courts’ treatment of ICL, the very problems identified in domestic attempts at interpretation implicate broader issues regarding the evolution of ICL within the confines of public international law’s archaic, formal system. These issues are exemplified by the way the CMCR has imported and applied JCE—a controversial, nascent theory of liability—while severing it from its factual and policy origins. The CMCR’s analysis of ICL is troubling not only for its serious inconsistencies with the jurisprudence of the ad hoc tribunals but also for the concerns it raises for the international community more broadly about the repercussions of adopting ICL judicial precedents uncritically.

This Note examines three issues in the wake of Hamdan II and Al Bahlul: (1) whether material support is properly analogous to JCE; (2) whether, as a matter of formal public international law, U.S. courts have properly interpreted the authority of the ICTY’s jurisprudence vis-à-vis the Rome Statute in defining and identifying customary international law norms; and (3) whether the importation of these ICL sources for the purposes of the military commission is proper given the unique context of the tribunals and what, if any, restraints should be placed on the use of their doctrinal developments. The Note proceeds to address these issues as follows: Part I provides a short background to contextualize the cases of Hamdan and Al Bahlul, the U.S. constitutional limits that frame their legal challenges, and the CMCR’s and D.C. Circuit’s attempts to identify customary international law norms through a variety of sources. Part II summarizes the development of JCE at the ICTY as well as the ICC’s recent decisions appearing to reject JCE liability as a matter of statute. Part III examines the CMCR’s attempt to analogize material support to JCE in order to establish it as a recognized offense against the customary laws of war. Part IV situates the ICTY and ICC jurisprudence within a public international law framework by looking to the doctrine of sources and the intercircuit debate on the nature and authority of these sometimes-contradictory ICL sources. Finally, the Note concludes by suggesting normative concerns that should inform the use and application of ICL doctrinal developments and by offering some initial suggestions for ways to delineate the boundaries of ICL to prevent its unmitigated expansion into contexts in which it was never envisioned to apply.

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I. THE INTERNATIONAL LAW FOUNDATION OF MILITARY COMMISSION JURISDICTION

A. Domestic Authority for Military Commissions

In the United States, military commissions act as an exception to traditional federal courts. As an exception, military commissions as a U.S. constitutional matter have historically been understood to possess jurisdiction as substitutes for civilian courts in three instances: (1) during martial law, (2) in occupied enemy territory, or (3) as “an incident . . . of war” to try “enemies who . . . have violated the law of war;” usually on the battlefield. Because the facts would not support, and the government has not alleged, a jurisdictional basis arising under the first two scenarios, the ability for the military commissions to exercise jurisdiction over Guantanamo detainees is thus understood to be limited to the “law-of-war commission model.” This model purportedly derives from the customary laws of war and from Congress’s authority to define and punish offenses against the law of nations, although the government presented a novel new argument on appeal that asserted a fourth model deriving from a domestic common law of war under Congress’s amalgamated war powers. Although the D.C. Circuit rejected this argument as applied to Hamdan and Al Bahlul, it rooted its decision in the lack of statutory authority prior to 2006 and the concomitant retroactivity concerns, thus leaving the constitutional question of Congress’s authority to prospectively “define” such crimes undecided.

47. The U.S. Constitution provides that the “judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts” created by Congress that retain constitutionally specified characteristics that are not possessed by military commissions. U.S. Const. art. III, § 1, cl. 1. The ability to subject some offenses and offenders to military commissions or courts-martial is considered to be a result of various exceptions to this otherwise exclusive federal judicial system. See Hamdan I, 548 U.S. 557, 591, 596–98 (2006); Steven I. Vladeck, The Laws of War As a Constitutional Constraint on Military Jurisdiction, 4 J. Nat’l Security L. & Pol’y 295, 300–01 (2010).


49. See id. at 597 (“Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available.”).

50. U.S. Const. art. I, § 8, cl. 10; see Vladeck, supra note 47, at 316, 319 (reviewing primary U.S. case law on the subject).

51. Although the law-of-war commission model has traditionally required courts to locate law-of-war offenses in international law, in its appellate briefs and oral argument to the D.C. Circuit in Hamdan II and Al Bahlul, the U.S. government appeared to drop any pretense of arguing that offenses such as material support to terrorism or conspiracy constitute international law-of-war violations. Instead, they advanced the novel argument that there exists a heretofore-unknown “domestic common law of war,” violations of which may also be tried before military commissions regardless of their link to customary international law-of-war offenses. Brief for the United States in Al Bahlul, supra note 45, at 38–39. This theory asks the courts to determine that Congress may subject such offenses to the purview of military commissions pursuant to its amalgamated war powers rather than the explicit “define and punish” clause. Vladeck, supra note 47, at 330.

52. See Hamdan II, 696 F.3d 1238, 1241 n.1, 1246 (D.C. Cir. 2012).
The issue of the limitations on Congress’s power in this regard remains one that the military commissions themselves have either ignored or misconstrued. For the purposes of this Note, it is essential to distinguish between Congress’s ability to criminalize the conduct constituting material support as a domestic criminal law matter (triable before traditional federal courts) and its ability to subject that criminal conduct to the purview of military commissions as a violation of the laws of war. This latter power has traditionally required that the subject-matter jurisdiction of military commissions originate in the laws of war, a subset of the law of nations. Because the explicit grant of power to Congress in the Define and Punish Clause is by reference to international law, Hamdan and Al Bahlul have contended that the offenses they have been charged with—inchcate conspiracy and material support for terrorism—have no analogues in the laws of war. Article I, Section 8 of the U.S. Constitution—which allows Congress to “define and punish offenses against the law of nations”—has added some ambiguity to this analysis, as neither the constitutional clause nor the courts describe whether this constraint is one that permits Congress merely to recognize or in fact to newly elaborate international offenses. However, as Justice Stevens noted in Hamdan I, absent Congress’s attempt to define such an international law violation by statute, the subject-matter jurisdiction of the military commissions must rest on “a substantial showing” of a violation of the customary laws of war at the time they were committed. Both defendants hence also contended that even if Congress may prospectively proscribe such conduct by statute, the Ex Post Facto Clause and its ICL

54. See infra Part I.B.1.
55. See Fletcher, supra note 53, at 440.
57. Both Hamdan’s and Al Bahlul’s charges are inchcate in that they do not link to an underlying completed offense. Rather, like Pinkerton conspiracy liability in the United States, these charges reflect a legislative determination that this conduct—irrespective of a link to a completed offense, such as a specific terrorist attack—should be considered criminal, regardless of whether it can be linked to another harm. See infra Part III; see also Pinkerton v. United States, 38 U.S. 640, 646–47 (1946).
58. U.S. Const. art. I, § 8, cl. 10 (emphasis added).
59. See Vladeck, supra note 47, at 329–34.
60. Hamdan I, 548 U.S. at 603 (“At 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.”).
61. U.S. Const. art. I, § 9, cl. 3.
nullum crimen sine lege (no crime without law, or the principle of legality)—require that such conduct be recognized as a violation at the time the conduct occurred.\(^\text{62}\) Since Congress’s first attempt to statutorily “define” material support as a law-of-war violation did not occur until 2006, nearly five years after both Hamdan and Al Bahlul were detained,\(^\text{63}\) the MCA is largely inapplicable. This did not stop the government from proceeding to trial on the statutory charges, based on its statutory assertion that the codified offenses were cognizable prior to statutory enactment.\(^\text{64}\) By challenging Congress’s ability to subject either conspiracy or material support\(^\text{65}\) to military commission jurisdiction, both lawsuits could substantially alter the basis on which the government may try remaining and future detainees.\(^\text{66}\)

### B. The Courts’ Search for International Law

In attempting to identify material support’s corollary in international law, the D.C. Circuit limited itself to a conclusory analysis that appeared to be largely defined by whether the precise term “material support”—rather than analogous conduct or liability—was formally recognized in international law.\(^\text{67}\) In determining that neither relevant treaties nor customary international law recognized material support for terrorism as a war crime, it cited only to the primary treaties governing the laws of war and the statutes for various international criminal tribunals.\(^\text{68}\) Although adding that no international court had found material support to be a war crime nor did leading commentators support the claim, it failed to cite to or examine any international precedent.\(^\text{69}\)

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\(^\text{63}\) See supra text accompanying notes 6–7.


\(^\text{65}\) Because conspiracy has been previously addressed, this Note focuses primarily on material support. However, as discussed below, the two offenses operate similarly, and both defendants challenge the subject-matter jurisdiction over both charges on the same grounds. See infra Part III.

\(^\text{66}\) See Petition of the United States for Rehearing En Banc, supra note 23, at 14 (arguing that rehearing is particularly important because of the use of conspiracy and material support charges “in all of the military commission cases to date that have resulted in convictions, as well as the pending prosecutions of defendants charged with participation in the terrorist attacks of September 11, 2001 and the bombing of the U.S.S. Cole”).


\(^\text{68}\) Id.

\(^\text{69}\) Id. Notably, the court relied on its Hamdan II analysis to vacate all of Al Bahlul’s convictions, including for conspiracy and solicitation. Al Bahlul v. United States, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (per curiam). Yet its opinion in Hamdan II does not so much as reference World War II–era precedent that arguably provides a stronger case for conspiracy. The
In contrast, the CMCR analyzed a diverse array of international sources, most of them of questionable relevance to the issue at hand: whether the charged offenses were cognizable violations of the customary international laws of war. Given the relative clarity of the issues presented by the appellants (and indeed by the Hamdan I plurality), the CMCR’s reframing of this issue portended the problematic analysis that ensued. In a troubling and superficial engagement with the questions, the CMCR asserted, “Our focus here is on whether the international community considered Appellant’s actions to be criminally punishable.”70 It then proceeded to evidence this general criminal culpability by reference to an amalgamation of disparate sources without regard to their status as a matter of international law, let alone the laws of war specifically.71 Nevertheless, its analysis provides a framework for assessing whether material support possesses some international support in substance, if not in form.

1. Foreign Law

First, the CMCR cited examples of domestic criminal laws of three foreign jurisdictions.72 However, just as U.S. domestic criminal law does not evidence international law, neither do the statutes of foreign jurisdictions. As leading national security law scholar Robert Chesney quipped, “Let’s assume, for example, that just about every country in the world criminalizes car theft. We would not claim that car theft also violates the law of nations, let alone the laws of war.”73 Domestic criminality is irrelevant to the primary question before the court, which is the need to distinguish this type of traditional criminal culpability from liability arising under the laws of war.

This survey of foreign law is all the more perplexing because the court did not even purport to frame it as an international law inquiry that seeks, lack of interpretative analysis in Hamdan II may be due to the government’s concession that material support was not recognized under customary international law, see Hamdan II, 696 F.3d at 1251, as well as to the fact that the holding was a statutory, rather than constitutional, one, thus leaving Congress an open door.


71. Id. at 1288 (“It is the duty of this court to ascertain whether appellant’s conduct, providing material support for terrorism, constituted an offense against the law of nations. In doing so, we apply the definition of terrorism [in the MCA] and we consider the degree to which appellant’s underlying conduct violated international standards defining crimes as shown by various national laws prohibiting terrorism.”).

72. Id. at 1288–92 (discussing laws in Canada, India, and Pakistan). The court also referenced three secondary sources for the proposition that “[s]ome nations have had prohibitions against offenses involving criminal organizations for many years” without explaining how any of the laws cited supported the MCA’s criminalization of material support for terrorism. See id. at 1289 & n.89.

for example, to identify a general principle of international law. Although one valid source of international law may be “the general principles of law recognized by civilized nations,” as the ICTY Appeals Chamber recognized in its own similar analysis of war crimes liability,

national legislation and case law cannot be relied upon as a source of international principles or rules, under the doctrine of the general principles of law recognized by the nations of the world: for this reliance to be permissible, it would be necessary to show that most, if not all, countries adopt the same notion of common purpose. More specifically, it would be necessary to show that, in any case, the major legal systems of the world take the same approach to this notion. The above brief survey shows that this is not the case. . . . In the area under discussion, domestic law does not originate from the implementation of international law but rather, to a large extent, runs parallel to and precedes international regulation.

In part the CMCR’s analysis may be informed by the court’s confusion as to the role international law is meant to play in determining its jurisdiction. In an early passage of its Hamdan II opinion, the court engaged in a page-long analysis of why customary international law does not and cannot trump a subsequently adopted domestic statute. It thus appeared to be treating the defense’s argument as asking the court to view international law as a restraint on Congress’s otherwise-constitutional power. Yet international law is not a separate restraint on, but instead the source (by way of the Define and Punish Clause) of, congressional authority in this context. Congress can, of course, pass statutes discordant with the law of nations, but not with the Constitution.

2. Treaty Law

This propensity for conflating states’ domestic criminalization of analogous conduct with law-of-war liability informed the CMCR’s second evidentiary source: international conventions. The majority of conventions cited by the CMCR are multilateral suppression treaties unrelated to the laws of war. Rather, such treaties on the suppression of terrorist bombings and the financing of terrorism oblige the signatories to address terrorism through their respective domestic criminal laws. The D.C. Circuit

74. ICI Statute, supra note 39, art. 38(c).
77. See id.
78. See id. at 1281 & n.59.
recognized as much on appeal. 80 If anything, such treaties underscore an international consensus that terrorism is primarily the concern of domestic law enforcement, undercutting rather than supporting military commission jurisdiction. 81 The CMCR also referenced several relevant treaties, namely the Hague Conventions, Geneva Conventions, Genocide Convention, and Rome Statute. 82 Yet although these treaties comprise the backbone of relevant positive law and inform the ad hoc tribunals’ subject-matter jurisdiction, the CMCR was content to treat them only cursorily, perhaps recognizing that there is nothing analogous in this fount of the laws of war that would support the court’s ultimate determination. 83 For example, the CMCR failed to cite the actual offenses detailed by the conventions, none of which are inchoate, and none of which correspond to material support. 84 The CMCR ignored the inclusion of conspiracy in the Genocide Convention entirely in Hamdan II but cited it as supportive for inchoate war crimes conspiracy charges in Al Bahlul. 85 Notably, the Genocide Convention’s conspiracy provision is unique to that convention and has been understood to be “the exception that proves the rule” against recognizing similar inchoate liability for other international crimes deriving from the Hague and Geneva Conventions. 86 Moreover, genocide is not inherently a war crime


81. See Chesney, supra note 73.
83. See United States v. Al Bahlul, 820 F. Supp. 2d at 1141, 1175–79 (C.M.C.R. 2011) (en banc) (discussing the conventions in the context of determining whether it has proper personal jurisdiction over an alien unlawful enemy combatant but not in determining subject-matter jurisdiction for the alleged offenses), rev’d, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (per curiam); Hamdan II, 801 F. Supp. 2d at 1281–82, 1310.
and requires no nexus to an armed conflict, rendering it of little relevance to
determining war crimes jurisdiction.  

3. War Crimes Tribunals

Finally, the CMCR made its first foray into ICL, citing to U.S. military
tribunals dating from the Civil War, the London Charter and cases arising
under both the International Military Tribunal (IMT) and National Military
Tribunals that followed World War II (WWII), and the ICTY. This Note
is not concerned with the domestic-war-tribunal analysis of the Civil War
era: the precedent from these tribunals is murky at best in that the proffered
cases often involved tribunals exercising multiple forms of jurisdiction sim-
ultaneously and thus are not strong precedent for military commissions
operating only under law-of-war jurisdiction. To the extent that they repre-
sent U.S. practice under the laws of war, they remain insufficient to establish
international custom without substantial evidence of other states’ similar
practice.

As to the WWII precedents, there has been a proliferation of recent
scholarship on the correct interpretation of some of the more controversial
forms of liability employed during the post-WWII trials. A review of that
scholarship here would be redundant and tangential to this Note’s central
concern since WWII-era jurisprudence has largely been subsumed by mod-
ern ICL developments. Briefly, the CMCR offered a handful of select trials
as evidence of international liability for conduct analogous to material sup-
port during the Nuremberg prosecutions. This evidence stemmed primarily
from the inclusion in the London Charter (which established the IMT) of
conspiracy liability and the offense of criminal organizational

87. Yves Sandoz, Penal Aspects of International Humanitarian Law, in 1 INTER-
nATIONAL CRIMINAL LAW: SOURCES, SUBJECTS, AND CONTENTS 308 (M. Cherif Bassiuoni ed.,

1304–09.


90. Hamdan I, 548 U.S. 557, 603–04, 608 (2006); Vladeck, supra note 47, at 312–22,
328 (reviewing seminal cases from the Civil War era).

91. See Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins
of International Criminal Law 275–94 (2011); Jonathan A. Bush, The Prehistory of Cor-
COLUM. L. REV. 1094 (2009); Allison Marston Danner & Jenny S. Martinez, Guilty Associations:
Joint Criminal Enterprise, Command Responsibility, and the Development of
International Criminal Law, 93 CAL. L. REV. 75, 113–16 (2005) (discussing the response
to the United States’ proposal to include organizational membership and conspiracy liability in
the London Charter and the eventual limitation of those provisions by the International Military
Tribunal [IMT]); Jens David Ohlin, Joint Intentions to Commit International Crimes, 11
CHI. J. INT’L L. 693 (2010); Wala, supra note 86.

92. Ohlin, supra note 91, at 707–08; Wala, supra note 86, at 690.
membership. The history in this area has lent itself to selective citation, and much confusion appears to derive from the conflation of the negotiations over and ultimate inclusion of certain provisions in the London Charter by the Allies and the judicial interpretation, criticism, and ultimate limitations of those provisions imposed by the IMT. In fact, the IMT largely rejected the attempt to use expansive inchoate offenses or conspiracy as a form of liability, and it read the conspiracy theory of liability to apply only to crimes of aggression and not to either war crimes or crimes against humanity.

Although recognized as an authoritative pronouncement on the law at the time, the London Charter was a multilateral treaty that has been subsequently reinterpreted and reapplied, and much of the subsequent history of ICL is viewed as repudiating the attempt by the Allied powers to impose such broad forms of criminal liability. Neither the Nuremberg Principles drafted at the request of the U.N. General Assembly nor the International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind include inchoate conspiracy or criminal-organization membership as war crimes, nor do they include any other inchoate offense for war crimes. In fact, the comments to the Draft Code clarify that the Article 2 provision that nominally refers to direct participation in “planning or conspiring to commit such a crime which in fact occurs” requires actual participation in forming the criminal plan. The comments further clarify that the provision was “intended to ensure that high-level government officials or military commanders . . . are held accountable for the major role that they play which is often a decisive factor

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93. Al Bahlul, 820 F. Supp. 2d at 1203–04; Hamdan II, 801 F. Supp. 2d at 1306 (stating that it was “clear that the concept of organizational guilt” included in the London Charter’s provisions and the subsequent trials of members before the National Military Tribunals “is similar to providing material support to terrorism”).

94. See Danner & Martinez, supra note 91, at 119; Fletcher, supra note 53, at 448; Wala, supra note 86, at 705.

95. STEVEN R. RATNER ET AL., ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 141 (3d ed. 2009); Danner & Martinez, supra note 91, at 116.

96. See Fletcher, supra note 53, at 448; Wala, supra note 86, at 692, 695–97, 702–04. Interestingly, in its admittedly brief review of international law sources that could support material support as a war crime in international law, the D.C. Circuit did not even mention the IMT or London Charter, despite the fact that the Charter’s organizational membership charges would seem to be the best precedent for material. See Hamdan II, 696 F.3d 1238, 1249–52 (D.C. Cir. 2012).


98. Draft Code of Crimes, supra note 97, art. 2(3)(e) (emphasis added).
in the commission of the crimes,” while participation by midlevel and low-level actors who carry out the plan is subject to other distinct liability provisions.99

Finally, the jurisprudence of the subsequent international criminal tribunals has largely subsumed and consolidated any international legal precedent originating from the WWII tribunals. The ad hoc tribunals in turn have explicitly rejected any form of inchoate offense while adopting a newly formed doctrine of broad vicarious liability: JCE.

II. INTERNATIONAL CRIMINAL LIABILITY

A. The ICTY and the Development of JCE

What remains of the CMCR’s sources is modern ICL precedent, including the judgments of the ICTY and, to a lesser extent, the Rome Statute.100 It is precisely the absence of other relevant sources, the rarity of law-of-war prosecutions,101 and the wealth of jurisprudence on individual criminal liability in the context of armed conflict that renders the ICTY judgments unquestionably important. The United Nations established the tribunal under its Chapter VII powers in the midst of the war following the dissolution of the former Yugoslavia.102 The ICTY’s organic statute—which prescribes its jurisdictional boundaries—was left to the U.N. Secretary-General.103 His report provides a summary of the major treaties that elaborate the primary rules of war that formed the basis of the Nuremberg prosecutions as well as the post-WWII Nuremberg Principles and the International Law Commission Draft Code.104

The substantive offenses triable by the ICTY—grave breaches of the Geneva Conventions, war crimes, genocide, and crimes against humanity—are listed in Articles 2 through 5 of the statute.105 Additionally, Article 1 limits the ICTY to the prosecution of “serious violations of international

99. Id. art. 2, cmt. 14 (emphasis added).
100. Because of limited jurisprudence from the International Criminal Court (ICC) thus far, most references have relied on the Rome Statute. However, two recent decisions contradict initial assumptions about the Rome Statute’s liability provisions, as discussed infra Part II.B.
101. Danner, supra note 42, at 46.
104. Rep. of the Secretary-General, supra note 103, ¶ 35. The reference to each category of crimes is explicitly made with reference to these treaties. Id. The Secretary-General also referenced the IMT Charter, id.; however, that reference—as indicated in the ICTY statute—does not extend to any reference to the criminal-organization-membership provisions of the IMT Charter. Statute of the International Tribunal art. 12, in Rep. of the Secretary-General, supra note 103, Annex [hereinafter ICTY Statute].
105. ICTY Statute, supra note 104, arts. 2–5.
humanitarian law.” Since neither the tribunal’s statute nor any judgment explicitly recognizes conspiracy, material support, or any other inchoate offense for war crimes, U.S. courts have sought recourse in analogy to the tribunal’s theory of JCE liability. Article 7(1) of the ICTY statute elaborates the modes of individual responsibility for a crime within the tribunal’s jurisdiction, providing that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime . . . shall be individually responsible for the crime.”

Although appearing nowhere in the text of the ICTY’s statute, the tribunal identified JCE as an additional mode of responsibility in its first merits case. The Trial Chamber was presented with charges against Dusko Tadić, a member of an armed group of Serbs in the Prijedor region of Bosnia. Tadić had actively participated in an operation to ethnically cleanse the town of Jaskici; during that operation, five Bosniak males were killed. The question before the Trial Chamber was whether Tadić could be held liable for their deaths even if it could not be determined whether he physically struck the fatal blows. Although ultimately convicting Tadić of eleven of thirty-three counts involving charges of persecution, killing, rape, and other inhumane treatment, the Trial Chamber found the defendant not guilty on

106. Id. art. 1.
107. In fact, in Al Bahlul, the CMCR en banc panel specified the following issue:

Assuming that [the charges alleged are violations of the law of war] and that “joint criminal enterprise” is a theory of individual criminal liability under the law of armed conflict, what, if any, impact does the “joint criminal enterprise” theory of individual criminal liability have on this Court’s determinations of whether [the charges] constitute offenses triable by military commission and whether those charges violate the Ex Post Facto clause of the Constitution?

United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1158 n.11 (C.M.C.R. 2011) (en banc), rev’d, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (per curiam). The inclusion of the specified issue is oddly followed by a citation to a footnote in Hamdan I. That footnote to the plurality opinion provided additional support for the assertion that conspiracy was not a violation of the law of war, at least in its inchoate form. The footnote itself indicates that JCE liability is “a species of liability for the substantive offense (akin to aiding and abetting), not a crime on its own” and included a citation to ICTY jurisprudence explicitly distinguishing JCE from conspiracy. Hamdan I, 548 U.S. 557, 611 n.40 (2006).

108. ICTY Statute, supra note 104, art. 7(1).
109. Technically, the first case resulting in a conviction was Prosecutor v. Erdemović; however, the defendant pled guilty and went directly to sentencing. Prosecutor v. Erdemović, Case No. IT-96-22-T, Sentencing Judgement, ¶ 3 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 29, 1996). Consequently, Tadić was the first case on the merits in both the Trial and Appeals Chambers.


112. Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 181.
the five counts related to the deaths of the men in Jaskici. The Trial Chamber concluded that while it could find beyond a reasonable doubt that Tadić entered Jaskici with a small group of armed men and beat a number of the residents, it could not eliminate doubt as to who was responsible for the deaths of five of those residents. After the prosecution and the defense cross-appealed the decision, the ICTY Appeals Chamber overturned the ruling, finding that Tadić could be held liable for the five deaths, and proceeded to elaborate what is now termed the JCE theory of liability. It is important to note at the outset that the phrase “joint criminal enterprise” can cause some confusion due to the modern connotations of “enterprise” as an entity such as an organization or company. Here, however, enterprise refers to a form of collective action, project, or joint undertaking, with the emphasis on a shared criminal intent. For example, as support for the existence of extended JCE as a matter of customary international law, the ICTY cited a number of cases at Nuremberg that focused on mob action. In these instances, it is not as though the individuals comprising the mob created a formal organization with the goal of killing a soldier; rather, what mattered was that they all formed a common intent to commit the crime and acted collectively, resulting in a soldier’s death. It is with this understanding that JCE was defined as a theory of liability for collective action.

The Appeals Chamber first noted that from the facts, “the only reasonable conclusion that the Trial Chamber could have drawn is that the armed group to which [Tadić] belonged killed the five men in Jaskici” and that the essential issue was whether Tadić could be held liable for the murder of the five men even though “there is no evidence that he personally killed any of them.” To answer this, the Appeals Chamber turned to the modes of liability in the tribunal’s statute and the accompanying Secretary-General’s

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113. Tadić Trial Judgement, Case No. IT-94-1-T, ¶ 285.
114. Id. ¶ 373.
115. In contrast to most common law jurisdictions, the ICTY is a fusion of common and civil law practice and thus allows prosecutorial appeals of acquittals. Danner & Martinez, supra note 91, at 78–79 & n.1.
118. For example, the Oxford English Dictionary defines enterprise as, inter alia, “[a] design of which the execution is attempted; a piece of work taken in hand, an undertaking.” Enterprise Definition, Oxford English Dictionary, http://www.oed.com/search?searchType=dictionary&q=enterprise&_searchBtn=Search (last visited Jan. 27, 2013).
120. Id. ¶ 183.
121. Id. ¶ 185 (emphasis added).
Report, which underscored individual criminal responsibility as an “important element in relation to” the personal jurisdiction of the court. The Appeals Chamber concluded that the statute could not possibly restrict the notion of commission only to the physical perpetrator, for to do so would exclude those modes of participating in the commission of crimes which occur where several persons having a common purpose embark on criminal activity that is then carried out either jointly or by some members of this plurality of persons. Whoever contributes to the commission of crimes by the group of persons or some members of the group, in execution of a common criminal purpose, may be held to be criminally liable, subject to certain conditions . . . [T]o hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator to physically carry out that criminal act.

In a lengthy discussion, the Appeals Chamber found that customary international law recognized a theory of coperpetrator liability known as JCE that existed in three classes—basic, systemic, and extended—each with distinct requirements. The actus reus for each of the three classes of JCE is the same, requiring (1) a plurality of persons; (2) a common plan, design, or purpose among them to commit a crime within the tribunal’s jurisdiction; and (3) the accused’s participation in that common plan to perpetrate the crime. The common plan need not have been “previously arranged or formulated . . . [but] may materialise extemporaneously.” The manner of participation need not be a separate criminal offense but rather “may take the form of assistance in, or contribution to, the execution of the common plan.”

122.  Id. ¶ 186; Rep. of the Secretary-General, supra note 103, ¶ 53.
123.  Tadić Appeals Judgement, Case No. IT-94-1-A, ¶¶ 190, 192 (emphasis added).
124.  Wala, supra note 86, at 706–07. Systemic JCE is understood to be particular to concentration camps or analogous organized systems of mistreatment and as such is not discussed in depth here. See Tadić Appeals Judgement, Case No. IT-94-1-A, ¶¶ 202–203.
125.  The act requirement is known in international law as the “objective elements.” Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 227.
126.  Id.
127.  Id.
128.  Id. Compare Prosecutor v. Popović, Case No. IT-05-88-T, Judgement (Vol. 1), ¶ 1026 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010) (“An accused may contribute to and further the common purpose of the JCE by various acts, which need not involve carrying out any part of the actus reus of a crime forming part of the common purpose, or indeed any crime at all.”), with Prosecutor v. Milutinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdana’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 23 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003) (“[T]he liability of a member of a joint criminal enterprise will depend on the commission of criminal acts in furtherance of that enterprise.”).
The mens rea requirement, however, differs with the class of JCE charged. In basic JCE, the accused must share the intent with his co-perpetrators “to perpetrate a certain crime.” Where the underlying crime has a specific-intent element, the accused must share that specific intent. This would be the case for genocide, for example, which requires intentionally killing with the specific “intent to destroy in whole or in part, a national, ethnical, racial or religious group.” Under the second, or “systemic,” class of JCE, the accused must have both knowledge of and the intent to further a system of ill treatment. Liability under the third, or “extended,” class of JCE, however, may potentially arise for a crime other than the one agreed upon. Such extended JCE liability requires that the accused (1) share the intention to commit the original, planned crime; (2) foresee that this second crime might be perpetrated by other members of the JCE; and (3) by participating, “willingly [take] that risk.” The crime must be shown to have been foreseeable to the accused in particular.

Tadić’s culpability for the murders of the five Bosniak men is illustrative of how extended JCE functions in practice. Tadić participated in the armed conflict in the Prijedor region and “actively took part in the common criminal purpose to rid the Prijedor region of the non-Serb population, by committing inhumane acts.” In furtherance of this policy, inhumane acts were committed against numerous victims and pursuant to a recognisable plan. Although killing the non-Serb population was not the criminal purpose, “it is clear that killings frequently occurred,” and that Tadić was aware of them “is beyond doubt.” In that context, Tadić “was an armed member of an armed group that . . . attacked Jaskici . . . rounding up and severely beating some of the men” and could thus be held liable under JCE for the deaths of the men without proof that he fired the fatal shots.

Subsequent ICTY cases have further elaborated, if not further clarified, various aspects of JCE in application. For example, while the tribunal must “identify the plurality of persons belonging to the JCE,” this does not

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129. The mental state is also referred to as the “subjective elements” in international law. Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 194.
130. Id. ¶ 228.
132. Id. ¶ 1022, n.3362; ICTY Statute, supra note 104, art. 4(2).
133. Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 228.
134. Id. (emphasis omitted). The second category, systemic JCE, is reserved for concentration camp cases or an analogous system of mistreatment. Id. ¶¶ 202–203.
136. Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 231.
137. Id. ¶ 230 (internal quotation marks omitted).
138. Id. ¶ 231.
139. See id. ¶ 232.
necessarily require identifying each individual by name.\textsuperscript{140} The tribunal must also “specify the common criminal purpose in terms of both the criminal goal intended and its scope (for example, the temporal and geographic limits of this goal, and the general identities of the intended victims),” as well as detail the accused’s contribution to the common plan.\textsuperscript{141} Whether a crime comprises part of the JCE must be assessed on a case-by-case basis.\textsuperscript{142} Moreover, where the common criminal purpose is to commit crimes over a large geographic area, a defendant may be liable for crimes within that area, even if his contributions are only committed within a portion of that area.\textsuperscript{143} To date, however, those charged with crimes outside the geographic area in which they were physically present have typically been high-ranking government officials. For example, although charging President Slobodan Milošević with the deaths of thousands across Bosnia and Croatia,\textsuperscript{144} the prosecution has yet to attempt to hold someone like Tadić liable for all of the deaths or persecutions committed throughout Bosnia based on his contribution to an expansive, country-wide ethnic-cleansing JCE.\textsuperscript{145} The Appeals Chamber has also offered different statements on whether the contribution to the criminal plan itself must be itself intrinsically criminal.\textsuperscript{146}

The similarities between the language of JCE and the language of both the IMT’s organizational membership charges and conspiracy more generally have led to much confusion. Recognizing the controversy attached to these latter two forms of responsibility, the ICTY has taken pains to explicitly distinguish JCE, emphasizing that JCE is “concerned with the participation in the commission of a crime . . . , a different matter.”\textsuperscript{147} The Appeals Chamber noted that liability premised on criminal organizational membership such as during WWII would run counter to its mandate to establish individual, not organizational or collective, culpability.\textsuperscript{148} This formal distinction has been criticized as a disingenuous attempt to use a

\textsuperscript{140} Brđanin, Case No. IT-99-36-A, ¶ 430.
\textsuperscript{141} Id.
\textsuperscript{142} Prosecutor v. Popović, Case No. IT-05-88-T, Judgement (Vol. 1), ¶ 1025 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010).
\textsuperscript{143} Id. ¶ 1024.
\textsuperscript{144} Prosecutor v. Milošević, Case No. IT-02-54-T, Amended Indictment, ¶ 1, 2 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 22, 2002); Prosecutor v. Milošević, Case No. IT-02-54-T, Second Amended Indictment (Int’l Crim. Trib. for the Former Yugoslavia Oct. 23, 2002).
\textsuperscript{145} Danner & Martinez, supra note 91, at 150.
\textsuperscript{146} See cases cited supra note 128.
\textsuperscript{147} Prosecutor v. Mlilitinović, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction—Joint Criminal Enterprise, ¶ 26 (Int’l Crim. Trib. for the Former Yugoslavia May 21, 2003).
\textsuperscript{148} Id. ¶ 25 (“The Secretary-General made it clear that only natural persons (as opposed to juridical entities) were liable under the Tribunal’s Statute, and that mere membership in a given criminal organization would not be sufficient to establish individual criminal responsibility.”).
controversial form of liability under a new name; the ICTY and its proponents, however, maintain that the participation aspect of JCE does in fact impose a higher burden, in theory, regarding the level of contribution that would constitute an actus reus necessary to incur liability.\(^{149}\) Although subsequent cases have rendered the actual-contribution requirement something of a rhetorical quagmire,\(^{150}\) there appears to be some consensus that the contribution must be “significant.”\(^{151}\) What “significant” actually entails is, of course, another matter.\(^{152}\) For example, in *Prosecutor v. Krstić*, a commander of the notorious Drina Corps division of the Bosnian Serb army was charged under JCE for the genocide committed at Srebrenica.\(^{153}\) The tribunal found, however, that although Krstić would have been aware of the mass killings in and around Srebrenica and permitted his resources and subordinates to take part in them, this was not sufficient to trigger liability for the genocide. Instead, the Appeals Chamber found that the prosecution had not proven that Krstić shared the genocidal intent of the JCE and thus that his liability was akin to aiding and abetting, which permits a lesser mens rea (knowledge) and results in accessorial liability.\(^{154}\) In contrast, in *Prosecutor v. Popović*, the commander’s “ubiquitous” presence at the locations of mass killings in and around Srebrenica and demonstrable evidence that he coordinated and organized the logistics of the killings rendered him guilty of genocide because he had significantly contributed to


\(^{150}\) Compare *Prosecutor v. Popović*, Case No. IT-05-88-T, Judgement (Vol. 1), ¶¶ 1165, 1298, 1388, 1504, 1930 (Int’l Crim. Trib. for the Former Yugoslavia June 10, 2010) (“[The accused] must have significantly contributed to the common purpose.”), with *Prosecutor v. Milutinović*, Case No. IT-05-87-T, Judgement (Vol. 1), ¶ 103 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2009) (“[A]n accused . . . need not act or fail to act in a way that assists, encourages, or lends moral support to another in the perpetration of a crime or underlying offence. Rather, the accused need merely act or fail to act ‘in some way . . . directed to the furtherance of the common plan or purpose.’ ”), and *Prosecutor v. Kvocka*, Case No. IT-98-30-1-A, Judgement, ¶ 104 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 28, 2005) (“Joint criminal enterprise responsibility does not require any showing of superior responsibility, nor the proof of a substantial or significant contribution.”), and *Prosecutor v. Brdanin*, Case No. IT-99-36-A, Judgement, ¶ 430 (Int’l Crim. Trib. for the Former Yugoslavia Apr. 3, 2007) (“Although the contribution need not be necessary or substantial, it should at least be a significant contribution to the crimes for which the accused is to be found responsible.”).

\(^{151}\) See *Prosecutor v. Callixte Mbarushimana*, Case No. ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 280 (Dec. 16, 2011), http://www.icc-cpi.int/iccdocs/doc/doc1286409.pdf (reviewing ICTY cases and concluding that “the current formulation of JCE liability at the ad hoc tribunals only requires a significant contribution”).

\(^{152}\) See, e.g., *Brdanin*, Case No. IT-99-36-A, ¶ 427 (“The Appeals Chamber considers that not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question, and that the pleading practice of the Prosecution, at least in cases where the Appeals Chamber has had an opportunity to rule on the judgement, has followed this principle.”).


\(^{154}\) *Id.*
the JCE with genocidal intent.155 In these cases, the requirements of intent and level of contribution appear to merge, one often being indicative of the other.

Although JCE as formulated may appear nearly identical to aiding and abetting, the ICTY has adamantly distinguished the two. For example, aiding and abetting is considered a secondary form of liability in which the accused is treated as an accessory to the crime rather than a principal and is thus considered less culpable.156 Under the ICTY’s jurisprudence, aiding and abetting, unlike JCE, does not require a common plan or shared intent between the accessory and principal, but only knowledge that the principal will commit the crime.157 Further, aiding and abetting is focused on specific assistance that substantially effects the commission of a specific crime, whereas JCE addresses broader criminal activity in which the principal participates in a manner that furthers that plan.158 While the aiding-and-abetting formulation remains clear, the finer points of JCE, such as the breadth and specificity of the common plan and the requisite contribution, remain remarkably opaque. The ICC has recently confronted these distinctions in its interpretation of the Rome Statute’s own theories of liability.

B. The Rome Statute and the ICC’s Control Theory of Liability

Despite receiving only cursory reference in the CMCR opinions, the Rome Statute is notable because it codifies a list of crimes and corresponding theories of liability. The Rome Statute is a product of negotiation and agreement and has been signed by 137 states and ratified by 120.159 Though the language of its liability provisions is similar to that used by the ICTY, there are important differences. Article 25(3) elaborates four types of liability applicable to all crimes encompassed within the statute. In addition to solicitation160 and aiding and abetting,161 the statute holds liable a person who

(a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible; [or]

158. Id. ¶ 1029.
160. Rome Statute, supra note 32, art. 25(3)(b).
161. Id. art. 25(3)(c).
(d) in any other 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.162

Because both (a) and (d) include language reminiscent of JCE, the statute was initially thought to have codified JCE.163 Indeed, the CMCR found as much in citing the Rome Statute as additional support that material support was triable by military commission by analogy to JCE.164 However, ICC Pre-Trial Chamber I165 rejected an interpretation of 25(3)(a) that would have aligned it with JCE, adopting instead a “control theory of liability.”166 In the ICC’s first judgment, Trial Chamber I upheld the Pre-Trial Chamber’s adoption of a control theory of liability for coperpetration through a common plan in 25(3)(a) and its concomitant rejection of JCE.167 Comparing common-plan liability in 25(3)(a) to aiding-and-abetting liability in 25(3)(c), Trial Chamber I noted that “if accessories [to the crime] must have had ‘a substantial effect on the commission of the crime’ to be held liable, then coperpetrators must have had, pursuant to a systematic reading of this provision, more than a substantial effect.”168 It thus rejected a JCE-esque reading of the provision because it felt that standard would not establish a

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162. Id. art. 25(3)(a), (d).
164. United States v. Al Bahlul, 820 F. Supp. 2d 1141, 1214 (C.M.C.R. 2011) (en banc) (“Thus the ICC statute includes a JCE theory of individual criminal liability based upon the knowing or purposeful contribution to the commission or attempted commission of such crimes by a group acting with a common purpose.”), rev’d, No. 11-1324 (D.C. Cir. Jan. 25, 2013) (per curiam).
165. The ICC’s judicial chambers are composed of Pre-Trial, Trial, and Appeals Chambers. Rome Statute, supra note 32, arts. 34, 39.
168. Id. ¶ 997 (emphasis omitted).
high-enough threshold of contribution to convict someone as a principal in
the commission of a crime.

In December 2011, Pre-Trial Chamber I also rejected an analogy
between JCE and Article 25(3)(d) liability when it declined to confirm the
prosecution’s charges against Callixte Mbarushimana.\textsuperscript{169} In doing so, the
Pre-Trial Chamber engaged in a critical analysis of both 25(3)(d)’s
requirements and its relationship to JCE.\textsuperscript{170} It found that liability under
Article 25(3)(d) is a form of residual secondary liability not already
included in the preceding liability provisions.\textsuperscript{171} Thus, unlike JCE, which the
ICTY read as a form of principal-commission liability,\textsuperscript{172} Article 25(3)(d)
has a lower mens rea standard: the accused must intend the acts that
contribute, but must only be aware of their contribution, to the crime.\textsuperscript{173} This
lower standard obviates the specific-intent requirements under JCE’s shared
criminal intent element.\textsuperscript{174} Further, the Pre-Trial Chamber distinguished this
liability from aiding and abetting, which, unlike the ICTY, the ICC holds to
a purpose threshold.\textsuperscript{175}

The ICC also distinguished its actus reus requirement from that of JCE.
Where the ICTY has been enigmatic in its treatment of contribution, the
ICC has been concrete. For liability to arise under 25(3)(d), the contribution
to the crime must “be at least significant.”\textsuperscript{176} The determination of what may
constitute a significant contribution requires “a case-by-case assessment . . .
[to determine] whether a given contribution has a larger or smaller effect on
the crimes committed.”\textsuperscript{177} Reviewing “leading scholars and past international
cases” to determine “why defendants have been convicted as principals,
convicted as accessories or acquitted,” the Pre-Trial Chamber distilled sev-
eral factors frequently used to assess culpability: “the sustained nature of the

\textsuperscript{169} Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/10, Decision on the
doc1286409.pdf. Mbarushimana was one of five civilian leaders of the Force Démocratiques
de Libération du Rwanda, a political and military organization formed in the Democratic Re-
public of the Congo by members of the Rwandan armed forces and Interahamwe that fled
Rwanda after the Rwandan Patriotic Front ended the genocide. See id. ¶¶ 1–8. The Prosecu-
tion alleged that the Forces Démocratiques committed war crimes and crimes against
humanity in the Democratic Republic of the Congo to garner public attention. Id. ¶¶ 1–13. The
Prosecution appealed the Pre-Trial Chamber’s decision, but for prudential reasons, the Ap-
peals Chamber declined to examine the issue on the merits, finding both that the record was
insufficient and that a determination on the standard would not alter the ultimate decision on
the charges. Prosecutor v. Callixte Mbarushimana, Case No. ICC-01/04-01/1 OA 4, Judgment,

\textsuperscript{170} Callixte Mbarushimana, Case No. ICC-01/04-01/10, ¶ 281.

\textsuperscript{171} Id. ¶ 283.

\textsuperscript{172} See text accompanying supra note 157.

\textsuperscript{173} Rome Statute, supra note 32, art. 25(3)(d).

\textsuperscript{174} Callixte Mbarushimana, Case No. ICC-01/04-01/10, ¶ 288.

\textsuperscript{175} Id. ¶ 289.

\textsuperscript{176} Id. ¶ 283.

\textsuperscript{177} Id. ¶ 284.
participation”; efforts to prevent or impede the crimes; “whether the person creates or merely executes the criminal plan”; the accused’s position in the organization; and “perhaps most importantly, the role the suspect played vis-à-vis the seriousness and scope of the crimes committed.”

However, these factors are not conclusive and should not replace an individualized assessment that considers additional factors. Key to the Pre-Trial Chamber’s discussion was the requirement of a clear causal relationship between the contribution and the commission of a crime. The ICC has thus initially indicated that Article 25 creates a sliding scale of greater to lesser forms of liability, and the most attenuated form of liability recognized by the court still requires a significant contribution to an underlying offense.

III. JCE AND MATERIAL SUPPORT: A MISTaken ANALOGY

Due to the absence of other definitive resources and the way in which the international criminal tribunals have largely subsumed the field of criminal liability for war crimes, U.S. courts have been forced to rely on the opinions and statutes of the international tribunals. However, since neither the opinions of the ICTY and ICC nor their respective statutes explicitly recognize “material support” as an offense, the military commissions in particular have sought recourse in analogy of the crime to JCE. Yet despite paying rhetorical homage to the doctrine, the CMCR failed to properly apply it, and the D.C. Circuit simply ignored it. While the CMCR was content to find a “similar analytical nexus” between the JCE and material support, an assessment of their elements demonstrates how inapt that analogy is.

A. The MCA and Material Support for Terrorism

Both Hamdan and Al Bahlul were charged with providing material support for terrorism. The MCA defines material support for terrorism as follows:

Any person subject to this chapter who provides material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, an act of terrorism (as set forth in paragraph (24) of this section), or who intentionally provides material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such

178. Id.
179. Id.
organization has engaged or engages in terrorism, shall be punished . . . . 182

The conduct constituting material support is further defined with reference to the parallel domestic criminal law provision of the same offense, 183 which defines material support or resources as

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials . . . . 184

Finally, the Manual for Military Commissions, issued by the Department of Defense, elaborates the specific elements of each listed offense, articulating two distinct ways to violate the material-support provision. 185 First, an accused may provide material support for a terrorist act, in which case the prosecution must prove (1) that the accused provided material support “to be used in preparation for, or carrying out, an act of terrorism”; (2) that the accused knew or intended the support to be used for those purposes; and (3) that “the conduct took place in the context of and was associated with hostilities.” 186 Incorporating the definition of terrorism in paragraph 24 should, as a procedural matter, require that the prosecution further prove that the attack for which the material support was provided was committed “in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or coercion, or to retaliate against government conduct.” 187 This raises the question of whether the individuals accused of providing material support must themselves intend this to be the purpose of the attack, or whether they must only have knowledge that such is the purpose of the principal perpetrator.

The second way an accused may provide material support is “to a terrorist organization engaged in hostilities against the United States.” 188 This requires the prosecution to prove that the accused (1) provided such support, (2) intended to provide that support “to an international terrorist organization,” (3) knew the organization “has engaged or engages in terrorism,” and that (4) the “conduct took place in the context of and was associated with

183. See id. § 950h(25)(B).
186. Id. pt. 4, § 6(25)(b)(A).
187. Id. pt. 4, § 6(24)(a).
188. Id. pt. 4, § 6(25)(b)(B)(1).
hostilities.” In this formulation, the only required actus reus appears to be as simple as providing oneself in any capacity to a designated terrorist organization. Because military commissions have personal jurisdiction only over alien unlawful enemy combatants, the so-called fourth element seems to be resolved by determining personal jurisdiction, a threshold matter. At least, it is difficult to see how a court could determine that an accused was an enemy combatant without being aware that his conduct took place in the context of hostilities. It is thus unclear how this element can also serve as a criminal element subject to the reasonable-doubt standard, since its determination pretrial effectively removes it as a legitimate constraint on the determination of guilt or innocence of the accused.

Hamdan was charged and convicted under both iterations of material support, while Al Bahlul was charged and convicted only under the second form of providing material support to a terrorist organization. Under this latter formulation, there is no requirement that the accused have contributed to or facilitated any actual terrorist attack or war crime, nor that he even had knowledge of any specific plan to commit a future violation. Rather, if providing oneself amounts to material support, it seems possible that an accused could be convicted for travelling to an Al Qaeda encampment and joining the organization, even if he was detained the very next day, so long as he intended to provide his personal support to Al Qaeda with knowledge of its prior attacks. No further completed attack need even occur. Although the statutory language of the first provision criminalizing material support for a terrorist act could be read to require knowledge of and support directly intended to contribute to a specific act of terrorism, this has not been its application. Rather, Hamdan was charged under both iterations for the same conduct, and no knowledge of nor direct contribution to any attack was required to convict him; instead it was sufficient to allege that by providing personal driving services to Osama bin Laden, Hamdan knew that “he was directly facilitating communication and planning used for an act of terrorism.” This application of the charge largely erases any genuine distinction between the two forms of material support.

Thus, material support is similar to an inchoate conspiracy charge, as both predicate criminal liability on the manifestation of a common or shared criminal intent rather than on any harm deriving from a terrorist act that an accused helped to bring about. Although conspiracy requires an agreement whereas material support requires some sort of provision of support, where that support is merely joining a terrorist organization, the distinction becomes elusive.

189. Id. pt. 4, § 6(25)(B)(I)-(4).
The most important difference between material support and conspiracy lies in the two charges’ respective mens rea requirements: conspiracy typically requires a shared criminal purpose, while material support requires only that one know of the terrorist activities of the organization. Indeed, it seems possible to convict someone of material support even if they possessed the diametrically opposed intent to prevent further terrorist attacks. This was precisely the proposition posed to the U.S. Supreme Court in Holder v. Humanitarian Law Project, where the Court confirmed that assistance—even where designed to mainstream terrorist organizations away from violence and into politics—would violate the law. In any instance, the CMCR has not belabored the distinction’s niceties.

The conduct alleged to prove the charges in Al Bahlul and Hamdan II is instructive of how the prosecution intends to use its new statutory weapon. Al Bahlul was alleged primarily to have provided himself as support to Al Qaeda by pledging bayat, or fealty, and by serving in the public relations office of Al Qaeda. Although contested by his attorney on appeal, he was found to have created a promotional video aimed at gaining recruits to Al Qaeda following the bombing of the U.S.S. Cole. No allegations that Al Bahlul had “any foreknowledge” of any terrorist act, or that he was present or privy to any such act, were made. As his attorney argued in brief, “From the opening statement, through the testimony of every witness to the summation, Mr. Bahlul’s trial was about his film.” Hamdan has likewise never been alleged to have been present at, or to have possessed foreknowledge of, any terrorist act. Rather, like Al Bahlul, Hamdan was charged and convicted of conduct comprising providing himself as material support to Al Qaeda by joining the organization, pledging bayat, and serving as a driver and bodyguard to Osama bin Laden.

196. Al Bahlul, 820 F. Supp. 2d at 1221–23 (“Resolution of this enduring and complex controversy is not essential to decide appellant’s challenge. . . . The similarity between appellant’s conviction of conspiracy in the Specification of Charge I and providing material support for terrorism in the Specification of Charge III, including the same ten overt acts, informs our analysis of the assigned error.”).
197. Charge Sheet at 1, Al Bahlul, 820 F. Supp. 2d 1141, MC Form 458.
198. Al Bahlul, 820 F. Supp. 2d at 1161; Charge Sheet, supra note 197, at 1.
200. Id. at 8. On appeal to the CMCR as well as to the D.C. Circuit, Al Bahlul has also raised an equal protection challenge and a First Amendment challenge to premising any form of criminal liability on the video itself as expressive, political conduct. Id. at 13.
B. The CMCR’s Problematic Analysis

As discussed above, JCE comprised one of the only relevant international analogues cited by the CMCR. However, despite its relevance, any analogy between material support and JCE is a mistaken one. An attempt to link material support to JCE is to analogize the terrorist organization to the criminal enterprise and the provision of support to the contribution. Yet, as elaborated below, such parallels are prohibitively problematic as a result of decisive differences in the mens rea and causation requirements.

First, the mens rea requirements are distinct. For basic JCE, the prosecution must identify the criminal object of the common plan and must prove that the accused and all members of the JCE shared the criminal intent to commit that crime.\[^{202}\]\[^{203}\] Knowledge of the crime is insufficient to trigger liability. Material support for a terrorist act, in contrast, does not require a shared intent, but instead requires only that the accused intended to provide support with knowledge that the support would be used to commit the underlying crime (terrorist acts).\[^{204}\] In the case of providing material support to a terrorist organization, there is no requirement of knowledge of a particular terrorist act to which the accused would be prospectively contributing; it is sufficient that he has knowledge that such a crime has been committed by the organization at some point in the past.\[^{205}\] This is on its face antithetical to the requirements of JCE. Extended JCE applies to crimes other than the one intended by the JCE and thus would not appear to apply in the cases of most detainees, since trials center around the underlying crime and criminal goal of terrorism.

This low mens rea standard may in part be explained by the conceptualization of membership in a terrorist organization as a stand-in for shared criminal intent. Yet such a conceptualization would be incredibly problematic, since membership does not establish a shared intent toward a particular crime and, moreover, is an element of the crime subject to government designation rather than the evidentiary burdens of a criminal trial.\[^{206}\] The charge thus takes as a predicate one of the key elements of the offense. The label “terrorist organization” effectively alleviates the need to demonstrate a shared criminal intent (the intent itself being embodied in the “terrorist” designation) or to link the accused’s mental state to a specific crime. In contrast to this administrative designation, at the ICTY, a JCE must be defined by its temporal and geographic scope, the plurality of participants, and its


\[^{203}\] MMC, supra note 185, pt. 4, § 6(25)(B).

\[^{204}\] Id.

\[^{205}\] Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 228.

\[^{206}\] See 18 U.S.C. § 2339B(g)(6) (2011); Brief of Petitioner in Al Bahlul, supra note 19, at 10; Brief of Petitioner in Hamdan II, supra note 19, at 40–43.
common criminal objective. Because material support obviates the need to do so, it is unclear how the courts can determine whether a particular crime fell within or outside the JCE and thus whether basic or extended JCE and their concomitant mens rea requirements should apply.

The mens rea distinction highlights a primary problem with material support’s actus reus requirements: a JCE is not an entity or an organization. The use of terms such as “join” and “member” in the ICTY’s language describing JCE causes much confusion. But, as noted above, an enterprise is not an organization that can be joined in the common connotation of these words. To the extent that “membership” means anything in a JCE context, it is that the accused joined in and shared intent to commit the alleged crime—the only way to “join” a JCE. This concept of “joining” in ICL thus goes to establishing the mens rea necessary for committing the crime and thus does not comprise the actus reus of the crime. By borrowing the term, if not the meaning, the language of the material-support provision permits the fusion of mens rea and actus reus into the concept of providing oneself as support by “joining” a terrorist organization. This is why, in the case of Hamdan and Al Bahlul, joining the organization and pledging bayat both demonstrate the necessary mens rea and comprise the only acts that, according the statute, need to be charged. Although Al Bahlul was charged with additional conduct that could conceivably comprise material support, this was not necessary by the terms of the statute.

Similarly, making the underlying criminal offense—terrorism or a terrorist act—a matter of administrative designation obviates the JCE requirement of finding a significant contribution to a specified crime. The tenuousness of the “conduct” requirement in the material-support charge is demonstrated by a comparison of Hamdan and Al Bahlul’s charges. Whereas Al Bahlul was effectively charged with soliciting membership in Al Qaeda, conduct that the U.S. government could plausibly argue contributed to a given attack, it is exceedingly more difficult to ascertain how Hamdan’s conduct of serving as a driver and bodyguard did so. Both the specificity of allegation and the causal nexus between conduct and underlying crime are lacking against both defendants. Although the first definition of material support for a terrorist attack may in fact be analogous to JCE if charged properly, that is, linking the accused’s participation directly to a

208. Fletcher, supra note 53, at 445 (“But we need to realize the peculiarly American way of thinking about conspiracy. The charge against Hamdan is not that Hamdan, bin Laden, and others entered into an agreement to commit terrorist acts, but rather that Hamdan, as bin Laden’s driver, ‘joined an existing conspiracy.’ It is not clear how one joins a conspiracy but if you think of a criminal conspiracy as something like a criminal organization, then presumably you can join by collaborating with the organization with the intent to further its goals.”).
209. 18 U.S.C. § 2339A(b)(1) (defining material support to include the provision of “personnel (1 or more individuals who may be or include oneself)” (emphasis added)).
specific terrorist attack, the statutory elements for the second definition—
providing material support to a terrorist organization—intrinsically fail this
test. Material support obscures the causal connection or nature of a contribu-
tion to the actual underlying offense, obviating the need for the government
to link the conduct of the accused to the actual harm-causing crime itself.

There is simply no analogue in modern ICL for that kind of inchoate li-
bility. The closest parallel—reference to the IMT’s attempt to declare
certain organizations criminal—cannot support the weight of the point. Be-
sides being rejected by every subsequent tribunal, the criminality of those
organizations were subjects of their own criminal trials; of the seven orga-
nizations charged, only three were found to be criminal.211 Thus, even with
regard to the ICL precedent most conducive to the government’s argument,
the courts ultimately determined the criminality of the organizations. While
this may seem of little consequence when referring to Al Qaeda, at least in
its current form, such a principle becomes substantially harder to sustain
when applied to other allegedly terrorist organizations that are more diverse,
whose “terrorism” designation is more controversial, and that comprise vari-
ous factions that are linked but not identical. In this regard, groups such as
the Irish Republican Army and Sinn Fein or Hezbollah come to mind.

The truly fatal error in the analogy is that material support is functionally
an inchoate offense in direct contradiction to ICL precedent. The lip
service paid by the CMCR to the distinction between vicarious liability and
inchoate offenses belies the panel’s imposition of the latter, ignoring that to
use the former, both defendants would need to be charged with an actual
war crime.212 JCE is not an offense. Tadić was not found guilty of JCE; he
was found guilty of killing the men in Jaskici, that is, guilty of murder.213
Indeed, the Appeals Chamber underscored the point when it rejected a Trial
Chamber assertion that one could aid and abet a JCE; because JCE is not an
offense in itself, a defendant cannot aid and abet it.214

But is this just semantics? Even if the courts were to acknowledge that,
as provided in the statute, material support impermissibly constitutes an
inchoate offense, what would prevent the government from recharging
Hamdan or Al Bahlul for an underlying terrorist attack? For example, as a

211. Danner & Martinez, supra note 91, at 113–14.
(“Review of the elements of [MST] amply demonstrates that appellant’s charged conduct is
not an inchoate offense. . . . [It] is akin to providing direct support to an ongoing criminal en-
terprise . . . . [and] is essentially co-perpetrator liability.”), rev’d, No. 11-1324 (D.C. Cir. Jan.
25, 2013) (per curiam); Hamdan II, 801 F. Supp. 2d 1247, 1285–86 (C.M.C.R. 2011) (en banc)
(“JCE doctrine provides a theory of liability for proving a specific crime, and it is not a
213. Tadić Appeals Judgement, Case No. IT-94-1-A, ¶ 327 (Int’l Crim. Trib. for the For-
mer Yugoslavia July 15, 1999); Prosecutor v. Tadić, IT-94-1-I, Amended Indictment, Counts
for the Former Yugoslavia Feb. 28, 2005).
matter of ICL, what would prevent the government from retrying Hamdan and Al Bahlul for an actual terrorist attack under a theory of JCE or aiding and abetting based on their alleged contribution to its commission? When the CMCR referred in its analysis to “culpability,” was it merely attempting to acknowledge that ICL has recognized the type of conduct and type of liability sufficient for culpability to attach to these defendants, even if Congress codified this type of criminal liability under a different name and treated it like a substantive offense? For example, whether or not Al Bahlul’s contribution could be sufficient to convict him under ICL, is it not plausible to allege that he intentionally joined Al Qaeda and solicited additional members, which in fact contributed to the commission of at least one terrorist attack? And if it can be so alleged under JCE, what is the reason that the CMCR could also not so find, even if its legal analysis is less than exemplary in explaining why? Is there really a there there to this Note’s critique?

If the argument were to rely entirely on the rhetoric of the ICTY, the answer very well may be no. Despite the schizophrenic renderings of the tribunal’s chambers that periodically recast JCE requirements, there is little as a textual matter that, if applied to Hamdan or Al Bahlul, would not place them in exactly the same situation as they are now. Yet when one transcends the expansive dicta of the tribunal, as the ICC recently did, the facts of the cases they have considered speak for themselves, and they speak loudly.

To date, U.S. courts that have examined the ICTY’s jurisprudence have been blind to this context. Untethered from its unique ICL foundations, the tribunal’s law floats freely—a contribution, significant or substantial, criminal or not, to a common plan or purpose: it could mean anything. And in the military commissions, it has. The CMCR has readily taken note, as have the scholars who have cautioned against this reckless experiment in utilizing individuals’ criminal liability to build an area of legal scholarship and doctrine. Yet the context of that jurisprudence and the facts presented to the Tribunal speak volumes. Not a single ICTY case cited by the CMCR has found liability for analogous conduct or convicted a defendant on facts remotely resembling that of either Al Bahlul or Hamdan. A review of the defendant who provided the primary vehicle for the development of JCE proves illuminating: Tadić was tied to the murders of five men by having been part a single group of men who, in the same place, at the same time, beat numerous Bosniak men, some of whom died. Like the accused in the WWII cases that the ICTY looked to in developing JCE, Tadić, Popović, Krstić, and Ojdanić were all physically present and in a position of authori-

215. See supra note 150 and accompanying text.


ty, actively participating, or both, in the pervasive, mass crimes for which they were convicted. There is nothing plausibly analogous between their conduct and that of Hamdan or Al Bahlul. Yet despite the obvious dissimilarities in actual conduct, the expansive rhetoric of the ICTY does little to define the doctrine’s limits, allowing courts to wield this prosecutorial weapon indiscriminately.

IV. ICTY Jurisprudence & Public International Law

No matter the failure of the analogy, a broader problem left unaddressed by the CMCR is the authority of the ICTY and the status of JCE as a matter of international law. As detailed above, the court’s objective in supporting its jurisdiction is to identify customary international law. Yet international law’s statist doctrine of sources prevents courts and scholars from creating or contributing to the development of customary norms, which remain as a formal matter a result only of the crystallization of state practice. Herein lies the paradox of ICL, a body of law that has been defined by judicial innovations of vague and dated treaty language. The fact that the ICTY articulated a theory of JCE liability does not render it unquestionably a rule of customary international law, even if the tribunal has ostensibly dominated the ICL field.

The CMCR stated that JCE “has been adopted or recognized . . . under customary international law” since the 1990s, when the ICTY first articulated it in Tadić. In part, the CMCR relied on the fact that the ICTY’s jurisdiction was confined to “those areas of international humanitarian law which were beyond any doubt part of customary international law.” While in theory the ICTY’s authority is so constrained, in practice the tribunal has engaged in a wide-ranging project to create ICL, taking liberties in transgressing its statutory limitations. In doing so, the ICTY’s jurisprudence and its adoption by subsequent tribunals exposes the modern fragility of formal public international law doctrine and demonstrates the need for new analytical frameworks to interpret, apply, and constrain this unwieldy body of law.

A. Sources of Public International Law

The law of nations, or international law, comprises both positive and customary law. As articulated by the U.S. Supreme Court, in the absence of either a binding treaty or domestic legislation, “resort must be had to the customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators.” Customary international law “results from a general and consistent practice of states followed by them from a

218. Danner & Martinez, supra note 91, at 111 (reviewing the World War II cases cited for the proposition).
220. Id. (internal quotation marks omitted).
221. The Paquete Habana, 175 U.S. 677, 700 (1900).
That sense of legal obligation (*opinio juris*) is essential, such that common practice alone from which a state would feel free to deviate does not evidence a rule of customary international law. In determining the customary status of a rule, most courts look to the statutory scheme of the International Court of Justice (ICJ). Article 38 recognizes as sources of international law treaties, customary law, “general principles of law recognized by civilized nations,” and “judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.” This last source is qualified by the fact that the each of the ICJ’s own decisions “has no binding force except between the parties and in respect of that particular case.”

Although formally binding only on the ICJ, this description of the proper sources of international law has been adopted as “canonical” or “constitutional” for the determination and interpretation of international law.

Often referred to as the doctrine of sources, the ICJ Statute enshrines a central premise of formal international law: international courts cannot “make law” through binding precedent, their judicial opinions being granted only a subsidiary status as evidencing, but not establishing, international law. This is reflected in the *Restatement (Third) of Foreign Relations Law*, which omits judicial decisions from a list of sources of international law but, concurrent with the ICJ Statute, lists them as persuasive secondary evidence of existing international law. This framework poses a challenge to domestic courts seeking to apply ICL. Though judgments of the ICTY are one of the only sources interpreting and applying individual criminal liability for violations of the laws of war, under the formal limitations of international law, they offer only persuasive interpretations of customary international law, on par with that of any other scholar or jurist. Judicial institutions’ persuasive rather than precedential authority is ostensibly subject to the strength and legitimacy of their legal analysis; the absence of

223. *Id.* § 102 cmt. c.
224. ICJ Statute, supra note 39, art. 38 (emphasis added).
225. *Id.* art. 59.
227. Danner, supra note 42, at 34–35.
228. *Restatement (Third) of Foreign Relations Law* § 102 reporters’ n.1 (1987); see also *The Paquete Habana*, 175 U.S. 677, 700 (1900) (“[R]esort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.” (emphasis added)).
229. Danner, supra note 42, at 49.
hierarchy suggests that under a formalist approach, any conflicts between such judicial institutions should be resolved on the soundness of their arguments as reflections of customary international law as it is. Consequently, international tribunals cannot create or advance new norms alone. Yet that is precisely what they have unabashedly sought to do, embracing an international “common law,” often of necessity.

In its opinions, the CMCR failed to situate its sources within this international law framework. However, three U.S. circuit courts of appeal confronted with ICL jurisprudence have engaged in such an analysis; the disparate results at which they have arrived demonstrate the travails plaguing the interpretation and application of ICL doctrine.

**B. Tribunal Precedent: An Intercircuit Debate**

In the last decade, U.S. federal courts have been faced with a series of lawsuits originating under the domestic Alien Tort Claims Act (ATCA). A number of these recent suits, as relevant here, have asked courts to hold various corporations liable for extrajudicial killings, torture, war crimes, genocide, and crimes against humanity. Much of this litigation has focused on how the courts can and should determine what theories of liability and what level of mens rea are sufficient to hold corporations liable for such crimes as a result of their collaboration or association with government entities committing the underlying offenses. That is, like Al Bahlul and Hamdan, the corporations are not alleged to have physically perpetrated the crimes in question, but rather to be liable under a theory of vicarious liability for their support or contribution to crimes physically perpetrated by others. In addressing these claims, the U.S. federal courts have engaged in a far more complex and nuanced analysis of the role that ICTY jurisprudence and the Rome Statute play in international law and thus their respective authority to define customary rules regarding international standards of

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230. See Boas, supra note 226, at 91; Ward N. Ferdinandusse, Direct Application of International Criminal Law in National Courts 6, 129 (2006); Joseph Powderly, Judicial Interpretation at the Ad Hoc Tribunals: Method from Chaos?, in Judicial Creativity at the International Criminal Tribunals, supra note 40, at 17, 39; Mohamed Shahabuddeen, Judicial Creativity and Joint Criminal Enterprise, in Judicial Creativity at the International Criminal Tribunals, supra note 40, at 184, 203.


233. See Aziz v. Alcolac, 658 F.3d 388, 396 (4th Cir. 2011); Doe v. Exxon Mobil Corp., 654 F.3d 11 (D.C. Cir. 2011); Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244 (2d Cir. 2009); Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 267 (2d Cir. 2007).
liability. The result is an intercircuit conflict that frames the obstacles presented in interpreting and applying ICL in new contexts.

1. The Second Circuit

In *Khulumani v. Barclay National Bank Ltd.*, the Second Circuit Court of Appeals issued a per curiam opinion vacating a district court dismissal and holding that plaintiffs could sue under the ATCA on an aiding-and-abetting theory of liability.\(^{234}\) Judges Katzmann and Korman issued accompanying opinions\(^{235}\) in which they agreed that the relevant mens rea was purpose; however, they differed as to their reasoning, thus engaging each other in a detailed analysis of the authority of ICTY jurisprudence and the Rome Statute as a matter of public international law doctrine. Judge Katzmann began by situating his analysis with reference to the ICJ Statute and conducting a comprehensive review of the relevant conventions, statutes, and jurisprudence\(^{236}\) to conclude that aiding-and-abetting liability was recognized as a matter of customary international law.\(^{237}\) However, he recognized that liability only where it was defined so as to require a substantial contribution that was made with purpose. Judge Katzmann distinguished the decisions of the ICTY (applying a lesser knowledge standard) from the Rome Statute’s requirement of purpose, noting that “the decisions of the ICTY and ICTR . . . arise out of completely distinct factual contexts and often involve defendants who might have been convicted on alternate theories of liability” and that ICTY opinions “occasionally (and consciously) engaged in discussions peripheral to the ratio decidendi of a case . . . .”\(^{238}\)

Consequently, while recognizing ICTY opinions as constituting some evidence of customary law, Judge Katzmann rejected the idea that the ad hoc tribunals’ determinations could be sufficient to establish a knowledge standard under customary international law for purposes of the ATCA suits.\(^{239}\)

Judge Korman agreed insofar as the ultimate standard for aiding-and-abetting liability to be recognized by the courts but differed both as to the standard’s application to the case and to the reasoning Judge Katzmann used to arrive at that standard.\(^{240}\) Even recognizing that the Rome Statute may ev-

\(^{234}\) *Khulumani*, 504 F.3d at 260.

\(^{235}\) Judge Hall also issued a concurring opinion. However, while he concurred in the result, he disagreed with both Judges Katzmann and Korman in looking to international law for the answer and would have determined the appropriateness of accessorial liability by looking to domestic law. *Id.* at 284 (Hall, J., concurring). As such, his opinion is not discussed here.

\(^{236}\) *See id.* at 267–84 (Katzmann, J., concurring) (reviewing and comparing liability under the London Charter, Control Council 10, the Rome Statute, the statutes of the ad hoc tribunals, a number of multilateral conventions, and the judicial decisions of the ICTY and ICTR).

\(^{237}\) *Id.* at 277.

\(^{238}\) *Id.* at 278 (emphasis added) (citation omitted) (internal quotation marks omitted).

\(^{239}\) *Id.* at 279.

\(^{240}\) *Id.* at 292–93 (Korman, J., concurring).
idence a current customary rule of international law for aiding-and-abetting liability now, Judge Korman was skeptical that at the time of the conduct alleged in the case there was “any well established and universally recognized definition of aiding-and-abetting sufficient to be considered customary international law for the purposes of the ATCA.” Unlike Judge Katzmann, Judge Korman believed that courts must undertake “a norm-by-norm analysis to determine whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued,” at least where it involves a private (nonstate) actor. In the case before the court, the plaintiffs were seeking liability for extrajudicial killings carried out under the apartheid regime in South Africa; consequently, Judge Korman did not think that ICL jurisprudence could necessarily create a customary rule of liability for crimes unrelated to those within the tribunals’ mandate or subject matter.

More importantly, he rejected Judge Katzmann’s “gratuitous suggestion” that the ICTY and ICTR cases cited could prospectively “provide a reliable basis for a broader definition [encompassing a knowledge standard] than the one proscribed in the Rome Statute.” First, Judge Korman noted the context-specific nature of the ICTY statute, whose terms linking crimes against humanity to armed conflict belie the subsequent development of international criminal law, which no longer does. He also criticized Judge Katzmann’s reference to several ICTY cases that adopted a knowledge standard. In reviewing the Tadić, Kvocka, and Furundžija judgments, Judge Korman underscored that much of the analysis was “rambling” dicta, unnecessary and irrelevant to the actual facts of those cases in which the actus reus and mens rea requirements more aptly matched JCE than aiding and abetting.

[T]o the extent that any language in these opinions suggest more than that, it rises only to the level of dicta, of which peremptory norms of international law are not made. Indeed, the leading treatise Judge Katzmann cites explains that “decisions of international tribunals . . . exercise considerable influence as an impartial and considered statement of the law by jurists of authority in light of actual problems which arise before them.” Dicta unrelated to the actual problems which arise before them do not warrant such deference.

Both judges made a number of insightful moves. They articulated both the standard for customary international law and the nature of the varied

241. Id. at 333 (internal quotation marks omitted).
242. Id. at 331 (internal quotation marks omitted).
243. See id. at 292–93.
244. Id. at 333.
245. Id. at 334.
246. See id. at 337.
247. Id. at 337 (citation omitted).
sources that may be relied on to determine a customary rule. They properly distinguished the authoritative quality of the Rome Statute and tribunal judgments, noting the persuasive nature of both and looking to them as evidence of customary law without treating either as determinative. In reconciling the discordant views on aiding-and-abetting liability in the two sources, both judges carefully weighed the persuasive authority of each with reference to state practice. Judge Korman, however, went one step further: rather than simply assess the ICTY’s persuasive authority generally within the hierarchy of sources, he viewed it as necessary to assess the persuasive weight of the opinions themselves, distilling the facts and distinguishing dicta from necessary legal holdings, and refusing to accord persuasive weight to the former.248 He further expressed reticence to apply a theory of liability outside the norms and circumstances in which it originated.249 Although not resolving this dispute between Judges Katzmann and Korman, the Second Circuit in Presbyterian Church of Sudan v. Talisman Energy, Inc. reaffirmed the purpose standard for aiding and abetting.250 The court admonished that “[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place.”251

2. The D.C. Circuit

In 2011, the Fourth Circuit and D.C. Circuit Courts of Appeals were both presented with similar cases. In reviewing the Second Circuit’s international law analysis, the two courts split on their interpretation of international law standards. The D.C. Circuit rejected the analysis of both Judge Katzmann and Judge Korman, finding that the decisions of the IMT, the National Military Tribunals, and the ad hoc tribunals were “authoritative sources” that trumped the Rome Statute.252 The court not only rejected the Rome Statute as treaty law not applicable to customary international law,253 but seemed to argue that even if the Rome Statute applied, Article 25(3)(d) liability and its knowledge standard, not subsection (c)—which specifically refers to “aiding and abetting” and requires purpose—would apply.254

248. Id.
249. Id.
250. Presbyterian Church of Sudan v. Talisman Energy, Inc., 582 F.3d 244, 247–48 (2d Cir. 2009). In reference to Khulumani’s fractured opinion, the court noted that both Judge Katzmann and Judge Korman ultimately agreed that aiding-and-abetting liability required purpose after both adopting the language of the Rome Statute, rather than the ICTY’s knowledge precedent. Id. at 258.
251. Id. at 259. Unlike Khulumani, Talisman Energy confronted the court with the further question of conspiracy liability and noted that while JCE was the ICL analogue, the court could not review the issue because it was not sufficiently pled. Id. at 252.
253. Id. at 35.
254. Id. at 37.
Although the D.C. Circuit is correct in that a treaty, standing alone, does not rise to the standard of customary law, the court’s language evinced a perception of treaty law and customary law as two distinct and nonoverlapping fields. This misconstrues both international law and the Second Circuit’s analysis which, in looking for evidence of customary norms, determined that the treaty rather than the ICTY judgments more strongly represented an international consensus on the appropriate form of liability, since it represented a clear expression of a majority of states. The court’s confusion may derive from its apparent failure to distinguish between “sources of international law” as those that create or develop international law and sources that can serve as persuasive evidence of what the law is. Unlike judicial decisions, multilateral agreements exemplify state practice, and thus can contribute to, while not being determinative of, the formation of customary law. This is consistent with the Second Circuit’s conclusion that the Rome Statute better evidenced international agreement than the ICTY’s juridical pronouncements.

3. The Fourth Circuit

Parting ways with the D.C. Circuit, the Fourth Circuit in Aziz v. Alcolac noted the divergent rationales of its sister courts and adopted that of the Second Circuit.

While we agree with the premise that the Rome Statute does not constitute customary international law, we find that its status as a treaty cuts in favor of accepting its mens rea standard as authoritative for purposes of ATS aiding and abetting liability. . . . In our view, then, the Rome Statute constitutes a source of the law of nations, and, at that, a source whose mens rea articulation of aiding and abetting liability is more authoritative than that of the ICTY and ICTR tribunals.

Granting the Rome Statute preference over customary international law to resolve the issue before us is particularly appropriate given the latter’s elusive characteristics.

Consequently it, like the Second Circuit, found that the fact that the ICTY had applied the knowledge standard did not indicate a consensus for applying such liability and thus that knowledge, rather than purpose, did not have the “requisite acceptance among civilized nations” for application in

257. See id. § 102 reporters’ n.4.
259. Id. at 399–400 (footnote omitted).
Despite arriving at the same result, the court also misconstrued the international law analysis. While treaties can trump prior customary norms, they may do so only for the parties involved. Because the United States is not a party, the Rome Statute is not necessarily more authoritative for the mere fact of being a treaty; rather, the Second Circuit allocated it more persuasive weight precisely because it evidenced a consensus among 120 states as to the state of the law.

The prominence and loquacity of the ICTY on the topic should not obscure the fact that JCE remains a formulation by an ad hoc tribunal whose intricate criminal theories are neither immediately relevant nor of interest to most states. This is all the more important given the ICC’s early rulings, which have appeared to reject JCE as it has been formulated by the ad hoc tribunals. While the U.S. cases discussed here predate several of these rulings, going forward the courts will not be able to gloss over the clear conflict in liability thresholds between the two international courts. Although the ICC’s decisions reflect an interpretation of the Rome Statute, rather than direct reliance on customary law, if the Rome Statute is in fact more indicative of state consensus, should its decisions not also be granted greater persuasive weight in evidencing customary international law than those of the ad hoc ICTY? In a legal system that does not recognize judicial lawmaking, on what basis should courts resolve such intercourt conflicts? In confronting conflicting interpretations among ICL institutions, courts will need to assess how to weigh disparate analyses and to consider the sustainability of the fiction that an expanding body of law is little more than persuasive scholarly opinion. This intercourt discussion frames the challenge that the public international law doctrine presents to the development of ICL.

C. The ICTY’s Persuasive Authority

To date, the U.S. courts that have attempted to assess ICTY jurisprudence with respect to public international law’s strictures have focused on the tribunal’s statutory provisions and accorded the ICTY’s judgments deferential acceptance. Despite Judge Korman’s caution, they have largely failed to analyze this jurisprudence with respect to the actual problems that gave rise to their decisions or to examine the soundness of the legal rationales and contextual motivations offered to justify them. In determining whether JCE can or should evidence a customary international law corollary to the charges against Hamdan and Al Bahlul, the courts must assess the persuasive authority of the ICTY vis-à-vis other international scholarly opinion and in light of the unique context and informal constraints that have

260. Id. at 401.
263. See supra Part II.B.
shaped ICTY jurisprudence and ICL more broadly. Several factors are integral to this analysis, including the origins and authority of the ICTY itself, the reasoning behind the adoption of JCE, and the broader context and purpose of ICL. When viewed in light of these factors, the application of JCE to a low-level driver in a domestic prosecution becomes particularly concerning.

1. Authority of the ICTY As Institution

Several scholars who have acknowledged the formal prohibitions on judicial lawmaking in international law have sought to justify the reality of said lawmaking by suggesting that courts such as the ICTY are acting as state agents, exercising a form of delegated authority. Thus, the ICTY (and other courts like it) derives legitimacy from exercising the power of states to make law, and state practice can be imputed to it. While this rationale seems persuasive when looking to judicial institutions created pursuant to a consent-based treaty regime, such as the WTO, it seems far less applicable in the case of the ad hoc tribunals. Both the ICTY and its sister ICTR were imposed by the Security Council. Their jurisdiction was limited to states whose consent was decidedly not implicated in the creation of the tribunals.

Alternatively, other scholars argue that even if the ICTY was not consciously designed to engage in this type of customary lawmaking, it is still exercising a form of implied delegated authority that derives from the gap-filled and ambiguous language of its statute. Whether this result was due to deliberate compromise or inadvertent failure to supplement an underdeveloped body of law, the U.N. Security Council would have been aware that the ICTY would need to engage in substantial judicial innovation in order to

264. See Boas, supra note 226, at 112 (discussing ICJ jurisprudence as a “de facto normative system of precedent” that relies on persuasive authority); Danner, supra note 42, at 41–42; Ginsburg, supra note 226, at 641–42; Powderly, supra note 230, at 22–32; Shahabuddeen, supra note 230, at 184–87.


266. Cassese, supra note 62, at 7–9; Ginsburg, supra note 226, at 635. Allison Danner has suggested viewing the ICTY as “an example of an agent that has contravened the instructions of the principal but has somehow escaped discipline. Or, the ICTY judges may have acted as a sophisticated agent that understood what the principals desired, even in the face of seemingly contradictory political rhetoric.” Danner, supra note 42, at 43. The problem with the latter view of tribunals as faithful agents is that it relies too heavily on a conscious body of international community representatives who are aware of what the courts are doing and the implications of those actions, and who have an ability to communicate and coordinate a response to correct unfaithful actions. Moreover, one could argue that many of the distinctions in the Rome Statute are just such a response.
fulfill its broad mandate. Indeed, this is the argument made by the ICTY itself in justifying some of its more expansive doctrines.267

Yet the history of the establishment of the ICTY seems to indicate that little thought was given to the statute, in part because it was believed to be a sui generis institution, a one-off designed to assuage international anxiety about the failure to otherwise act in Bosnia. The ICTY was created pursuant to a U.N. Security Council resolution as a primary response to a conflict whose atrocities were accelerating by the day.268 The statute and its legal underpinnings were not the subject of extensive debate or analysis prior to its adoption. Rather, facing a dilemma of political inaction and popular derision at the lack of intervention in Bosnia, the Security Council hurriedly issued a resolution adopting a report by the Secretary-General that would constitute the ICTY’s organic statute.269 The direction that the ICTY apply only those rules of international humanitarian law that “are beyond any doubt part of customary law” casts further doubt on the idea that the U.N. Security Council anticipated the role the ICTY would play in developing an entire field of international law through judicial gap filling.270 Concerns about its repercussions for international law were allayed by assurances that it would have none.271 The rapidity with which the United Nations established what in retrospect may be seen as one of the most important developments in modern international law can be seen as due to the anticipated unimportance it was to have.272 This intended inapplicability proved a paradox: it at once obviated the concerns of the Security Council in leaving the tribunal with little but a vague jurisdictional mandate drawn from sketchy precedent and simultaneously necessitated that the tribunal engage in the very lawmaking it was proscribed from doing. While there has been an undoubted necessity for gap filling, that need does little to legitimate the court’s authority or reasoning in doing so.

Granting the many criticisms of the ICTY’s persuasive logic, prior to 2000, its jurisprudence occupied the field of modern ICL. A decade ago the ICTY may thus have been said to have exercised a discursive dominance, providing a jurisprudential baseline from which other courts must at least begin their reasoning.273 This is no longer the case, as the establishment of


268. Ratner et al., supra note 95, at 3–9.


270. Rep. of the Secretary-General, supra note 103, ¶ 34.

271. Id. ¶ 29; Danner, supra note 42, at 20–23, 37.

272. See Danner, supra note 42, at 22, 37, 41–42, 49.

273. See Boas, supra note 226, at 113–14; Bogdandy & Venzke, supra note 265, at 10; Cassese, supra note 217, at 110; Cohen, supra note 39, at 266–68; Ginsburg, supra note 226, at 640–42.
the ICC and the ratification of the Rome Statute by more than half of the world’s states has undermined this prior dominance. Conflicts between the Rome Statute or the ICC’s decisions and those of the ICTY challenge the characterization of the ICTY as (deliberate or inadvertent) faithful agent; notably, this is the case with regard to JCE. Even if one were to accept that in its early days the ICTY and its judicial innovations were made with the tacit approval of the U.N. Security Council, the establishment of the ICC would seem to have bracketed this project. A majority of the world’s states negotiated the bounds of international criminal liability under which they consented to be bound. The result was a product of substantially greater detail than anything contained in the ICTY and ICTR statutes and, in some areas, notably different from emerging jurisprudence from the tribunals. While the tribunals were never explicitly restrained in their actions by the states or the U.N. Security Council that created them, the Rome Statute and the ICC’s subsequent jurisprudence seems to be a rebuke to the human rights dominance of the ICTY. Not only have the pre-trial chambers sought to distinguish and constrain the broad JCE liability used at the ICTY, but the Rome Statute has enshrined a high level of specificity in the categorization of criminal elements and theories of liability and has explicitly included the principles of legality and specificity among its provisions. At the very least, this indicates discord among the community of states as to the proper limits of ICL; at most, it illustrates a subtle if firm rejection of the ICTY’s larger ICL innovations.

2. The Persuasive Authority of the ICTY’s JCE Analysis

Notwithstanding the authority accorded to the ICTY generally, many of its legal pronouncements have been cited by other international and national courts and incorporated into domestic legal standards. However, not all of its determinations have met with such broad acceptance; its legal reasoning justifying the adoption of JCE as a mode of liability has been one of its most controversial. Despite being “recognized” over a decade ago, it continues to receive criticism.

The legal rationale of JCE is largely a product of the tribunal’s origins and the statutory inadequacies discussed above. The ICTY was established in the midst of an ongoing conflict and appeared intended to serve as a substitute for other forms of international intervention. From the outset, it was faced with the expectation that a strong mandate could deter and prevent further war crimes and help impose an element of restraint among the parties to the conflict. Yet the ICTY had limited resources and staff and no

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275. *Id.*
277. *Danner, supra* note 42, at 45.
independent ability to actually arrest and bring to trial suspected war criminals.\textsuperscript{279}

It was in this setting that the ICTY faced its first merits case, a case in which it realized that it would need a theory of liability like JCE if it were ever to be able to convict the leaders the world deemed most responsible for the atrocities but whom the tribunal would be hard pressed to physically tie to the commission of individual crimes. Tadić, who it is unlikely would have ever seen the inside of the tribunal in the later years because of the completion strategy of focusing on only the most serious crimes, was the first defendant in a merits trial, a trial that established the modes of liability for later “big fish.”\textsuperscript{280}

In seeking to hold Tadić liable for the five murders that likely occurred in his presence, but not necessarily by his hand, the ICTY identified JCE as a mode of liability in customary international law.\textsuperscript{281} However, its analysis of JCE’s status in customary law has been heavily criticized, and rightly so, as it engages in much the same problematic and haphazard analysis of a scattered cross section of WWII cases, domestic criminal laws, and treaties as did the CMCR.\textsuperscript{282} Indeed, the entire ICTY defense bar maintains that JCE does not exist as a matter of customary international law.\textsuperscript{283} Former ICTY President Antonio Cassese has admitted that tribunal judges, particularly in the early days, were aware they were developing a legal field and regularly utilized judgments as vehicles for designing a new body of law.\textsuperscript{284} To justify the adoption of JCE as a legitimate exercise of the ICTY’s necessary gap-filling authority, there would need to be an actual gap to fill. Although the tribunal chose to read such a gap (by way of the object and purpose) into the statute, the statute’s modes-of-liability provision does not on its face necessitate this outcome. It could in fact just as easily be read to proscribe liability where defendants could not be convicted of ordering, planning, instigating, committing, or aiding and abetting a crime within the statute.\textsuperscript{285}

The decision to expand liability beyond the usual meaning of these modes was at its heart a policy decision—although perhaps a perfectly rational one,


\textsuperscript{280}. See Brown, supra note 279, at 99–101.


\textsuperscript{282}. See id. ¶¶ 195–226; Danner, supra note 42, at 47; Ohlin, supra note 91, at 707–08.


\textsuperscript{284}. Cassese, supra note 231, at 589–90.

\textsuperscript{285}. It is particularly interesting that, rather than read JCE into the potentially ambiguous phrasing of “otherwise aiding and abetting” contained in Article 7, the ICTY chose to create a new form of “committing” in order to ensure a broad doctrine for primary, rather than secondary, liability. See ICTY Statute, supra note 104, art. 7.
the very kind of decision that seems proscribed under formal public international law.

The tenuousness of this customary law analysis—the only ground on which the ICTY could justify the adoption of JCE—is highlighted by its persistent refusal to revisit it. Since it first articulated JCE in Tadić, the ICTY has steadfastly held to the very concept of stare decisis, which does not formally operate in international law, to avoid confronting those criticisms.286 If JCE in fact existed as a customary rule prior to the Tadić decision, then any court should be able replicate a similar customary international law analysis and locate JCE without reference to the tribunal’s own judgment. That such a task proves so difficult is demonstrative of the problems underlying the tribunal’s jurisprudence. In effect, that single opinion of heavily criticized analysis has served to justify the routine use of an expansive doctrine, unhindered by precise limits to its scope or application.287

Finally, the ICTY Appeals Chamber has refused to refine the doctrine by imposing clear limitations and standards and has actively rejected attempts by the Trial Chamber to do so. Instead, the Appeals Chamber has chosen to rely on prosecutorial discretion to impose constraints on JCE in practice. The Appeals Chamber has expressly rejected defendant concerns about the potential breadth of JCE on the grounds that the prosecution has never indulged in such expansive pleading.288 At the very least, it seems inappropriate to apply the textual elements of the doctrine, which the ICTY has left purposefully broad, without engaging with the charging practice of the prosecutor, which the tribunal itself has relied on as a formative constraint.

Although the ICTY and ICTR, which share a single Appeals Chamber, have used JCE ubiquitously, the trend among a number of international courts has been to constrain that doctrine. Extended JCE has been rejected (albeit as a matter of statutory interpretation) by the hybrid Extraordinary Chambers in the Courts of Cambodia,289 while the ICC has initially rejected it in its entirety.290 In lieu of the broad doctrine, the ICC has thus far differentiated coperpetrator liability along a spectrum that more closely corresponds to the original commentary to the International Law Commission Draft Code and has established a significant-contribution requirement for even its most attenuated form of liability.291 While past silence by the international community in the face of JCE’s deployment at the ICTY may

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286. Danner, supra note 42, at 34–35; Ohlin, supra note 91, at 712.
287. See Ohlin, supra note 91, at 716 (discussing the attempts by the Trial Chamber in Stakic and Kvocka to reject JCE and adopt a coperpetration doctrine similar to that adopted by the ICC).
290. See Part II.B.
have arguably implied a tacit acceptance, the now explicit discord registered by the ICC must be considered.

3. Implicit Limitations: Prosecutorial Discretion and the Object and Purpose of ICL

As noted in Tadić, JCE was adopted by the court despite any textual basis in the statute. Instead, the tribunal relied on the “object and purpose” of its creation, which it felt would be defeated without the doctrine. International criminal law, although a derivation of the laws of war, is also distinct from it. It is a fusion of “international human rights law, domestic criminal law, and transitional justice. Each one, to varying degrees, informs the purposes and principles of international prosecution, and their interaction creates conflicts within international criminal law itself.” It is a product of the international community’s response to the proliferation of intracommunal conflict and mass atrocity during the 1990s. Its doctrinal evolution has been informed by the unique objectives heralded by international practitioners, scholars, and policy makers alike to provide an effective response to the phenomenon of collective violence presented by these conflicts. For example, legal scholars and practitioners have championed this form of retributive justice as essential for deterrence, incapacitation, individual accountability, rehabilitation, reconciliation, establishing truth, creating a historical record, doing justice for victims, combating impunity, conflict resolution, and strengthening the rule of law. This multifaceted purpose has led to conflicting trends in the development of ICL’s substantive law. Several scholars have recently drawn attention to the conflict between the human rights focus on accountability and the criminal justice focus on rights of the accused. Whereas the former has provided the impetus for broad theories of liability in the quest for accountability, such legal reasoning is anathema to a criminal justice approach and the principles of legality and specificity, which require explicit notice and prohibit the expansion of crim-


293. Danner & Martinez, supra note 91, at 78.


297. See Bogdandy & Venzke, supra note 265, at 23; Cassese, supra note 62, at 8, 37–48; Danner & Martinez, supra note 91, at 96.
inal liability by analogy.298 These principles were subsequently incorporated explicitly in the Rome Statute of the ICC.299

Within this context, expansive forms of liability such as JCE may not seem troubling when used to prosecute a head of state such as Slobodan Milošević; indeed, JCE may seem not only appropriate but necessary. Yet an application of such liability to ensnare individuals like Hamdan in contravention of more stringent domestic criminal norms seems strikingly disproportionate. This is in part because ICL has largely developed as a unique response to mass atrocity and collective violence. In attempting to develop a normative understanding of ICL as a distinct body of law, Kirsten Fisher has suggested that what is unique about the situations addressed by ICL is the combination of severe deprivations of physical security and an associational aspect.300 That is, in cases of mass atrocity, political identity and association define the actors and methods of the violence, implicate the use of political institutions and resources, and frequently coincide with the breakdown of political accountability and the rule of law. Atrocities are crimes that “often [arise] out of a travesty of political power.”301

The nature of the violence and its roots in sociopolitical associations create a multiplicity of demands on international tribunals in a way atypical of domestic criminal trials and create dilemmas in the attribution of liability, particularly when the breadth of that liability is being newly defined in the wake of competing demands. The sheer scale of crimes committed through such collective or communal violence relies on the complicity of an array of individuals: from political masterminds and low-level perpetrators to neighbor-on-neighbor violence and even bystanders, “totalizing experiences necessitate totalizing responses.”302 Although the ICTY’s first merits case involved a low-level perpetrator, the subsequent history of ICL, and of transitional justice more generally, has been one of focusing international prosecutions on the gravest crimes committed by the most responsible individuals. The residual liability for crimes or actors falling outside this implicit gravity threshold is left to a diverse array of transitional-justice mechanisms. While a comprehensive survey of such mechanisms may help to inform customary international rules, anecdotal evidence demonstrates diversity rather than consensus as the norm for dealing with these lesser forms of participation in even the most heinous of crimes.303 This in turn

299. Rome Statute, supra note 32, art. 22.
301. Id. at 23.
302. Fletcher & Weinstein, supra note 295, at 639.
303. See generally Priscilla B. Hayner, Unspeakable Truths: Confronting State Terror and Atrocity (2001) (discussing truth commissions); Burying the Past: Making Peace and Doing Justice After Civil Conflict (Nigel Biggar ed., 2001) (discussing the aftermath of international crimes); My Neighbor, My Enemy: Justice and Community in
reflects the lack of a global consensus on how to address lesser forms of participation in international crimes.

The inherent discrepancies in how ICL treats organizational leaders, on one hand, and low-level participants and the swaths of society that were "swept-up in the inexorable process of killing," on the other, should be viewed as an inherent limitation implicit in most charges before the tribunals. Such limitations—whether viewed as a pragmatic result of limited resources or normative preferences by practitioners—are evidenced at the ICTY not in explicit statutory provisions or judicial opinions but in the use of prosecutorial discretion in charging.

To the extent that courts may look to ICL precedent for evidence of customary law, it is informative to look at what is not found in the decisions. From the role of de-Nazification boards and the gravity limitations imposed on the ad hoc tribunals, hybrid tribunals, and the Rome Statute to the myriad domestic mechanisms that supplement formal criminal liability, ICL has relied on prosecutorial discretion (with rare judicial intervention) to define its substantive limitations. Whether patterns of such discretion reflect normative preference, legal analysis, or the simple practicality of resource constraints, this reality rather than the ICTY’s rhetoric better explains the lack of factual analogues to *Hamdan* and *Al Bahlul*.

**D. The Judicialization of International Law and the Fiction of the Doctrine of Sources**

This analysis, however, rests on continued reliance on the doctrine of sources, in reality a fiction of international law. In light of the judicialization of international law, this formal doctrinal constraint is little more than an anachronism. To disclaim over a decade of jurisprudence as mere scholarly opinion based on this formalist fiction seems absurd given the dominant role courts have come to play in international law. ICL is a body of law: it is one that is increasingly relied on and applied by states. Whether intentional or not, the effective delegation of its development by states to the international judiciary must be recognized in the wake of the last two decades.

Yet to cast aside the constraints imposed by public international law’s formalities without an alternative framework in place presents the dangers exemplified by the cases of Hamdan and Al Bahlul. Without reliance on the doctrine of sources and its limitations on the ICTY’s authority, it is unclear what, if anything, may restrain courts from engaging in their own innovation and using ICTY rhetoric to impose historically novel criminal liability under the guise of opaque customary law. Indeed, the uncertainty of customary

305. See Danner & Martinez, *supra* note 91, at 114.
law has long been the font of judicial creativity. The emergence of this de facto international common law in the face of a de jure rejection of its legitimacy is nowhere more evident than in ICL, nor are its repercussions more important. Harlan Cohen has suggested that now may be international law’s *Erie* moment, a reference to the U.S. Supreme Court case that recognized the fiction of a federal common law and the injustice, or at least arbitrariness, that arose from continuing to rely on it. Harlan Cohen has suggested that now may be international law’s *Erie* moment, a reference to the U.S. Supreme Court case that recognized the fiction of a federal common law and the injustice, or at least arbitrariness, that arose from continuing to rely on it. 309 *Hamdan* and *Al Bahlul* present a wake-up call to international scholars and jurists that international law, and international criminal law in particular, has reached a tipping point. New frameworks are needed that transcend this statist fiction, recognize the role that nonstate actors play, and address the increased delegation and reliance by states on international courts to clarify and develop the law.

Such a framework must not just result in a reinvigorated role for courts that accords with the actual dominant role they have had in shaping international legal norms. It must lay out a system of precedent and interpretation that guides both international and domestic courts in applying rules within and between legal regimes. It must offer a mechanism for weighing authority among courts. For example, such persuasive authority, not unlike state action, could be acknowledged to contribute to the development of customary rules when sufficient court practice, just as when sufficient state practice, can evidence a newly crystallized rule. Explicitly recognizing such a role for courts under the theory of courts as state agents accords with and even protects the role of states in developing international law. A renewed appreciation for the ability of courts to “make law” if they are not constrained by their principals will create an impetus for states to take cognizance of the way in which their ostensible agents are interpreting customary and treaty law and encourage greater discussion and intervention when judicial innovation strays too far. Moreover, recognizing internally binding precedent or source hierarchy, perhaps with certain specified exceptions, could help systematize the internal coherence of legal regimes. This seems particularly important in the imposition of criminal liability, which has generally been understood to prioritize notice to the defendant, and the need to minimize arbitrariness in application to similarly situated defendants. Finally, such a framework should clarify the way in which decisions deriving from peculiar contexts may, if ever, be used outside those factual scenarios. Although rarely expressly reflected in opinions, the unique context, divergent rationales, and multiplicity of demands on ICL prosecutions have shaped the procedural and substantive development of this body of law. Such foundations need to be clearly analyzed to determine when and how ICL principles should be borrowed in other contexts.

CONCLUSION

There may be much to applaud in a system of international law moving toward judicial precedent as a basis for legal evolution. However, such unprecedented moves absent a conscious and critical acceptance by the international community, and a framework providing guidance as to the limitations and manner in which such jurisprudence is applied, are dangerous. That danger is reflected in the way in which context-specific ad hoc tribunals have been able to “recast the laws of war”\(^\text{310}\) without oversight or safeguards due to their monopoly on the subject matter, as well as in the way that judicial rhetoric has been detached from its factual foundations and applied outside its intended context, as U.S. courts have done. Although definitive reliance on evolving ICL doctrine is incorrect as a formal matter, there is scant legal doctrine to prevent such misuse.

In the absence of a guiding framework, courts should be careful to adopt a narrow application of ICL norms that takes account of their underlying rationale and context. As Judge Korman counseled in recommending a “norm-by-norm analysis,”\(^\text{311}\) courts applying ICL analogies should recognize the aforementioned discrepancies and contradictions within the ICTY’s doctrine and seek to resolve them by reference to the context and reasoning that gave rise to them. JCE is a doctrine designed to serve a body of law whose purpose is to provide accountability and justice to societies riven by mass atrocity. It responds to the type of violent conflict that is predicated on centralized mobilization by political leaders of massive swaths of the population and where traditional theories of domestic criminal law render it difficult to convict wily leaders careful to remain physically remote from the crimes they orchestrate. JCE is meant to expand liability’s reach up, not down, the chain of culpability. The ICC’s most recent decisions can be seen as clarifying this issue by constraining the expansion of liability down the ranks. While the rhetoric so oft quoted from ICTY opinions frequently fails to reflect this reality, the facts of the cases before the tribunal are telling. By looking beyond the words to the conduct that animates them, courts will be forced to engage in a more nuanced and more loyal analysis of international law; in doing so they will find little support for the MCA’s material support offense in any international criminal tribunal.

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\(^{310}\) For example, Danner has suggested that there is evidence that some jurisdictions have evidenced acceptance of the ICTY’s authority by incorporating language from decisions into their military manuals, although this does not necessarily extend to JCE. Danner, supra note 42, at 45.

\(^{311}\) See supra note 242 and accompanying text.