

JUDGMENT DAY: PROSECUTING JIHADIST TERRORISM AS A CRIMINAL ENTERPRISE UNDER THE MILITARY COMMISSIONS ACT

A Thesis Presented to The Judge Advocate General's School
United States Army in partial satisfaction of the requirements
for the Degree of Master of Laws (LL.M.) in Military Law

The opinions and conclusions expressed herein are those of the author and do not necessarily represent the views of either The Judge Advocate General's School, the United States Army, the Department of Defense, or any other governmental agency.

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20100420274

55TH JUDGE ADVOCATE OFFICER GRADUATE COURSE
APRIL 2007

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JUDGMENT DAY: PROSECUTING JIHADIST TERRORISM AS A CRIMINAL ENTERPRISE UNDER THE MILITARY COMMISSIONS ACT

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The author gratefully acknowledges the following individuals for their invaluable insight and assistance: GEN Peter Schoomaker; MG Scott Black; COL William Lietzau; COL Morris Davis; COL Mark Martins; LTC William Britt; LTC Timothy MacDonnell; MAJ Sean Watts; MAJ Howard Hoege; MAJ Sean Condron; MAJ William Nelson; Professor Anthony H. Cordesman; Professor Azizah Y. al-Hibri; Mr. Daniel Lavering; and Mr. Charles Strong.

Special thanks to my wife, Sharon Diaz, for her patience and understanding.

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*I swear allegiance to you, to listen and obey, in good times and bad, and to accept the consequences myself; I swear allegiance to you, for jihad and hijrah, and to listen and obey; I swear allegiance to you, to listen and obey, and to die in the cause of God.*²

I. Introduction

What if the Coalition captures Usama bin Laden?³ What if the United States charges him with the capital crime of terrorism under the Military Commissions Act of 2006 (MCA)?⁴ What if the United States prosecutes bin Laden for the September 11, 2001 terrorist attacks (hereinafter 9/11), as the head of Al-Qaeda's criminal enterprise?⁵ This dissertation argues that the United States should prosecute Usama bin Laden for the terrorist attacks of 9/11, as if he had crashed the four hijacked planes himself.⁶ As head of Al-Qaeda, Usama bin Laden can and should be held legally responsible, for the capital crime of terrorism, under the legal theory that Al-Qaeda is a criminal enterprise.⁷ For decades,

² United States v. Moussaoui, Bayat oath of allegiance to Usama bin Laden and Al-Qaeda, Defendant's Exhibit 941, at 54, from the substituted testimony of Khalid Sheikh Mohammed, *available at* <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/941.pdf> [hereinafter KSM Testimony].

³ This dissertation contains transliterations, Usama is one of them. Touted as the nation's most wanted criminal for the last decade, Usama bin Laden has yet to stand trial for any crimes. *See* United States v. Usama Bin Laden, S.D.N.Y., Indictment (16 Nov. 1998), *available at* <http://cns.miis.edu/pubs/reports/pdfs/binladen/indict.pdf> (alleging 267 crimes, including five conspiracies, against bin Laden and fourteen other named Al-Qaeda defendants, within a 157 page charging document) (last visited Apr. 4, 2007). [hereinafter UBL Indictment].

⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a – 950p).

⁵ *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 145-73 (2004) [hereinafter 9/11 COMMISSION REPORT].

⁶ *Id.* at 32-33; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a, - 950p).

⁷ *See* 9/11 COMMISSION REPORT, *supra* note 5, at 365-67; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a, - 950p) (depending on the convening authority's referral of tribunal charges, a MCA terrorism conviction could result in a life or death maximum sentence); *see also* Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004).

American criminal enterprise prosecutions have targeted organized crime, while international tribunals have prosecuted mass atrocities of size and structure similar to 9/11.⁸

Since 9/11, Al-Qaeda's transnational terrorist threat figures prominently in America's National Defense Strategy.⁹ Bin Laden's agenda has also burrowed into the United States Code and single-handedly sired The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (PATRIOT) Act.¹⁰ Though the MCA is not the first United States criminal statute to hunt down terrorists, unlike white-collar crime laws, it is the first one to do so in a military courtroom.¹¹ The MCA is a political product of post 9/11 legislation legally tailored to combat Al-Qaeda's martyr attacks.¹² Unconventional attacks, like 9/11, produce piles of victims, but little conventional trial evidence.¹³ This explains why, to fight the Global War on Terror, Congress empowered the Secretary of Defense with the legal authority to determine the appropriate "[p]retrial, trial, and post-trial procedures, including elements and modes of proof" for cases tried under the MCA, so long as the Secretary consults "with the Attorney General" and such policies "apply

⁸ See *Milosevic*, No. 1T-02-54-T, Second Amended Indictment.

⁹ See THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006) (Al-Qaeda is mentioned by name in the forty-nine page document no less than eleven times.).

¹⁰ See The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

¹¹ See *In re Yamashita*, 327 U.S. 1 (1946); Appointment of Military Commission, 7 Fed. Reg. 5103 (July 2, 1942); Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001); Authorization for Use of Military Force Joint Resolution, 10 U.S.C. 836 (1998); S.J. Res. 23 107th Cong. (2001); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a, - 950p); see App. F, *infra*.

¹² See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a, - 950p); see also Military Order and Joint Resolution, *supra* note 11.

¹³ See 9/11 COMMISSION REPORT, *supra* note 5, at 285-315; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a, - 950p).

the principles of law and the rules of evidence in trial by general courts-martial.”¹⁴ Criminal enterprise is one such principle of law; it is so recognized by the Manuals for Courts-Martial (MCM) and the Manual for Military Commissions (MMC).¹⁵ However, the MMC now defines criminal enterprise as a type of conspiracy, a singular crime independent of a terrorism offense.¹⁶ This brand new MMC edit departs from the traditional MCM definition of conspiracy by agreement, and more importantly, adds unlegislated elements to the yet untried MCA crime of conspiracy by agreement; contrary to Supreme Court precedent; so one must explore another potential use of enterprise liability for terrorism trials.¹⁷

Part II delves into the MCA’s unique jurisdictional and substantive requirements to prosecute a terrorism charge.¹⁸ Al-Qaeda’s 9/11 attacks seem to fit this definition in form and substance.¹⁹ Part II closes by exploring jihadist symbolism as an aggravating factor inherent to the merits and sentencing of a terrorism case like 9/11.²⁰ Next, Part III compares and contrasts the American criminal enterprise model, an association-in-fact, with the

¹⁴ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a – 950p); MANUAL FOR MILITARY COMMISSIONS foreword (2006) [hereinafter MMC].

¹⁵ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified 10 U.S.C. §§ 948a – 950p); MMC, *supra* note 14, at foreword; UCMJ art. 116 (2005).

¹⁶ See MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

¹⁷ See *id.*; Bass v. United States, 404 U.S. 336, 347-49 (1971) (rule of lenity limits statutory construction of codified offense and precludes common law creation of an unlegislated crime.).

¹⁸ See Pt. II, *infra*.

¹⁹ See 9/11 COMMISSION REPORT, *supra* note 5, at 261-62.

²⁰ See Pt. II, *infra*.

international criminal enterprise model, a mass atrocity.²¹ Part III reconciles these enterprise models in a MCA context and applies them to 9/11.²² Applying their combined elements in a 9/11 MCA trial, one can prove the crime of terrorism as a criminal enterprise between clandestine Al-Qaeda operatives like Khalid Sheik Mohammed, and echelon leaders like Usama bin Laden.²³ To this end, Appendices B and C to this dissertation include a model criminal enterprise charging document and tribunal instruction.²⁴

Part III closes by proposing that the Secretary of Defense adopt a hybrid approach to the use of criminal enterprise in the MMC, which would unify the current American association-in-fact model and the international mass atrocity model, to fit the dual nature of terrorism as a domestic and international offense.²⁵ The American association-in-fact model is a compound liability approach; that is, being in an association-in-fact enterprise is not a crime *per se*, but such an enterprise can conspire to commit a codified federal offense, whether a predicate or object one, which is why an association-in-fact conspiracy, like a MCA conspiracy by agreement, requires an overt act to factually distinguish between the two.²⁶ In contrast, the international mass atrocity model is a primary liability approach to

²¹ See Pt. III, *infra*.

²² See Pt. III, *infra*.

²³ *Id.*

²⁴ See Apps. B and C, *infra*.

²⁵ See 9/11 COMMISSION REPORT, *supra* note 5, at 361-64; Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999); see Pt. III, *infra*.

²⁶ See Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 33 (2003) (“[A]n important theory of the case in terrorism is a terrorist conspiracy is analogous to a ‘criminal enterprise’ under RICO.”); see also UBL Indictment, *supra*, note 3. (fourteen Al-Qaeda suspects charged with 267 offenses in five conspiracies.).

enterprise prosecutions, because unlike an American conspiracy by agreement, JCE is not a substantive crime; a JCE is not a conspiracy by agreement or any other means – the group must actually commit and complete a separate codified crime like genocide.²⁷ So, an international joint criminal enterprise (JCE) model does not punish a group’s member the same way an American criminal enterprise model does; a JCE mass atrocity sentences a role player as a perpetrator just once, based on his participation within a group’s codified offense; whereas, a RICO enterprise’s compound liability sentences an individual’s role at least twice – once either in a group’s predicate or pattern transactions, then once again in the group’s ultimate racketeering result.²⁸ Therefore, JCE does not look at crime scene evidence in the same transactional way its American RICO counterpart does; it is the logical and factual inverse, JCE is holistic.²⁹ This dissertation favors the JCE approach of using criminal enterprise as primary liability theory to prove a codified crime, instead of charging criminal enterprise as a compound liability substantive crime like conspiracy; moreover, this paper

²⁷ *Tadic*, Case No. 1T-94-1-A, Judgment, ¶ 195.

²⁸ By “compound liability” I mean that within a statutory enterprise predicate and the object crime:

[T]he relationship is one of cause and effect, and it is used to apportion liability between two tiers: the first consists of primary liability for predicate crimes and for conspiracy to commit them, and the second consists of derivative liability for RICO/CCE offenses resulting from the predicate crimes, and derivative liability for conspiracy to commit substantive RICO offenses.

Susan W. Brenner, *RICO, CCE, and Other Complex Crimes: The Transformation of American Criminal Law?*, 2 WM. & MARY BILL RTS. J. 239, 263-64 (1993).

²⁹ See *Milosevic*, Case No. 1T-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004) (ICTY trial of Yugoslavia’s president concerning Serb on Croat violence); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (ICTR trial of the Taba commune’s mayor concerning Hutu on Tutsi violence), available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Apr. 1, 2007).

also advocates quantifying a quorum of at least four participants to prosecute MCA terrorism as a criminal enterprise, in order to avoid civil liberty issues and maximize legitimacy.³⁰

The better policy approach for MCA terrorism prosecutions is to use enterprise, not as an alternate type of conspiracy offense to be charged and punished separately from the crime of terrorism, but as a means of proving the *prima facie* elements of a terrorism offense.³¹ This approach reflects the dual nature of terrorism as a domestic and international crime, factually tantamount to extermination efforts typical of genocide and/or crimes against humanity.³² It also accounts for and protects an accused's unlawful alien enemy combatant status per *Hamdan* and international law.³³ This dissertation recommends amending the MMC to unequivocally state that criminal enterprise will be used as an evidentiary method for MCA prosecutions, and not a crime in itself.³⁴ The amendment should clarify that criminal enterprise will serve as a packaging of persons and common purpose, to substantiate the group crime of terrorism before a panel, and punish all players deemed terrorists as principals.³⁵ Such a prosecutorial policy is firmly grounded in fact.³⁶ The indiscriminate

³⁰ See Geoffrey Corn, *Taking the Bitter with the Sweet: A Law of War Based Analysis of the Military Commission*, 35 STETSON L. REV. 811, 834-35 (2006): “[T]he linchpin to legitimacy is threefold: First, the law of war must be applicable to the individual at the time of the alleged misconduct; second, the charge against the individual must properly allege a violation of the law of war; finally, the tribunal must comply with the procedural requirements derived from the law of war.”

³¹ *Id.*

³² *Id.*

³³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-99 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783; see also Corn, *supra* note 30, at 863-73 (arguing that the law of war and the Uniform Code of Military Justice create inherent jurisdictional offenses for United States military tribunals, but their application against Al-Qaeda and associated personnel may be limited.).

³⁴ See Pt. III, *infra*.

³⁵ *Id.*

nature of Al-Qaeda's violence to wage bin Laden's Jihad blurs the equitable need for the commissions to discriminate between Al-Qaeda's ranks, because yesterday's martyr begets today's trainee and tomorrow's volunteer.³⁷

Prosecuting group violence cases as a criminal enterprise is not without critics.³⁸ So, Part IV considers potential defense objections to criminal enterprise liability for the MCA crime of terrorism.³⁹ Some scholars challenge criminal enterprise's judicial development in American and United Nations tribunals.⁴⁰ In particular, critics argue that unconventional grouping of guilt in the international arena and compound criminal liability in the United States offends basic notions of American justice.⁴¹ This dissertation disagrees; criminal enterprise is not only an international law principle.⁴² It is also a longstanding principle of United States law that is legally consistent with the United States Constitution, as evidenced in the Manual for Courts-Martial and civilian white collar statutes that target organized

³⁶ See 9/11 COMMISSION REPORT, *supra* note 5, at 365-67.

³⁷ *Id.* at 374-76; *see also* App. F, *infra*.

³⁸ See Allen O'Rourke, *Recent Development: Joint Criminal Enterprise and Brdanin: Misguided Overcorrection*, 47 HARV. INT'L L.J. 324-25 (2006); Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 CALIF. L. REV. 75, 109, 142-46 (2005); Steven Powles, *Joint Criminal Enterprise—Criminal Liability By Prosecutorial Ingenuity and Judicial Creativity?*, I.C.J. 2.2 (606), 1 (2004).

³⁹ See Pt. IV, *infra*.

⁴⁰ See Powles, *supra* note 38, at 2-3.

⁴¹ See Danner & Martinez, *supra* note 38, at 139-41.

⁴² See Powles, *supra* note 38, at 6-7; UCMJ art. 116 (2005); The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, § 848(c)(2); The Continuing Financial Crimes Enterprise Act, § 225(a); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

crime.⁴³ For over thirty years, criminal enterprise liability has survived legitimacy challenges to statutory prosecutions.⁴⁴ However, the MMC's editorial amplification of criminal enterprise liability as a type of codified conspiracy offense does not mirror the Manual for Courts-Martial's formulation of conspiracy; this disconnect calls into question the tribunal's legitimacy and the statute's constitutionality.⁴⁵ Adopting criminal enterprise as the MCA method of proving a *prima facie* case of terrorism, instead of an unlegislated conspiracy type, will avert a morally and legally null prosecution under the United States Constitution.⁴⁶

II. Terrorism: The Charge

⁴³ See UCMJ art. 116; The Racketeer Influenced and Corrupt Organizations Act, §§ 1961-1968; The Continuing Criminal Enterprise Act, 21 U.S.C. § 848(c)(2) (1984); The Continuing Financial Crimes Enterprise Act, § 225(a); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

⁴⁴ See *Diamonds Plus, Inc. v. Kolber*, 960 F.2d 765, 769-70 (8th Cir. 1992) (though not required under RICO, proof that an enterprise conducts lawful activity unrelated to a pattern of racketeering can prove that enterprise is separate from the pattern of racketeering.); *River City Mkts., Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992) (two contracting business entities can form an enterprise for RICO purposes and still be named as individual RICO defendants, provided the enterprise otherwise falls within the statutory proscriptions.); *McDonough v. Nat'l Home Ins. Co.*, 108 F.3d 174, 177 (8th Cir. 1997) (to prove a RICO enterprise, it is insufficient that each individual member carries on activities distinct from the pattern of racketeering; the group as a whole must have a common link other than the racketeering activity.).

⁴⁵ See, e.g., *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2779-86 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁴⁶ See *Bass v. United States*, 404 U.S. 336, 347-49 (1971) (rule of lenity limits statutory construction of codified offense and precludes common law creation of an unlegislated crime.); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-71 (1972) (vagrancy ordinance is void for vagueness, when it: (1) failed to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by statute; (2) encouraged arbitrary and erratic arrests and convictions; (3) criminalized activities that by modern standards are normally innocent; and (4) placed almost unfettered discretion in police hands.); *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002) (a penal statute violates the First Amendment if, on its face, it prohibits a substantial amount of protected expression.).

To prosecute a terrorism charge under the MCA, one must first, as a matter of law, establish personal and subject matter jurisdiction over an accused.⁴⁷ Unlike domestic prosecutions in Article III civilian courts, establishing MCA personal jurisdiction requires the government to prove the accused is an enemy of the United States before that accused has to answer for any terrorism-related crime allegedly perpetrated against the United States.⁴⁸ No enemy status means no MCA prosecution is forthcoming.⁴⁹ This preliminary administrative process exists to account for and protect an accused's legal status per *Hamdan* and international law.⁵⁰ Currently, it avails no interlocutory *habeas* petition to the Supreme Court.⁵¹ The MCA prosecution of 9/11 as terrorism begins in Guantanamo Bay, Cuba.⁵²

A. Personal Jurisdiction: The Accused's Combatant Status

⁴⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a, -950p).

⁴⁸ *Id.* The MCA's personal jurisdiction process is a preliminary administrative determination that exists to satisfy the Geneva Convention's Article V tribunal and Common Article III combatant rules, regardless of conflict classification. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761-63 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ch. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members at Sea ch. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War pt. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War pt. I, art. 2 (Aug. 12, 1949), T.I.A.S. No. 3365 [hereinafter, collectively, Common Article 2]; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field ch. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea ch. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3363; Geneva Convention Relative to the Treatment of Prisoners of War pt. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War pt. I, art. 3 (Aug. 12, 1949), T.I.A.S. No. 3365 [hereinafter, collectively, Common Article 3].

⁴⁹ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a, -950p).

⁵⁰ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761-63 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁵¹ See *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁵² Guantanamo Bay currently houses the MCA detention facility.

The MCA may exercise personal jurisdiction only over “unlawful alien enemy combatants.”⁵³ The jurisdictional term “alien”⁵⁴ under the MCA simply means one is not a citizen of the United States, like Usama bin Laden, who is a Saudi Arabian national.⁵⁵ Whether or not an alien, like Usama bin Laden, is also an unlawful enemy combatant, however, is not a *pro forma* matter of birthright; it is actually a case-by-case analysis.⁵⁶ As a matter of law, a jurisdictional tribunal, like the CSRT in Guantanamo Bay, must determine Usama bin Laden’s combatant status under the law of war.⁵⁷ From such an

⁵³ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948c, 948d(a)); U.S. Department of Defense Press Resources, Detainee Affairs, CRST Reviews, *available at* <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> (last visited Apr. 5, 2007).

⁵⁴ *Id.* § 948(3).

⁵⁵ See PETER L. BERGEN, *HOLY WAR, INC: INSIDE THE SECRET WORLD OF OSAMA BIN LADEN* 44 (2002). Usama was raised in Riyadh though his father hailed from Yemen and his mother from Syria. *Id.* at 42-46.

⁵⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948c, 948d(a)):

The term ‘unlawful enemy combatant’ means – (i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its cobelligerents who is a lawful enemy combatant (including a person who is a part of the Taliban, al Qaeda, or associated forces); or (ii) a person who, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.

⁵⁷ Memorandum, DoD Deputy Secretary, to Secretaries of the Military Departments, Chairman of the Joint Chiefs of Staff, Under Secretary of Defense for Policy, subject: Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba (July 14, 2006), *available at* <http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf> [hereinafter CRST Memo]. Please note that Al-Qaeda’s “failed state” association with the Taliban during the early days of “Operation Enduring Freedom” caused some legal angst among international law scholars, who opined that Al-Qaeda’s insurgent role during post-9/11 U.S. military deployment to Afghanistan was tantamount to a *de facto* “state sponsored armed force involved in an international armed conflict.” The United States summarily rejected this view in a White House memorandum dated 7 February 2002, stating that: (1) Al-Qaeda is a “non-state entity;” (2) its terrorist members are not entitled to “prisoner of war” status under the Geneva Conventions; and (3) the terrorist network’s members are “unlawful combatants.” Memo. from Pres. George W. Bush, *Humane Treatment of al Qaeda and Taliban Detainees* (Feb. 7, 2002), *available at* http://www.humanrightsfirst.org/us_law/etn/gonzales/memos_dir/dir_20020207_Bush_Det.pdf. Thus, this MCA criminal enterprise proposal does not encompass the Taliban. Similarly, it will not explore charging someone with a grave breach of the Geneva Conventions under The War Crimes Act of 1996, 18 U.S.C. § 2441 (amended 17 Oct. 2006).

administrative, non-adversarial, transcribed hearing, a panel of three neutral commissioned officers would generate a written report, which by a majority vote and preponderance of the evidence, is legally reviewed to decide Usama bin Laden's: (1) nationality; and (2) combatant status.⁵⁸ Appendix A of this dissertation details the entire CRST process, since an in depth study is beyond this MCA discussion.⁵⁹ If the CRST determines that bin Laden is not an enemy combatant, then formal arrangements would be made through the Secretary of State to coordinate transfer to bin Laden's country of origin, Saudi Arabia, or "such other disposition consistent with applicable laws."⁶⁰ Alternatively, if deemed an enemy combatant, bin Laden could then face prosecution for a crime under the MCA's subject matter jurisdiction.⁶¹ While federal prosecutors may brainstorm which substantive crimes could apply to Usama bin Laden for 9/11, the CRST's determination of his combatant status is legally "dispositive," for the limited purpose of establishing MCA personal jurisdiction.⁶²

B. Subject Matter Jurisdiction: The Crime's Elements

The MCA may exercise subject matter jurisdiction only over a number of codified federal offenses and some international violations of the law of war.⁶³ If Usama bin Laden is

⁵⁸ See CRST Memo, *supra* note 57.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948d(c)).

⁶² See CRST Memo *supra* note 57; MCA § 948d(c).

⁶³ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948d). This duality is a sovereign's charge. Corn, *supra* note 30, at 816: "The law of war is the contemporary manifestation of an age-old effort to balance the concept of military necessity with the dictates of humanity."

indeed an unlawful alien enemy combatant, he potentially faces MCA prosecution for 9/11, so long as the crimes charged occurred “on or after September 11, 2001.”⁶⁴ As Al-Qaeda’s leader, bin Laden’s alleged organizational role in the 9/11 attacks invites discussion concerning the MCA crime of conspiracy⁶⁵ and the MCA crime of terrorism.⁶⁶ Each of these MCA crimes signifies a distinct offense that prosecutors must first prove independently of one another, before an accused may be punished for either or both of them:

(8) Conspiracy to commit an offense is a separate and distinct offense from any offense committed pursuant to or in furtherance of the conspiracy, and both the conspiracy and any related offense may be charged, tried, and punished separately. Conspiracy should be charged separately from the related substantive offense. It is not a lesser-included offense of the substantive offense.⁶⁷

Section 950v of the MCA defines the enumerated crime of conspiracy, as follows:

Any person subject to this chapter who conspires to commit one or more substantive offenses triable by military commission under this chapter, and who knowingly does any overt act to effect the object of the conspiracy, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and,

⁶⁴ *Id.* § 948c. Though enacted in 2006, the MCA’s criminal jurisdiction is expressly retroactive only up to 9/11. In a MCA conspiracy charge context, this calls into question whether Al-Qaeda’s criminal agreement or overt acts vested before the penal statute’s retroactive limit. If either survives the MCA’s jurisdictional onset, which, if any part of the plot, may be factually linked to Usama bin Laden during those early morning hours? *Id.*; see also 9/11 COMMISSION REPORT, *supra* note 5, at 145-73.

⁶⁵ *Id.* § 950v(b)(28).

⁶⁶ *Id.* § 950v(b)(24).

⁶⁷ See MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

if death does not result in any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.⁶⁸

In turn, Part IV of the MMC specifies three conspiracy elements:

(1) the accused entered into an agreement with one or more persons to commit one or more substantive offenses triable by military commission *or otherwise joined an enterprise of persons who shared a common criminal purpose that involved, at least in part, the commission or intended commission of one or more substantive offenses triable by military commission*; (2) the accused knew of the unlawful purpose of the agreement *or the common criminal purpose of the enterprise and joined willfully, that is, with the intent to further the unlawful purpose*; and (3) the accused knowingly committed an overt act in order to accomplish some objective or purpose of the agreement *or enterprise*.⁶⁹ (emphasis added).

Curiously, though the MMC uses enterprise to describe an alternate version of group criminal liability under the MCA's statutory rubric, the term enterprise is not defined in either text.⁷⁰ A fair reading of the MMC passage and accompanying official comments leads one to believe that "enterprise" is a second species of conspiracy; the first type being one of "agreement."⁷¹ These conspiracy terms state variant parts as textual alternatives, using "or" to parcel characteristics between themselves.⁷² They appear to forge distinct elements for

⁶⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950v).

⁶⁹ MMC, *supra* note 14, Pt. IV, § 950v(28)b and c. So the question remains, under a MCA conspiracy theory, would bin Laden's plot agreement or attack order vest on 9/11, as one or more Al-Qaeda overt acts? *See 9/11 COMMISSION REPORT, supra* note 5, at 145-73 (2004).

⁷⁰ *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified 10 U.S.C. §§ 948a – 950p); MMC, *supra* note 14, Pt. IV, at § 950.

⁷¹ *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950v(b)(28)); MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

⁷² *See* MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

conspiracy by agreement and conspiracy by enterprise.⁷³ This paper will explore three legal objections to such a MMC editorial practice in Part IV; for now, it recognizes that one could seemingly charge one of two species of conspiracies in connection with 9/11, but it would not prove bin Laden committed terrorism.⁷⁴ One could only prove he committed terrorism on 9/11 by charging that crime separate from the offense of conspiracy, whether the latter occurred by agreement or enterprise.⁷⁵ This seems legally inconsistent with the executive policy and legislative intent that created the MCA military forum, when the administration was mindful of other civilian compound-liability statutes that could prosecute an enterprise.⁷⁶ This apparent textual gap of American federal law in the MMC does not foreclose the use of criminal enterprise liability in a MCA terrorism trial, since the statute empowers a military commission to “try any offense punishable by this chapter or the law of war;” in a 9/11 context, this prosecutorial freedom of choice allows MCA trials to import and apply the international doctrine of “joint criminal enterprise” liability, as a tested law of war option to an untested MMC edit, so long as one heeds *Hamdan v. Rumsfeld* and does not charge a terrorist enterprise as a conspiracy to violate the law of war.⁷⁷

⁷³ *Id.*

⁷⁴ *See* Pt. IV, *infra*.

⁷⁵ *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950v(b)(24) and (28); MMC, *supra* note 14, Pt. IV, § 950v(24) and (28).

⁷⁶ *See* UCMJ art. 116 (2005); The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, 21 U.S.C. § 848(c)(2) (1984); The Continuing Financial Crimes Enterprise Act, 18 U.S.C. § 225(a) (2005); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

⁷⁷ *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948d.(a); *see also* *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761, 2785 n.40 (2006) (distinguishing JCE liability

The term enterprise is no stranger to the United States Code.⁷⁸ For decades, Congress has used the legal term enterprise, to identify a group of persons engaged in organized crime,

in international tribunals from conspiracy as substantive crime under a law of war analysis); *see* Corn, *supra* note 30, at 840-41. In a truly elegant piece of legal reasoning, Professor Corn challenges the myopic notion that Common Article 2 and Common Article 3 are the exclusive triggering criteria for the laws of war, adding that the Geneva treaty provisions do not exclude application of basic principles of the law of war to armed conflicts that fall outside the international/internal armed conflict paradigm, like the GWOT. Professor Corn points out that the basic principles of distinction, necessity, and humanity, are seamlessly triggered by the legal analogue to declared war: armed conflict, regardless of the location, duration, intensity, or enemy engaged. Corn at 840-41. Citing the Department of Defense's Law of War Program in support of this insight, he explains:

In short, whenever an armed force engages in operations that rise to the level of armed conflict, basic principles of the law of war are triggered. When such operations also satisfy the criteria of Common Article 2, these principles become augmented by the provisions of the conventions triggered by such a conflict. With regard to the trigger of Common Article 3, operations falling within the traditional definition of internal armed conflict would unquestionably be regulated by the substance of that article. However, the basic principles reflected in Common Article 3 are redundant with the basic principles of humanity triggered by any armed conflict, and therefore the substantive effect of such a conclusion would be de minimis. This basic principles concept would, however, supplement the principle of humanity with other basic principles: necessity and distinction. In contrast, however, a narrow interpretation of Common Article 3 with the resulting conclusion that it provides the exclusive source of application for the law of war would undermine application of these principles whenever the strict triggering criteria of Common Article 3 were not satisfied - even when armed forces were engaged in conflict operations (such as operations conducted against non-state actors operating outside the territory of the state targeting those actors).

Corn at 851. *See also* U.S. Dept. of Defense, Dir. 5100.77, DOD Laws of War Program (9 May 2006) [hereinafter DOD Dir. 5100.77]; *see also* Chairman, Jt. Chiefs of Staff, Instr. 5810.01B, Implementation of the DOD Laws of War Program (22 Mar. 2002) [hereinafter CJCS Instr. 5810.01B].

Applying his basic law of war principles analysis to 9/11, Professor Corn concludes:

Any charge in violation of the law of war based on violation of the principle of humanity as reflected in this article could therefore encompass the taking of the airline passengers as hostages; the targeting of structures filled with civilians, or, in the language of the law, the targeting of "persons taking no active part in hostilities"; the terrorizing of the civilian population; and the killing of thousands of innocent civilians on September 11. No additional "positive legislation" is required. International law clearly provides the proscription for the conduct of the September 11 terrorists - and those who planned, encouraged, and supported them - and makes all such individuals liable as principles (*sic*) for violating these minimum standards of conduct to be adhered to during any conflict.

Corn at 870.

⁷⁸ *See* UCMJ art. 116; The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, 21 U.S.C. § 848(c)(2) (1984); The Continuing Financial Crimes Enterprise Act, 18 U.S.C. § 225(a) (2005); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

such as racketeering, drug-trafficking, and financial fraud.⁷⁹ Likewise, international tribunals chartered under the United Nations use their own version of criminal enterprise liability, to prosecute mass atrocities, such as “genocide” and “crimes against humanity.”⁸⁰ In both the federal and international versions of enterprise, an accused is punished as a principal actor, not a mere accessory to the object crime.⁸¹ This presents an interesting echelon prosecution approach to an accused like Usama bin Laden, someone who allegedly masterminded and resourced the 9/11 jihadist attacks over the course of years, vis-à-vis Al-Qaeda’s international clandestine network of suicide squads.⁸² He could be 9/11’s principal as a

⁷⁹ See The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, § 848(c)(2); The Continuing Financial Crimes Enterprise Act, § 225(a); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

⁸⁰ See *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 322 (Nov. 16, 1998) (providing first reference to “common purpose”); *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 253 (Dec. 10, 1998) (distinguishing between “co-perpetrators in a joint criminal enterprise” versus “aiders and abettors”, as two distinct international law theories of “criminal participation”); *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999) (tracing JCE’s customary international law lineage through “post-World War II case law, international conventions, and domestic criminal law”, plus finding that “the doctrine fell within the scope of ‘committed’ in Article 7(1) of the ICTY Statute”); *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004).

⁸¹ See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 253; see also Brenner, *supra* note 28, at 256 (distinguishing conspiracy from inchoate offense liability); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 950q).

⁸² See 9/11 COMMISSION REPORT, *supra* note 5, at 340-44; see also *United States v. Moussaoui*, Defendant’s Exhibit 941, at 2-4, 11, 21, 27, 30, 36-37, 52, from the substituted testimony of Khalid Sheikh Mohammed, available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/941.pdf> (last visited Apr. 5, 2007) [hereinafter KSM Testimony]; *United States v. Moussaoui*, Defendant’s Exhibit 943, at 1-7, 9-10, 12, from the substituted testimony of Mustafa Ahmed Al-Hawsawi, available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/943.pdf> [hereinafter MAH Testimony]; *United States v. Moussaoui*, Defendant’s Exhibit 944, at 2-4, 6, from the substituted testimony of Mohammad Manea Ahmad Al-Qahtani, available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/944.pdf> [hereinafter Al-Qahtani Testimony]; *United States v. Moussaoui*, Defendant’s Exhibit 945, at 1, 3, from the substituted testimony of Walid Muhammad Salih Bin Attash, available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/945.pdf> [hereinafter Khallad Testimony]; *United States v. Moussaoui*, Defendant’s Exhibit 946, at 1, from the substituted testimony of Riduan Isamuddin, available at <http://www.vaed.uscourts.gov/notablecases/moussaoui/exhibits/defense/946.pdf> [hereinafter Hambali Testimony].

MCA terrorist, rather than a MCA conspirator.⁸³ Part III of this paper will discuss his prosecution as part of Al-Qaeda's 9/11 criminal enterprise, using the civilian American and international models.⁸⁴ As a matter of federal law, Al-Qaeda is a "designated foreign terrorist organization."⁸⁵ Who in Al-Qaeda may bear criminal responsibility under the MCA for the 9/11 hijackings and crashes? Both the recent MCA statute and the new Manual for Military Commissions define a jurisdictional crime's principal, as "any person...who":

(1) commits an offense punishable by this chapter, or aids, abets, counsels, commands, or procures its commission; (2) causes an act to be done which if directly performed by him would be punishable by this chapter; or (3) is a superior commander who, with regard to acts punishable under this chapter, knew, had reason to know, or should have known, that a subordinate was about to commit such acts or had done so and who failed to take the necessary

⁸³ This prosecutorial distinction avoids the constitutional quagmire of limited retroactivity surrounding bin Laden's 9/11 role and the timing of agreed preparations versus actual attacks as overt acts. *See* Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950q); *see also* *Rosenberg v. United States*, 346 U.S. 273, 290, 295-96, 311 (1953) (limited retroactivity in two Espionage Act of 1917 death penalty convictions, where the overt acts relating to atomic secrets began two years before the enactment of the Atomic Energy Act of 1946, but other illegal aspects of a wartime conspiracy reached 1950.).

⁸⁴ *See* Pt. III, *infra*.

⁸⁵ 18 U.S.C. § 1189 (1997) (empowering the Secretary of State, in consultation with the Treasury Secretary and Attorney General, in addition to having notified Congress, to identify foreign organizations whose "the terrorist activity or terrorism . . . threatens the security of United States nationals or the national security of the United States"). It potentially avails the United States to freeze bank assets of a designated foreign terrorist organization. This official designation is subject to review every five years. Questioning the legal validity of this designation in a criminal proceeding against a member of the designated foreign terrorist organization "shall not be permitted." In effect, this designation opens the door to a judicial notice request of Al-Qaeda's terrorist status in a MCA trial as *res judicata*; the argument is that if one charges the offense of "terrorism" against an Al-Qaeda member, as a matter of controlling "domestic law" for the panel's instruction on the elements of "terrorism," Al-Qaeda's terrorist status is not otherwise "at issue" as an "adjudicative fact", only the alleged member's affiliation and participation in specific Al-Qaeda violence. *Compare* MMC, *supra* note 14, Pt. IV, R.M.C. 201 and 201A, and the comment discussion for RMC 920(e). Thus, as a matter of executive policy and legislative intent, the designation statute seems to independently support the prosecution of MCA terrorism as a criminal enterprise.

and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁸⁶

Even if Usama bin Laden's 9/11 organizational role within Al-Qaeda may factually be proven as that of a principal, because it either "aids, abets, counsels, commands, or procures its commission" or "causes an act to be done which if directly performed by him would be punishable;" in the jurisdictional context of a MCA conspiracy charge, that particular crime does not seem prosecutable as one that occurred "on or after September 11, 2001."⁸⁷ As a matter of American military law, a conspiracy's criminality vests at the time of agreement.⁸⁸ As the 9/11 facts bear out, it seems undisputed that the simultaneous attacks' means and objectives were agreed to by Al-Qaeda members prior to September 11, 2001.⁸⁹ So the question arises, what about prosecuting bin Laden as a principal for another "offense punishable by this chapter [MCA] or the law of war?"⁹⁰ One that accounts for the massive 9/11 organizational facts and effects, but does not vest prior to the calendar day of September

⁸⁶ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950q); MMC, *supra* note 14, Pt. IV, § 950q.

⁸⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 948d(a)).

⁸⁸ See UCMJ art. 81 (2005). The MCM comment to UCMJ article 81 states that "the conspirator who joined an existing conspiracy can be convicted of this offense only if, *at or after the time* of the joining of the conspiracy, an overt act in furtherance of the the object of the conspiracy is committed." *Id.* at c.(1). (emphasis added).

⁸⁹ See 9/11 COMMISSION REPORT, *supra* note 5, at 256-60; KSM Testimony, *supra* note 82, at 4-10, 11, 13.

⁹⁰ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950q).

11, 2001?⁹¹ What about prosecuting bin Laden as a 9/11 principal to the MCA of terrorism, by proving that Al-Qaeda is a joint criminal enterprise under the law of war?⁹²

The MCA statute defines the enumerated crime of terrorism, as follows:

Any person subject to this chapter who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, 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, shall be punished, if death results to one or more of the victims, by death or such other punishment as a military commission under this chapter may direct, and, if that does not result in any of the victims, by such punishment, other than death, as a military commission under this chapter may direct.⁹³

In turn, the MMC has three elements for terrorism:

(1) the accused intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced wanton disregard for human life; (2) the accused did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or corps and, or to retaliate against government conduct; and (3) the killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict.⁹⁴

The MMC also adds an official comment to the three MCA terrorism elements:

(1) This offense includes the concept of causing death or bodily harm, *even if indirectly*. (emphasis added); (2) This requirement that the conduct be

⁹¹ *Id.* § 950v(b)(24).

⁹² *See id.*

⁹³ *Id.*

⁹⁴ MMC, *supra* note 14, Pt. IV, § 950v(24)b.

wrongful for this crime necessitates that the conduct establishing this offense not constitute an attack against a lawful military objective undertaken by military forces of a state in the exercise of their official duties.⁹⁵

Reading terrorism's substantive MCA terms alongside the MMC's official comments, the enumerated crime's *mens rea* offers two terrorist mindsets, either: (1) intentional; or (2) knowing.⁹⁶ In contrast, the crime's *actus reus* seems to align three *prima facie* options, so a terrorist may intentionally or knowingly: (1) kill; (2) inflict great bodily harm; or (3) evince a wanton disregard for human life.⁹⁷ In turn, such a terrorist may project the aforementioned mindsets and results by one of two causal chains, he can: (1) influence or affect the conduct of government or civilian population by intimidation; or (2) retaliate against government conduct.⁹⁸ Add to this prosecutorial menu the MCA's definition of principal, and the international tribunals' application of joint criminal enterprise, and it seems jurisdictionally possible to prosecute Usama bin Laden with the MCA crime of terrorism, for his leadership role in Al-Qaeda's 9/11 suicide attacks.⁹⁹

⁹⁵ MMC, *supra* note 14, Pt. IV, § 950v(24)c.

⁹⁶ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 950v(b)(24)); MMC, *supra* note 14, Pt. IV, § 950v(24).

⁹⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 950v(b)(24)); MMC, *supra* note 14, Pt. IV, § 950v(24).

⁹⁸ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 950v(b)(24)); MMC, *supra* note 14, Pt. IV, § 950v(24).

⁹⁹ My enterprise theory is bin Laden's pre-9/11 *fatwas* are institutional death warrants or bounties that earmark Al-Qaeda's political targets of opportunity and his recruits are trained, resourced, disposable henchmen sworn to kill Americans. See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 948d(a) and 950q); MMC, *supra* note 14, Pt. IV, § 950q; JCE discussion in Pt. III, *infra*.

As one packages the *prima facie* elements of MCA terrorism, two prosecutorial imperatives control the pleading, proving, and convicting of an echelon leader like Usama bin Laden as a principal, for a group's mass crime like that of Al-Qaeda's 9/11 simultaneous attacks: (1) one must establish the jihadist group's criminal agenda; and (2) one must establish the jihadist leader's criminal role.¹⁰⁰ Conceptually, this requires factually synchronizing a crime within a crime without charging multiplicitous offenses.¹⁰¹ Based on prior Al-Qaeda cases, two controlling facts make 9/11 a difficult trial scenario: (1) a global clandestine network structure; and (2) indiscriminate suicide violence.¹⁰² Unlike domestic organized crime syndicates, Usama Bin Laden and Al-Qaeda functioned as a multi-tasked entity on 9/11, through the strong, violent, symbolism of Jihad.¹⁰³ What is it about Usama bin Laden's mind that "calculated" Al-Qaeda's terrorist attacks on 9/11?¹⁰⁴

¹⁰⁰ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. § 950v(b)(24)); MMC, *supra* note 14, Pt. IV, § 950v(a)(24); *see, e.g.*, United States v. Usama Bin Laden, 109 F.Supp. 2d 211, 213-22 (S.D.N.Y., 2001) (prosecution charged each Al-Qaeda operative as a conspirator in the Embassy bombings contributing a different compartmentalized cell function: (1) target approval; (2) reconnaissance and surveillance; (3) logistics; and (4) demolitions.).

¹⁰¹ See *Blockburger v. United States*, 284 U.S. 299, 302-04 (1932) (interpreting whether multiple drug transactions are separate offenses, by requiring proof of a different element between separate sales to the same buyer).

¹⁰² See *United States v. Usama Bin Laden*, ___ F.Supp. 2d ___, (S.D.N.Y., 2001); 2001 U.S. Dist. LEXIS 959 (ordering prosecution to produce the following discovery as "material" and/or "exculpatory" to the defense: (1) reports, photographs, line drawings and all source materials relating to the alleged *al Qaeda* terrorist training camps in the Sudan; (2) any and all statements, testimony, correspondence, reports, notes, memoranda, and other documents or records containing information that impeaches statements that the Government intends to use that were uttered by non-testifying declarants including, but not limited to, [redacted], and/or Usama bin Laden; and (3) items which indicate that *al Qaeda* operated under a "cell" structure in which participants were informed of plans and activities only on a "need to know" basis.; *see also* 9/11 COMMISSION REPORT, *supra* note 5, at 153-60; KSM Testimony, *supra* note 82, at 12-13, 2; Khallad Testimony, *supra* note 82, at 1.

¹⁰³ See 9/11 COMMISSION REPORT, *supra* note 5, at 1-14; KSM Testimony, *supra* note 82, at 52-54; Al-Qahtani Testimony, *supra* note 82, at 2.

¹⁰⁴ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950q).

C. Symbolism: The Aggravating Factor in a Jihadist Case

Terrorism, like all MCA offenses, presents its own set of aggravating factors, some of which are built into the crime's *prima facie* elements and others which are tailored to the facts at sentencing.¹⁰⁵ Jihadist symbolism will inherently permeate both trial phases in scenarios like 9/11.¹⁰⁶ Diagnostic and social science experts can help MCA prosecutors explain a jihadist perpetrator's political violence, and the mental and physical effects upon his or her victims.¹⁰⁷ It is crucial for MCA triers-of-fact to understand that terrorism is not a

¹⁰⁵ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950q). Terrorism is violence inflicted "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." MCA § 950v(b)(24). (emphasis added). Trial counsel may present aggravating factors at sentencing in accordance with R.M.C. 1001(b)(2). In a capital case, these sentencing aggravation factors may focus, among other things, on the number of victims involved, whether a law of war violation ensued, whether a weapon of mass destruction was used, and whether a victim was mutilated or tortured. R.M.C. 1004(c); *but see* United States v. Usama Bin Laden, 126 F.Supp. 2d 290-304 (S.D.N.Y., 2001) (granting co-defendants' motion for a limited bill of particulars identifying the factual basis for two of the aggravating factors noticed with the prosecutor's capital indictment; thereby: (1) striking the aggravating factor of "causing serious injury to surviving victims"; (2) amending the aggravating factor of "victim impact evidence" to include any "injury, harm, and loss" suffered by victims and their families, whether the victims are deceased or surviving; (3) striking the aggravating factor of "disruption to important governmental functions;" (4) allowing the aggravating factor of "knowledge of simultaneous acts of terrorism;" and (5) requiring a bill of particulars and amended death penalty notice.).

¹⁰⁶ See Usama bin Laden Video (released by U.S. Government, broadcast on multiple networks, Dec. 2001), transcript available at <http://www.cnn.com/2001/US/12/13/tape.transcript/> (last visited Dec. 21, 2006) [hereinafter December 2001 Video]; Usama bin Laden Video (aired on multiple television networks, Oct. 10, 2001), transcript available at http://news.bbc.co.uk/low/english/world/middle_east/newsid_1590000/1590350.stm (last visited Dec. 21, 2006) [hereinafter October 2001 Video]; ABC News Interview with Usama bin Laden, Interviewed by John Miller (ABC television broadcast, May 28, 1998), transcript available at http://abcnews.go.com/sections/world/dailynews/terror_980609.html (last visited Dec. 21, 2006) [hereinafter ABC Interview]; Frontline Interview with Usama bin Laden (PBS television broadcast, May 1998), transcript available at <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html> (last visited Dec. 21, 2006) [hereinafter Frontline Interview]; *Fatwa* by Usama Bin Laden, World Islamic Front Statement, Jihad Against Jews and Crusaders (Feb. 23, 1998), at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited Dec. 21, 2006); Al-Jazeera Interview with Usama bin Laden (Al-Jazeera television broadcast, 1998), transcript available at http://groups.yahoo.com/group/EDITOR_RMNEWS/message/502?? (last visited Dec. 21, 2006) [hereinafter 1998 Al-Jazeera Interview]; Usama bin Laden Interview, Nida'ul Islam (Oct.-Nov. 1996), available at <http://www.islam.org.au/articles/15/LADIN.HTM> (last visited Dec. 21, 2006).

¹⁰⁷ See JOHN DOUGLAS & MARK OLSHAKER, MINDHUNTER: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT 105, 109, 332, 358 (1996) (explaining FBI serial killer profiling study); JOHN HORGAN, THE PSYCHOLOGY OF TERRORISM preface (2005).

matter of temperament to be weighed in traditional character evidence terms.¹⁰⁸ To date, research criminologists and forensic psychologists have found no single psychopathology profile for those who commit terrorist acts, even jihadist offenders, like Usama bin Laden.¹⁰⁹ Quite the opposite is true, in strictly psychological terms; terrorists are “frighteningly normal and unremarkable.”¹¹⁰ Despite the lack of a defining psychosis to explain why an otherwise normal person commits a barbarous act of terrorism, the experts agree on one clinical condition – violence is not terrorism without symbolism.¹¹¹ Symbolism separates the mindset of terrorist violence from other domestic law enforcement problem groups in the United States like organized crime, drug dealers, and inner-city gangs.¹¹² Though these other criminal groups may share ritualistic violence, even executions, as part of their fraternal counter-culture, only a terrorist seeks to kill outside of his circle, in order to exert psychological control over the public at large.¹¹³ Mafia on mafia, drug dealer on drug dealer,

¹⁰⁸ See MMC, *supra* note 14, Pt. IV, MIL. COM. R. EVID. 401-406. (taking bin Laden’s *fatwas* at face value, no single victim character trait other than mere American nationality opens the door, to consider whether an Al-Qaeda operative exhibits a factual propensity to commit acts of terrorism.). See note 106, *supra*; App. F, *infra*.

¹⁰⁹ JOHN HORGAN, THE PSYCHOLOGY OF TERRORISM preface (2005).

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1.

¹¹² Even a ritualistic serial killer “internalizes” what the perpetrated crime means to his psyche, by either posing his victims or collecting keepsakes; that is not what terrorists do; a terrorist “externalizes” his psyche during the perpetrated crime by forcing the public to witness his cult violence (usually through a real time media broadcast). JOHN DOUGLAS & MARK OLSHAKER, MINDHUNTER: INSIDE THE FBI’S ELITE SERIAL CRIME UNIT 105-09 (1996); “[F]rom a psychological perspective, an important characteristic even in the simplest analyses distinguishing terrorism from other kinds of crime involving murder, or violence committed for some personal reasons (as for example, sexually motivated murder or rape), is the *political* dimension to the terrorist’s behaviour.” HORGAN, *supra* note 107, at 1.

¹¹³ Clinicians like Dr. Horgan see this violent departure from cultural norms as a psychological imperative:

An important and alternative defining [psychological] feature of terrorism is that for terrorists there is a distinction to be made between the immediate target of *violence and terror* and the overall target of *terror*: between the terrorist’s immediate victim (such as the person who has

gangster on gangster, these kinds of killings do not threaten national sovereignty, or panic citizens on a national scale.¹¹⁴ These kinds of violent domestic crimes lack the mass psychological effects of a terrorist attack:

(1) [A] perception of the threatened and actual danger posed by terrorist which is *disproportionate* to the realistic threat posed by the capabilities of terrorists, and (2) that terrorism has the ability to affect a set of “victims” far greater than those suffering from the media results of a violent terrorist act. The immediate aims and results of terrorist violence (intimidation, injury or death, the spreading of general climate of uncertainty among the terrorists’ audience and target pool) are those often secondary to the terrorists’ ultimate aims (and it is hoped, from the terrorists’ perspective, political change), which are often espoused in the group’s ideology or aspirations.¹¹⁵

Normally, people do not stop taking buses, trains, or planes when a drive-by shooting occurs. Schools do not close. Military bases do not barricade the gates and arm themselves.

died from a bombing or a shooting) and the terrorist’s *opponent* (which for many terrorist movements represents a government). Sometimes, terrorists bypass the symbolic intermediaries to target politicians directly, by assassination for instance, but because of this simple dynamic of terrorism, it might be viewed as one form of *communication* – a violent, immediate, but essentially arbitrary mean to a more distant political end.

¹¹⁴ See GAYLE RIVERS, *THE WAR AGAINST TERRORISTS: HOW TO WIN IT* 17 (1986). This observation is also found in the Department of Justice’s internal post 9/11 report, which was commissioned to assess legal options available against future terrorist threats. John Kane & April Wall, *Identifying the Links between White-Collar Crime and Terrorism*, National White-Collar Crime Center Report to U.S. Department of Justice (Sept. 2004), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/209520.pdf>. The report’s abstract states in part:

The threat of terrorism has become the principle security concern in the United States since September 11, 2001. One method of addressing this threat has been the enactment and modification of laws and rules, such as the USA Patriot Act, Border Security and Visa Entry Reform Act, and federal fraud statutes. All of these legal vehicles deal with crimes that have been traditionally refer to as white-collar crimes (WCCs), including money laundering, identity theft, credit card fraud, insurance fraud, immigration fraud, illegal use of methyl ethyl property, and tax evasion. Reasons behind this approach to counter-terrorism include the belief that terrorist activities require funding, not only for weaponry, but also for training, travel, and living expenses. In addition the need for anonymity during the planning stages of terrorist activities requires various acts of this section, such as the creation and use of false identifications.

¹¹⁵ HORGAN, *supra* note 107, at 3.

Why? Could it be because jihadist terrorism targets all, not just some, Americans? Part of the answer may lie within the physiological difference between terror and mere anxiety: “terror as a clinical term refers to a psychological state of constant dread or fearfulness, associated with the normally higher level of psycho-physiological arousal.”¹¹⁶ From a clinical perspective, a terrorist portrays his cause as a cultural archetype, and his victim as a political icon, because unlike other domestic offenders, “terrorists use violence to achieve political change.”¹¹⁷ This psychological paradigm seems to fit Usama bin Laden’s ideological justification of the 9/11 attacks, as part of Al-Qaeda’s ongoing Jihad against “Crusaders and Jews.”¹¹⁸ His rhetoric repeatedly evokes Qur’anic symbolism, whether calling for future attacks or praising the use of past violence against Americans.¹¹⁹ Moreover, the form and context of bin Laden’s statements make it clear that his messages are aimed at an audience larger than just Al-Qaeda’ mujahadeen.¹²⁰ He addresses the masses in clerical tones and purports to issue *fatwas* to Muslims, though he lacks Islamic credentials to do so.¹²¹ In doing so, Bin Laden calls out for zealous violence, not political protest.¹²²

¹¹⁶ *Id.* at 14.

¹¹⁷ *Id.* at 8.

¹¹⁸ See ROHAN GURATNA, *INSIDE AL QAEDA: GLOBAL NETWORK OF TERROR* 115-23 (2003) [hereinafter GURATNA]; see also THE JAMESTOWN FOUNDATION, *UNMASKING TERROR: A GLOBAL REVIEW OF TERRORIST ACTIVITIES: AL-QAEDA*, 3-5 (2005) [hereinafter JAMESTOWN FOUNDATION].

¹¹⁹ See GURATNA, *supra* note 118, at 61-62, 119-22; see also JAMESTOWN FOUNDATION, *supra* note 118, at 3-5; App. F, *infra*.

¹²⁰ See GURATNA, *supra* note 118, at 58-60; see also JAMESTOWN FOUNDATION, *supra* note 118, at 10-12.

¹²¹ By using Qur’anic doctrine to inspire and motivate an ethnically diverse and geographically dispersed paramilitary martyr force, bin Laden achieves an unprecedented level of operational solidarity among jihadist terrorists worldwide:

His use of symbolism tells as more about Al-Qaeda’s *emir*-general than what he preaches or

To support Usama bin Laden's global Jihad strategy, Al-Qaeda conducts "large-scale, simultaneous (martyr) attacks on symbolic, strategic and high-profile targets," and routinely "chooses (commemorative) anniversary dates for its international broadcast messages and attacks."¹²³ Unlike other Middle Eastern terrorist organizations of regional concern, like Hezbollah, Al-Qaeda has gone global by aggressively marketing itself as a Qur'anic

writes. By observing his deeds, body language and belongings, one can gain some clues into this thinking. In several posters which are widely available throughout Pakistan, Usama is depicted as a saint writing a white horse. Although horse riding is his favorite recreation, his approval of this image for dissemination is symbolically significant. For one thing it is meant to remind the viewer of images of the Prophet, who also fought on a white horse. Moreover bin Laden also tries to reinforce notions of his religious authority by dressing appropriately. The use of the Palestinian *keffiyeh*, or headdress, relates to Jerusalem's al-Aqsa mosque, one of Islam's holiest sites; and when Usama chooses to be filmed or photographed wearing a plain white turban, this to signify his near-clerical status. He has not, however, been seen or photographed in a black turban, which would identify him as belonging to the Prophet's family. At his waist Usama also wears a knife typical in design of the Arabian Peninsula, one that is unusually the preserve of rulers and others in authority, again reinforcing his historical legitimacy. And whenever he makes an important declaration—such as calls to jihad in 1998 (once) and 2000 (twice)—he sports a ring containing a black stone said and silver. From a strictly Islamic point of view, the stone symbolizes the Ka'aba, which in turn is a symbol of Mecca, the most revered holy place of Islam. This reminds us the viewer that Usama's principle goal is to free Mecca and the Arabian Peninsula both from foreign unbelievers (America and its allies) and the house of Al-Saud.

GURATNA, *supra* note 118, at 55-56.

¹²² Declaration of war by Usama bin Laden and the World Islamic Front for the Jihad Against the Jews and the Crusaders, Afghanistan 23 February 1998:

We-with God's help-call on every Muslim who believes in God and wishes to be rewarded to comply with God's order to kill the Americans and plunder their money wherever and whenever they find it. We also call on the Muslim *ulema* [community], leaders, youths and soldiers to launch the raid on Satan's U.S. troops and the devils supporters allying with them and to displace those who are behind them so that they may learn a lesson.

Fatwa by Usama Bin Laden, World Islamic Front Statement, Jihad Against Jews and Crusaders (Feb. 23, 1998), at <http://www.fas.org/irp/world/para/docs/980223-fatwa.htm> (last visited Dec. 21, 2006) [hereinafter 1998 *fatwa*]; Al-Jazeera Interview with Usama bin Laden (Al-Jazeera television broadcast, 1998), transcript available at http://groups.yahoo.com/group/EDITOR_RMNEWS/message/502?? (last visited Dec. 21, 2006) [hereinafter 1998 Al-Jazeera Interview].

¹²³ See 1998 Al-Jazeera Interview, *supra* note 122.

campaign of martyrdom against the American and Jewish “infidels.”¹²⁴ In MCA terms, extremist organizations like Al-Qaeda add an ideological component to the crime of terrorism not found in prior Marxist revolutionary or insurgent premises against American society – religion, more specifically, a violent call for Islamic theocracy.¹²⁵ Arab cultures are tribal by nature and depend upon traditional religious mores to regulate all aspects of its society, be it government, commerce, education, worship, or war.¹²⁶ While the codification and interpretation of these mores is nuanced among Islamic sects, Muslims in the Eastern Hemisphere subscribe to traditional principles regardless of nationality or demographic background.¹²⁷ The ethical result is that unlike Marxist dissenters, Islamic dissenters are motivated by a spiritual sense of obligation which does not depend on their enemy’s economic practices.¹²⁸ Bin Laden’s organizational practice through Al-Qaeda is to turn Islamic dissenters into martyr paramilitaries.¹²⁹ Mujahadeen pledge allegiance to Usama bin Laden and join Al-Qaeda to fight in God’s name and die in God’s name.¹³⁰ This moral drive

¹²⁴ See KSM Testimony, *supra* note 82, at 11; Al-Qahtani Testimony, *supra* note 82, at 2-3; Hambali Testimony, *supra* note 82, at 1; GURATNA, *supra* note 118, at 115-16, 123, 134, 294-97; JAMESTOWN FOUNDATION, *supra* note 118, at 13-15; *see also* December 2001 Video; October 2001 Video; ABC Interview; Al-Jazeera Interview, note 106, *supra*.

¹²⁵ See December 2001 Video; October 2001 Video; ABC Interview; Al-Jazeera Interview, note 106, *supra*.

¹²⁶ See ALBERT HOURANI, A HISTORY OF THE ARAB PEOPLES 11, 105-08 (1991); MAJID KHADURI, WAR AND PEACE IN THE LAW OF ISLAM, 51-54 (1955) [KHADI, WAR]; MAJID KHADURI, THE ISLAMIC CONCEPTION OF JUSTICE 3-5 (1984) [hereinafter KHADURI, JUSTICE]; Interview with Professor Azizah Y. al-Hibri, Islamic Jurisprudence Expert, in Charlottesville, Va. (Nov. 1, 2006) [hereinafter al-Hibri Interview].

¹²⁷ See HOURANI, *supra* note 126, at 14-21; KHADURI, WAR, *supra* note 126, at 69-73; KHADURI, JUSTICE, *supra* note 126, at 3-5, 7-11; al-Hibri Interview, *supra* note 126.

¹²⁸ See HOURANI, *supra* note 126, at 65-66; KHADURI, WAR, *supra* note 126, at 57-62; KHADURI, JUSTICE, *supra* note 126, at 112-14; al-Hibri Interview, *supra* note 126.

¹²⁹ See 9/11 COMMISSION REPORT, *supra* note 5, at 234; Al-Qahtani Testimony, *supra* note 82, at 2-3.

¹³⁰ See KSM Testimony, *supra* note 82, at 52-54; Al-Qahtani Testimony, *supra* note 82, at 2-3.

is unlike anything America ever experienced with organized and domestic crime or even secular terrorism.¹³¹ Qur'anic symbolism is what bin Laden has tapped into to incite Al-Qaeda's attacks.¹³² Jihad is terrorism's big why in the sky when it comes to 9/11.¹³³

III. Terrorism: Theory of the Case

During extrajudicial detention proceedings in Guantanamo Bay, the Department of Defense (DoD) responded to British detainee Moazzam Begg's discovery request for an "organizational definition" of Al-Qaeda, as follows: "A radical Sunni Muslim¹³⁴ umbrella organization established to recruit young Muslims into the Afghani Mujahideen and is aimed to establish Islamist states throughout the world, overthrow 'un-Islamic regimes', expel US

¹³¹ See JOHN DOUGLAS & MARK OLSHAKER, *MINDHUNTER: INSIDE THE FBI'S ELITE SERIAL CRIME UNIT 105-09* (1996) (identifying three primary motivations for serial killers: (1) domination; (2) manipulation; and (3) control.); GAYLE RIVERS, *THE WAR AGAINST TERRORISTS: HOW TO WIN IT* 17 (1986).

¹³² Bin Laden's 1998 *fatwa* asserts:

A martyr's privileges are guaranteed by Allah; forgiveness with the big first gush of his blood, he will be shown his seat in paradise, he will be decorated with the jewels of Imaan [belief], married off to the beautiful ones, protected from the test in the grave, assured security in the day of judgment, crowned with the crown of dignity, a ruby of which is better than Duniah [the whole world] and its entire content, wedded to seventy-two of the purest Houries [beautiful ones of paradise], and his intercession on behalf of seventy of his relatives will be accepted.

1998 *fatwa*, note 122, *supra*.

¹³³ See App. E, *infra*.

¹³⁴ Though Al-Qaeda is generally profiled as a *Sunni* movement, a number of prominent members actually adhere to *Wahhabism* (or the contemporary term, *Salafism*). Wahhabism dominates Islamic theology in Saudi Arabia, Qatar, Western Iraq, and a large part of Pakistan. Followers of Wahhabism or Salafism refer to themselves as the *Ikhwan* (the Brethren). While the Ikhwan accept the Qur'an and *hadith* as fundamental Islamic truths, they differ from orthodox Sunnis, in that they do not follow any of the four Islamic *Madhab* (jurisprudential schools or processes); instead, they purport to inherently internalize and interpret the Prophet Muhammad's words. Consequently, the puritanical Ikhwan see their *Sunni* and *Shia* counterparts as "heretics", while non-Muslims remain "infidels". al-Hibri Interview, *supra* note 126.

soldiers and Western influence from the Gulf, and capture Jerusalem as a Muslim city.”¹³⁵

As intellectually unsatisfying as DoD’s definition may have seemed to Mr. Begg; in practice,

Al-Qaeda fits both the American and international versions of criminal enterprise liability.¹³⁶

Each requires a prosecutor to prove three elements, before a court will impose group liability on a person for his functional role in a codified crime.¹³⁷ Would it not support a Trial

Counsel’s *prima facie* terrorism assertion that Al-Qaeda is a joint criminal enterprise under the MCA, if the international model is legally congruent with the American model?¹³⁸

A. Enterprise is a Principle of American Law: The Association-in-Fact Model

In everyday life, group crime requires more than one perpetrator and mass violence produces more than one victim. Conspiracy as currently crafted by the MMC, envisions that the MCA’s enumerated jurisdictional crimes could be carried out as a group project; and when one is, all participating enterprise members may vault from mere accessory liability to the prosecutorial level of a principal - if overt acts fit the facts.¹³⁹ For example, under the MMC, it is theoretically possible for a group of jihadist paramilitaries to commit the crime of

¹³⁵ A copy of Mr. Begg’s handwritten letter is available at <http://image.guardian.co.uk/sysfiles/Guardian/document/2004/10/01/guan.letters.pdf> (last visited Apr. 5, 2007). His entire captivity account is a best-seller. See MOAZZAM BEGG & VICTORIA BRITTAIN, *ENEMY COMBATANT: MY IMPRISONMENT AT GUANTANAMO, BAGRAM, AND KANDAHAR* (2006). Mr. Begg was never charged with any crimes during his three years of detention and was eventually released by the United States to British authorities.

¹³⁶ Compare the three enterprise elements of *United States v. Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995) with the three enterprise elements of *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, ¶ 227(i) (July 15, 1999).

¹³⁷ See *Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995) and *Tadic*, Case No. IT-94-1-A, Judgement, ¶ 227(i).

¹³⁸ See *Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995) and *Tadic*, Case No. IT-94-1-A, Judgement, ¶ 227(i).

¹³⁹ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. § 950q); MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

terrorism by way of conspiracy, should they enter into such an agreement or otherwise join an enterprise to carry out proscribed political violence; however, it is not necessary to first conspire before one can commit terrorism and vice-versa.¹⁴⁰ A legal timing issue inherent to the crime of conspiracy precluded MCA jurisdiction over the hypothetical 9/11 charge, because conspiracy punishes illegal agreements and the facts did not yield such agreements “on or after September 11, 2001.”¹⁴¹ What about group terrorism? What if one could prove 9/11 occurred as a joint venture, by using a criminal enterprise model recognized under international law to make out terrorism’s *prima facie* case?

The MCA rules envision group prosecutions in both procedure and substance.¹⁴² Procedurally, the MCA, like all federal penal statutes, avails joining offenses¹⁴³ or accused¹⁴⁴ at trial.¹⁴⁵ Substantively, the MMC clearly contemplates that a criminal enterprise can

¹⁴⁰ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 950v(b)(24) and 950v(b)(28)) with MMC, *supra* note 14, Pt. IV, § 950v(24) and (28).

¹⁴¹ *Id.* § 948c.

¹⁴² “In joint and in common trials, each accused shall be accorded the rights and privileges as if tried separately.” MMC, *supra* note 14, Pt. IV, R.M.C. 812.

¹⁴³ *Id.* R.M.C. 601(e)(2).

¹⁴⁴ *Id.* R.M.C. 601(e)(3). Compare *United States v. Usama Bin Laden*, 109 F.Supp. 2d 211, 213-222 (S.D.N.Y., 2001), where the court denied defendants’ motion to sever trials as alleged Al-Qaeda co-conspirators, weighing the estimated trial preparation time against the pre-trial detention terms served. The prosecution followed the federal preference for joint trials, under the efficiency theory that each Al-Qaeda operative contributed a different “cell” function in support of the Embassy bombing operations: (1) target approval; (2) reconnaissance and surveillance; (3) logistics; and (4) demolitions. Note that some, not all defendants, faced capital cases. The court expressed concern over potential jury bias and spill-over between capital and non-capital defendants. *Id.*

¹⁴⁵ The discussion section of RMC 601 notes:

A joint offense is one committed by two or more persons acting together with a common intent. Joint offenses may be referred for joint trial, along with all related offenses against each of the accused. A common trial may be used when the evidence of several offenses committed by several accused separately is essentially the same, even though the offenses were not jointly committed. A joint offense is one committed by two or more persons acting

commit a number of jurisdictional crimes, to include terrorism.¹⁴⁶ The MCA statute and the implementing MMC manual do not define the term enterprise; in context, enterprise appears to describe a means of proving group criminal liability for an MCA jurisdictional offense.¹⁴⁷ One concedes that as currently written, the MMC and its comments describe enterprise as one of two ways to prove the crime of conspiracy; however, there is room for improvement on that Agency edit, by taking a hard look at the MCA's mandate, in view of its' sister civilian enterprise statutes and legislative history.¹⁴⁸ One could propose an evidentiary enterprise approach to terrorism that in textual and policy terms is congruent with the MCA's mandate, and the MMC's preamble and penal sections, without running afoul of *Hamdan*.¹⁴⁹

The aftermath of 9/11 prompted the President of the United States to declare a “national emergency” against “the continued and immediate threat of (terrorist) attacks.”¹⁵⁰

together with a common intent. Offenders are properly joined if there is a common unlawful design or purposes. Convening authorities should consider that joint trials may be complicated by procedural and evidentiary rules.

Id. R.M.C. 601.

¹⁴⁶ *Id.* R. M. C., Pt. IV, § 950v(28).

¹⁴⁷ *Id.*

¹⁴⁸ See Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001); U.S. DEP'T OF DEFENSE, DIR. 5105.70, APPOINTING AUTHORITY FOR MILITARY COMMISSIONS para. 1 (10 Feb. 2004) [hereinafter DOD DIR. 5105.70]; *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761, 2785 n.40 (2006) (distinguishing law of war application to conspiracy as a substantive crime charged by an military tribunal, from joint criminal enterprise liability for committing a codified offense charged by an international ad hoc tribunal); Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a – 950p).

¹⁴⁹ The MCA maximum punishments for terrorism and conspiracy are identical. MMC, *supra* note 14, Pt. IV, R.M.C. § 950v(24) and (28).

¹⁵⁰ Per The National Emergencies Act of 1976 (50 U.S.C. §§ 1601-1651), President George W. Bush stated:

A national emergency exists by reason of the *terrorist* attacks at the World Trade Center, New York, New York, and the Pentagon, and the *continuing and immediate threat of further attacks on the United States*. NOW, THEREFORE, I, GEORGE W. BUSH, President of the

The President entitled his post-9/11 order “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.”¹⁵¹ In turn, Finding (f), Section 1 of the President’s order, sets up the first post-9/11, and pre-*Hamdan*, federal iteration of a military tribunal, as a criminal forum established to try “international terrorists” for “violations of the laws of war and other applicable laws.”¹⁵² Congress followed up the President’s “national emergency” proclamation with a joint resolution authorizing him to employ “all necessary and appropriate force” to “prevent any future acts of international terrorism against the United States.”¹⁵³ Congress specifically characterized the 9/11 terrorist attacks as “acts of

United States of America, by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the *national emergency has existed since September 11, 2001*, and, pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c), 12006, and 12302 of title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code. This proclamation immediately shall be published in the Federal Register or disseminated through the Emergency Federal Register, and transmitted to the Congress. This proclamation is not intended to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person. (emphasis added).

Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proc. No. 7463, Sept. 14, 2001, 66 F.R. 48199, continued, Sept. 10, 2004, 69 F.R. 55313.

¹⁵¹ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001), *available at* <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>. [hereinafter Military Order]. That order’s unequivocal executive intent is found in Finding (g), Section 1:

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Id.

¹⁵² *Id.*

¹⁵³ *Id.*; Authorization for Use of Military Force Joint Resolution, 10 U.S.C. § 836 (1998); S.J. Res. 23 107th Cong. (2001), *available at* <http://news.findlaw.com/wp/docs/terrorism/sjres23.es.html> [hereinafter Joint Resolution].

treacherous violence” and “grave acts of violence,” which “continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States.”¹⁵⁴

The intervening *Hamdan* interpretation of the Geneva Conventions’ Common Article III “necessary judicial guarantees,” revised the original post-9/11 proposal to try terrorists before military tribunals, from a purely Presidential measure to a joint Congressional measure.¹⁵⁵ The subsequent preamble to the MCA and its manual, signal a legislative intent to strike a “delicate balance” between due process and national security.¹⁵⁶ This explains why, to fight the Global War on Terror, Congress empowered the Secretary of Defense with the legal authority to emplace “[p]retrial, trial, and post-trial procedures, including elements and modes of proof” for cases tried under the MCA, so long as the Secretary consults “with the Attorney General” and such policies “apply the principles of law and the rules of evidence in trial by general courts-martial.”¹⁵⁷ Upon a closer reading these principles and rules, enterprise liability for criminal acts of terror seems to be one of them.¹⁵⁸ The MCA manual’s foreword memorializes the Secretary of Defense’s legal consultation with the Attorney General, such that: “the M.M.C. applies the principles of law and rules of evidence

¹⁵⁴ Military Order, 66 Fed. Reg. 57833; Joint Resolution, S.J. Res. 23 107th Cong.

¹⁵⁵ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795-97 (2006); Protection of War Victims: Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Protection of War Victims: Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516; Protection of War Victims: Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Protection of War Victims: Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3317 [hereinafter Geneva Conventions].

¹⁵⁶ MMC, *supra* note 14, pmbl.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; UCMJ art. 116 (2005); The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

in trial by general courts-martial so far as I have considered practicable or consistent with military or intelligence activities, and is neither contrary to nor inconsistent with the M.C.A.”¹⁵⁹ One looking to find the term enterprise in the Manual for Courts-Martial, will find it used as principle of law that explains a proof model for the group crime of “Riot,” a violation of article 116 of the Uniform Code of Military Justice (UCMJ).¹⁶⁰ Granted, the term enterprise is not defined in the Manual for Courts-Martial, but in the legal description of Article 116 of the UCMJ, it is both quantified and qualified in the context of a codified group crime, whose concerted violent action terrorizes the public.¹⁶¹ This use of enterprise as a principle of law in American prosecutions is not a military eccentricity.¹⁶² In a larger federal

¹⁵⁹ MMC, *supra* note 14, at foreword. Note that the limited “enterprise” interplay between the MCM and the MMC does not translate into the partial implementation of a MCA crime by the Secretary of Defense. The MCM mentions enterprise liability within the offense of “riot” and the MMC mentions enterprise liability within the offense of “conspiracy”; whereas, the MCA does not require enterprise liability of any codified crime. *See* UCMJ art. 116; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a – 950p).

¹⁶⁰ The UCMJ defines the crime of “Riot” as:

“Riot” is a tumultuous disturbance of the peace by three or more persons assembled together in furtherance of a common purpose to execute some *enterprise* of a private nature by concerted action against anyone who might oppose them, committed in such a violent and turbulent manner as to cause or be calculated to cause public terror. The gravamen of the offense of riot is *terrorization of the public*. It is immaterial whether the act intended was lawful. Furthermore, it is not necessary that the common purpose be determined before the assembly. It is sufficient if the assembly begins to execute in a tumultuous manner a common purpose formed after it assembled. (emphasis added).

UCMJ art. 116. Admittedly, the term “enterprise” is not used to quantify or qualify the military crime of conspiracy under Articles 81 or 134 of the UCMJ. *Id.*

¹⁶¹ *Id.*

¹⁶² The Federal Bureau of Investigations defines a criminal enterprise as “a group of individuals with an identified hierarchy, or comparable structure, engaged in significant criminal activity”. <http://www.fbi.gov/hq/cid/orgcrime/glossary.htm>. The FBI investigates such organizations for engaging in various illegal activities as robust interstate networks. So, for investigative purposes, the terms “organized crime” and “criminal enterprise” remain similar and often interchangeable out in the field; however, several statutes specifically define the criminal elements of an “enterprise” necessary to support the federal conviction of individuals or groups. First and foremost, the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970) defines an “enterprise” as “any individual, partnership, corporation, association, or other legal entity, and

context, criminal enterprise liability has existed for decades in organized crime statutes that prosecute offenders in Article III civilian courts.¹⁶³ These civilian criminal enterprise versions include three criminal profiteer models enacted along three different decades - The Racketeer Influenced and Corruption Organizations Act of 1970 (RICO), the Continuing Criminal Enterprise Act of 1984 (CCE), and the Continuing Financial Criminal Enterprise Act of 2005 (CFCE).¹⁶⁴ Post-9/11 amendments to The PATRIOT Act's civilian prosecution of terrorism specifically extended RICO's criminal enterprise jurisdiction, to encompass the federal offenses of domestic terrorism and international terrorism in Article III courts.¹⁶⁵

The criminal definitions of terrorism found in the PATRIOT Act and the MCA are not

any union or group of individuals associated in fact although not a legal entity." The Continuing Criminal Enterprise Act, 21 U.S.C. § 848(c)(2) (1984) defines a criminal "enterprise" as:

Any group of six or more people, where one of the six occupies a position of organizer, a supervisory position, or any other position of management with respect to the other five, and which generates substantial income or resources, and is engaged in a continuing series of violations of Subchapters I and II of Chapter 13 of Title 21 of the United States Code.

Some other post-9/11 statutory formulations of "criminal enterprise" will be discussed *infra*.

¹⁶³ See, e.g., Brenner, *supra* note 28, at 249-55.

¹⁶⁴ 18 U.S.C. §§ 1961-1968 (1970); 21 U.S.C. § 848(c)(2) (1984); and 18 U.S.C. § 225(a) (2005).

¹⁶⁵ The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001). The PATRIOT Act amended immigration laws, banking laws, and money laundering laws, to include racketeering activities punished by RICO. Section 802 of the PATRIOT Act created the new crime of "domestic terrorism" under 18 U.S.C. § 2331:

(A) involve acts dangerous to human life that are a violation of the criminal laws of the U.S. or of any state, that (B) appear to be intended (i) to intimidate or coerce a civilian population, (ii) to influence the policy of a government by intimidation or coercion, or (iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping, and (C) occur primarily within the territorial jurisdiction of the U.S.

Section 2331 also includes the crime of international terrorism, which is identical to domestic terrorism, except that it transcends national boundaries. As a result of these PATRIOT Act amendments, it is now possible to prosecute a RICO enterprise for domestic or international terrorism. 18 U.S.C. § 2331.

identical, but they are very close.¹⁶⁶ Likewise, the concept of criminal enterprise liability described in the MCA Manual, the Manual for Courts-Martial, and RICO is not identical, but it is very close.¹⁶⁷

1. Legislation: Compound Liability Framework

Admittedly, religious ideology sets jihadist extremists like Al-Qaeda apart from other criminal organizations with an international agenda and domestic front, like a Mafia family or a Colombian cartel.¹⁶⁸ Profit, not panic, is paramount in organized crime.¹⁶⁹ This is why pre-9/11 statutes like RICO¹⁷⁰ and the CCE,¹⁷¹ targeted syndicates with civil and criminal penalties for money-laundering-type operations.¹⁷² Pre-9/11, these penal laws considered an

¹⁶⁶ See MCA § 950v(b)(24) at note 92, *supra*; PATRIOT Act § 2331 at note 164, *supra*.

¹⁶⁷ Compare MMC, *supra* note 14, Pt. IV, § 950v(28)b and c; 18 U.S.C. § 1961(4). (a RICO enterprise faces compound liability for predicate criminal acts and also the resulting statutory racketeering; whereas the MCM riot offense and the MMC's conspiracy by enterprise face a singular count of federal liability.).

¹⁶⁸ Federal prosecutors also used the Smith Act's, 18 U.S.C. §§ 2384-2387 (1948), sedition prohibitions against domestic jihadist terrorists between 1993 and 1996. After the World Trade Center bombing, federal prosecutors charged Sheik Omar Abdel Rahman, a blind Egyptian cleric living in New Jersey, and nine codefendants with seditious conspiracy. Rahman and the other defendants were convicted of violating the seditious conspiracy statute, by "engaging in an extensive plot to wage a war of terrorism against the United States." The defendants (except Rahman) were arrested while mixing explosives in a garage in Queens. While they committed no "overt acts of war", they were all found to have taken "substantial steps" toward carrying out a plot "to levy war against the United States." In this case, the government could not prove Rahman participated in the actual plotting against the government or any other activities to prepare for terrorism. Therefore, prosecutors charged Rahman with providing "religious encouragement to his co-conspirators." Rahman argued that he only performed "the function of a cleric" and "advised followers about the rules of Islam." He failed. They were all convicted and Rahman received a life sentence. *United States v. Rahman*, 189 F.3d 88 (1999).

¹⁶⁹ RICO, the CCE, and CFCE target illicit financial transactions. Brenner, *supra* note 28, at 249-55.

¹⁷⁰ 18 U.S.C. §§ 1961-1968 (1970).

¹⁷¹ 21 U.S.C. § 848(c)(2) (1984).

¹⁷² For example, 18 U.S.C. § 1956(c)(4) sets the bar fairly low for prosecutors to trace money tracks:

[T]he term "financial transaction" means (A) a transaction which in any way or degree affects

“enterprise”¹⁷³ to be a scheming “association-in-fact.”¹⁷⁴ As a result, any pre-9/11 entity deemed an enterprise in federal court faced criminal liability, in whole or in part, for individual and group offenses enumerated in the U.S. Code.¹⁷⁵ Among these, the group offense of racketeering became the preeminent pre-9/11 criminal enterprise prosecution model in the United States.¹⁷⁶ Since the 1970s’, RICO’s legislative purpose is to eradicate “racketeering” and the ancillary interstate money-laundering-type wrongs it avails – tax evasion, bribery, fraud, intimidation, and felony violence.¹⁷⁷ Due to the number of perpetrators and transactions involved in a particular racketeering endeavor, RICO aims to prosecute these kinds of multi-faceted ventures as a criminal enterprise.¹⁷⁸ Critics say

interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce, in any way or degree.

18 U.S.C. § 1956(c)(4) (1994).

¹⁷³ 18 U.S.C. § 1961(4) defines a RICO “enterprise” as “including any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”

¹⁷⁴ Three elements make up an “association-in-fact”: (1) a common purpose; (2) a formal or informal organization of the participants in which they function as a unit some continuity of both structure and personality; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity. *United States v. Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995).

¹⁷⁵ *Id.*

¹⁷⁶ *See Brenner, supra* note 28, at 249-55.

¹⁷⁷ RICO’s section 1962(b) reads: “it shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.”

¹⁷⁸ RICO’s section 1962(c) adds: “It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise’s affairs through a pattern of racketeering activity or collection of unlawful debt.” Case law has determined that RICO encompasses both “legitimate and illegitimate enterprises.” *United States v. Turkette*, 452 U.S. 576, 580-81 (1981).

RICO's "enterprise" approach to racketeering is a dangerously superfluous form of "compound liability," because it creates no new crimes, but merely enhances the punishment of a group's role player.¹⁷⁹ They contend existing inchoate felonies, like solicitation or attempt, and complete felonies, like conspiracy or fraud, offer a sufficiently clear and robust arsenal against organized crime.¹⁸⁰ Textualists take exception with RICO's constitutional grammar and vocabulary, as either vague or overbroad, further arguing that the statute's conceptual incompleteness invites interpretive violations of the judicial canons of statutory construction.¹⁸¹ This paper will take up these objections to criminal enterprise liability in Part IV.¹⁸² For now, it is important to note that United States federal courts, to include the United States Supreme Court,¹⁸³ have considered RICO's editorial shortcomings and delineated proof requirements to prevent criminal enterprise from devolving into mere guilt-by-association on a prosecutor's whim.¹⁸⁴ Keep in mind that under RICO, an individual cannot associate with himself, so the person and enterprise charged remain different

¹⁷⁹ See Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 641-48 (2000) (examining judicial deference policies in the statutory context of RICO cases.).

¹⁸⁰ *Id.*

¹⁸¹ See *id.* at 639; Brian J. Murray, *Note: Protesters, Extortion, and Coercion: Preventing RICO From Chilling First Amendment Freedoms*, 75 NOTRE DAME L. REV. 691 (1999) (protected speech survey of abortion cases.).

¹⁸² See Danner & Martinez, *supra* note 38, at 139-40; Powles, *supra* note 38, at 4 (interpreting ICTY statute.).

¹⁸³ See *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256-62 (1994) (RICO does not require proving that either the racketeering enterprise or the predicate acts of racketeering in §1962(c) are motivated by an economic purpose.); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 236-49 (1989) (to prove a pattern of racketeering activity, a plaintiff or prosecutor must show at least two racketeering predicates that are related and that amount to, or threaten the likelihood of, continued criminal activity, neither of which requires proving that the racketeering predicates are in furtherance of multiple criminal schemes.); *United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (RICO encompasses both legitimate and illegitimate enterprises.).

¹⁸⁴ Compare similar "guilt of association" arguments espoused against the Antiterrorism and Effective Death Penalty Act of 1996. Jeff Breinholt, *Seeking Synchronicity: Thoughts on the Role of Domestic Law Enforcement in Counterterrorism*, 21 AM. U. INT'L L. REV. 157 n.46 (2005) (explaining that mere membership in a designated terrorist group is not a crime, but there is no constitutional right to arm or finance terrorists).

defendants.¹⁸⁵ Likewise, RICO requires that a prosecutor link enterprise members by more than their mere “participation in the same pattern of racketeering activity;” so, the enterprise and racketeering activity charged are factually distinct.¹⁸⁶ RICO’s statutory enterprise descendant, the CCE, actually quantifies the minimum composition of criminal enterprise to a specific number of persons, an evidentiary approach similar to the numeric grouping of perpetrators previously discussed in the Manual for Courts-Martial’s riot offense.¹⁸⁷

Like RICO, the CCE is an organized crime statute prosecuted in Article III civilian courts.¹⁸⁸ The difference is that RICO targets enterprises for racketeering, while the CCE targets enterprises for “drug-trafficking.”¹⁸⁹ This distinction is a legislative sign of the times, since the CCE was enacted in 1984 during the Colombian cartel era.¹⁹⁰ Interestingly, RICO critics have not so maligned the CCE’s version of enterprise, which rests upon a “continuing” series of “drug abuse prevention and control” violations, undertaken “in concert with five or more other persons,” when the accused “occupies a position of organizer, a supervisory position, or any other position of management,” so as to obtain “substantial income or

¹⁸⁵ *River City Mkts., Inc. v. Fleming Foods West, Inc.*, 960 F.2d 1458, 1461 (9th Cir. 1992).

¹⁸⁶ *McDonough v. Nat’l Home Ins. Co.*, 108 F.3d 174, 177 (8th Cir. 1997).

¹⁸⁷ A CCE “enterprise” requires at least five persons; the UCMJ’s Riot “enterprise” requires three.

¹⁸⁸ *See* 21 U.S.C. § 848(c)(2) (1984); Brenner, *supra* note 28, at 253-54.

¹⁸⁹ *See* Brenner, *supra* note 28, at 253-54.

¹⁹⁰ *Id.*

resources.”¹⁹¹ Perhaps the hard and fast quantum of “five or more persons” alleviated civil liberty concerns, because unlike RICO, a CCE enterprise has a set minimum size.¹⁹²

The 9/11 attacks shifted the criminal enterprise paradigm that existed in the United States between 1970 and 2000.¹⁹³ The Department of Justice’s counter-terrorism division began to employ a “multi-faceted” approach designed to synergize federal and domestic law enforcement assets.¹⁹⁴ Appendix F of this dissertation lists the most common criminal gap-filler federal statutes employed by federal prosecutors to engage domestic terrorist activity, as so-called white-collar offenses.¹⁹⁵ A detailed discussion of these white collar offenses is beyond the scope of criminal enterprise liability in a MCA context. The legislative history point of note is that the extraordinary operational requirements posed by international jihadist terrorist networks, specifically Al-Qaeda, drove Congress to legislate cross-referencing measures aimed at that extraordinary threat, which refined earlier organized crime statutes like RICO and the CCE; specifically, Congress enacted yet another criminal enterprise version to combat financial fraud in Article III civilian courts – The CFCE.¹⁹⁶ Congress

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ See 9/11 COMMISSION REPORT, *supra* note 5, at 350-52.

¹⁹⁴ National White Collar Crime Center, U.S. Department of Justice Study (Sept. 2004), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/209520.pdf> (last visited Apr. 5, 2007).

¹⁹⁵ See App. F, *infra*. The Antiterrorism and Effective Death Penalty Act of 1996 did amend 18 U.S.C. § 2339A to expand its list of “terrorist type” offenses (Pub. L. No. 104-132, § 323, 110 Stat. 1214, 1255 (enacted 24 Apr. 1996)), section 2339A, originally enacted on September 13, 1994, is primarily a statute aimed at reaching those persons who provide material support to terrorists, knowing that such support will be used to commit one of the offenses specified in the statute. The section requires only that the supplier of the material support have knowledge of its intended use. Section 2339A, unlike the aiding and abetting statute (18 U.S.C. § 2), does not require that the supplier also share the perpetrator of the actual terrorist act’s specific intent.

¹⁹⁶ 18 U.S.C. § 225(a) (2005).

enacted the Continuing Financial Crimes Enterprise Act in 2005, to prosecute criminal enterprises specializing purely in “financial fraud.”¹⁹⁷ The CFCE quantifies an enterprise’s size with four persons in concert, instead of the prior five person minimum set by the CCE.¹⁹⁸ The CFCE also qualifies an enterprise’s structure as one that would “organize, manage, or supervise”, to “receive \$ 5,000,000 or more”, in “any 24-month period.”¹⁹⁹ Like RICO, the CFCE defines “enterprise” in terms of “individual criminal responsibility” within a collective; it criminalizes “a series of violations under §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344” of Title 18.”²⁰⁰

2. Case Law: Association-in-Fact Elements

One may say that the American association-in-fact model is an accountant’s cartel view of organized crime.²⁰¹ In generic terms, this corporate vision of criminal enterprise tracks taxable blood money to ultimately decide whether white collar crime exists.²⁰² As an evidence matrix, an association-in-fact packages persons, assets, liabilities, and capital

¹⁹⁷ *Id.* Section 225 makes it a crime for a person to: “organize, manage, or supervise a continuing financial crimes enterprise; and receive \$ 5,000,000 or more in gross receipts from such enterprise during any 24-month period”. Subsection (b) defines the term “continuing financial crimes enterprise” to mean “a series of violations under §§ 215, 656, 657, 1005, 1006, 1007, 1014, 1032, or 1344” of Title 18, that is “committed by at least 4 persons acting in concert.”

¹⁹⁸ *Id.* § 225(a).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See Brenner, *supra* note 28, at 249 (citing 1968 Congressional session report.).

²⁰² See *id.* at 255. RICO’s enterprise liability punishes predicate violent offenses ancillary to racketeering; it is not just a financial crime concept, murder, kidnapping, arson, and robbery count among the thirty-five statutory offenses that qualify as racketeering activity. See The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961(1)(A) (1970).

transfers.²⁰³ In a white collar crime case, the factual focus of an association-in-fact is profiteering, so any evidence of an individual's participation within a suspect group is characterized as a transaction.²⁰⁴ Though news reports typically describe Al-Qaeda attacks as patently militant, the network's financial support to its clandestine cells is much more nuanced.²⁰⁵ Al-Qaeda pays its way around the world using "the *hawala*, or unregulated, banking system, based on the use of promissory notes for the exchange of cash and gold."²⁰⁶

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Consider the 5 May 2004 statement of Assistant Director Gary M. Bald of the FBI's Counterterrorism Division, before the United States Senate Committee on the Judiciary:

Another material support investigation identified an Al-Qaeda facilitator in the U.S. who was conducting pre-operational surveillance of potential U.S. targets for Al-Qaeda. The subject is in custody and ultimately pled guilty to providing material support to Al-Qaeda. The subject admitted casing the Brooklyn Bridge and identifying other potential U.S. targets for Al-Qaeda operations. The material support statutes provided the authority to disrupt this terrorist plan while it was being conceived, well before it could come to fruition.

More challenging material support cases involve the funding of designated terrorist organizations through the cover of charitable front companies frequently referred to as Non-Governmental Organizations, or NGOs. An investigation involving the Executive Director of the Benevolence International Foundation (BIF) illustrates the usefulness of the material support statutes in these types of investigations. BIF was a Chicago, Illinois-based charity long recognized by the IRS as a non-profit organization. The group's purposely ambiguous objectives were, ostensibly, to provide humanitarian relief aid. However, the recipients of the "humanitarian aid" were ultimately revealed to be terrorist groups, including Al-Qaeda. The October 2002 indictment described a multi-national criminal enterprise that, for at least a decade, used charitable donations from unwitting Muslim-Americans, non-Muslims and corporations to covertly support Al-Qaeda, the Chechen Mujahideen, and armed violence in Bosnia. The indictment alleged that BIF was operated as a criminal enterprise that engaged in a pattern of racketeering activity. In addition to fund-raising, the group acted as a conduit through which other material support was provided to further the violent activities of the mujahideen and other terrorist organizations. The Executive Director ultimately pled guilty to a material support-based racketeering conspiracy violation and admitted that donors to BIF were misled into believing their donations would support peaceful causes when, in fact, funds were expended to support violence overseas.

Federal Bureau of Investigation, Congressional Testimony, Statement of Gary M. Bald, Assistant Director, Counterterrorism Division, Before the United States Senate Committee on the Judiciary (May 5, 2004), available at <http://www.fbi.gov/congress/congress04/bald050504.htm> (last visited Apr. 5, 2007).

²⁰⁶ See UBL Indictment, *supra* note 3, at 7-9; 9/11 COMMISSION REPORT, *supra* note 5, at 171; GURATNA, *supra* note 118, at 17, 84.

The federal prosecutions of Zacarias Moussaoui and Mohammed Youssef, tell that Al-Qaeda's overseas financial and logistical support to the 9/11 suicide attack teams is a clandestine organizational practice, which fits the transaction characteristics of a criminal enterprise's association-in-fact.²⁰⁷ Applying the American association-in-fact model to Al-Qaeda cell cases like Moussaoui's or Youssef's, requires a judicial interpretation of Congressional enterprise terms in the context of unjustifiable violence against Americans.²⁰⁸

United States v. Darden is emblematic of the American association-in-fact test for criminal enterprises.²⁰⁹ In *Darden*, prosecutors pursued RICO charges against a violent heroin and cocaine ring in Missouri, whose participants clandestinely referred to as the Jerry

²⁰⁷ Moussaoui was indicted as an unsuccessful martyr trainee financed from Germany, Malaysia, and UAE. He faced six felony charges: "conspiracy to commit acts of terrorism transcending national boundaries, conspiracy to commit aircraft piracy, conspiracy to destroy aircraft, conspiracy to use weapons of mass destruction, conspiracy to murder United States employees, and conspiracy to destroy property." *United States v. Moussaoui*, Indictment, (E.D. Va. 2001), available at <http://www.usdoj.gov/ag/moussaouiindictment.htm> (last visited Jan. 21, 2007). Youssef was indicted in Miami along with José Padilla and three others, as members of a North American "jihad support cell," with counterparts in "Canada, Austria, Denmark, Italy, and the United Kingdom," bound by "radical Salafist" ideology that "encouraged and promoted a 'violent' jihad waged by 'mujahideen' using physical force and violence to oppose governments, institutions, and individuals that did not share their view of Islam." The indictment identified this particular cell's regional ideological leader to be "Sheikh Omar Abdel Rahman." As to each and every conspiratorial charge, the indictment defined 'violent jihad' or 'jihad' to "include planning, preparing for, and engaging in, acts of physical violence, including murder, maiming, kidnapping, and hostage-taking". *United States v. Padilla*, Superseding Indictment (S.D. Fl. 2005), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/padilla/uspada111705ind.pdf> (last visited Apr. 5, 2007); UBL Indictment, *supra* note 3, at 7-9; MAH Testimony, *supra* note 82 at 1, 4-7, 10.

²⁰⁸ The seminal U.S. "enterprise" proof model to prosecute "racketeering" as an "association in fact" under 18 U.S.C. § 1961(4), is one which requires three elements set by *United States v. Darden*:

- (1) a common purpose; (2) a formal or informal organization of the participants in which they function as a unit some continuity of both structure and personality; and (3) an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity.

United States v. Darden, 70 F.3d 1507, 1520 (8th Cir. 1995).

²⁰⁹ *Id.* at 1521.

Lee Lewis Organization (JLO).²¹⁰ For over a decade, the JLO fronted their deals and killings under an Islamic façade - Subordinate Temple No. 1 of the Moorish Science Temple of America (MTSA).²¹¹ The MTSA used ideological titles, like “Grand Sheik”, to indicate rank or function among personnel; the JLO did not.²¹² Federal prosecutors charged seven MTSA members with RICO crimes, under the theory that JLO was a MTSA criminal enterprise alter ego.²¹³ After nine months of trial, the seven JLO defendants were convicted of RICO charges as a criminal enterprise.²¹⁴ On appeal, some defendants argued prosecutors did not prove that a singular criminal enterprise of JLO existed; as a fall back position, the appellants also argued prosecutors did not prove “the existence of an enterprise distinct from the structure necessary to commit the various predicate acts.”²¹⁵ Both arguments failed, as the *Darden* appellate court found evidence of a criminal enterprise as an “association-in-fact,” between persons common to JLO, MTSA, and the RICO crimes charged.²¹⁶ Thus, *Darden*

²¹⁰ *Id.* at 1516.

²¹¹ *Id.*

²¹² *Id.* at 1516-17.

²¹³ *Id.* at 1518.

²¹⁴ *Id.* at 1517. The jury returned guilty verdicts against all seven appellants on one count of conducting a criminal racketeering enterprise in violation of 18 U.S.C. § 1962(c) (1988), against six appellants (all but Noble Laverne Bennett) on one count of conspiring to conduct and participate in the same criminal racketeering enterprise in violation of 18 U.S.C. § 1962(d), against Jerry Lee Lewis on six counts of committing violent crimes (murder, conspiracy to commit murder, and attempted murder) in aid of a racketeering enterprise in violation of 18 U.S.C. § 1959, and against Raymond Amerson on two counts of committing violent crimes (murder and conspiracy to commit murder) in aid of a racketeering enterprise in violation of 18 U.S.C. § 1959. Two co-defendants were acquitted. The others were sentenced to life in prison. *Id.*

²¹⁵ *Id.* at 1518, 1520.

²¹⁶ *Id.* at 1520-21.

requires three elements of an association-in-fact type of criminal enterprise; the first is “some continuity of structure and personnel.”²¹⁷

a. Some Continuity of Structure and Personality

The first *Darden* “association-in-fact” element of “some continuity of structure and personality,” is applicable to the evidentiary problem of turnover within an ongoing criminal group effort, like Al-Qaeda’s Jihad.²¹⁸ As time passes, faces and places change, though some functions may remain the same.²¹⁹ The testimony of Khalid Sheikh Mohammed in Zacarias Moussaoui’s trial proves this for Al-Qaeda.²²⁰ Some 9/11 operatives were unsuccessful in gaining entry into the United States.²²¹ Moussaoui did not follow Mohammed’s operational security directives, and was arrested before he could partake in a follow-on Al-Qaeda suicide mission to 9/11.²²² Usama bin Laden had previously approved the Al-Qaeda mission concept, therefore, Mohammed had to change the original plan and consider other martyr operatives.²²³ Nevertheless, a successful suicide mujahadeen attack like 9/11, makes “structure and personnel” turnover, a physical necessity of Usama bin Laden’s *fatwas*.²²⁴

²¹⁷ *Id.* at 1520.

²¹⁸ *Id.*; GURATNA, *supra* note 118, at 14-15.

²¹⁹ *See Darden* at 1520; GURATNA, *supra* note 118, at 14-15.

²²⁰ *See KSM Testimony*, *supra* note 82, at 32-36.

²²¹ *See KSM Testimony*, *supra* note 82, at 32-33; Al-Qahtani Testimony, *supra* note 82, at 6.

²²² *See KSM Testimony*, *supra* note 82, at 43-47.

²²³ *See KSM Testimony*, *supra* note 82, at 33-35.

²²⁴ *See 9/11 COMMISSION REPORT*, *supra* note 5, at 234; GURATNA, *supra* note 118, at 9-10.

Waging Jihad via martyrdom missions requires the continuous recruiting, training, and managing of new operatives in secret camps.²²⁵ Thus, Al-Qaeda's ideological method of killing "infidels" drives the group's organization and staffing.²²⁶ Like *Darden's* JLO, Al-Qaeda also masks the "continuity" of its true size and structure to outsiders.²²⁷ However, the evidence presented in the *Moussaoui* and *Youssef* trials, confirms that Al-Qaeda, like *Darden's* JLO-MTSA hybrid, is actually a dedicated network of specialists who function in an interdisciplinary environment, identifying each other through pseudo-Islamic titles, positions, and projects.²²⁸ Al-Qaeda's exact global size remains a classified urban legend, but its command and control structure is reasonably well known from court proceedings.²²⁹ In

²²⁵ From an operational standpoint training sites are, literally, Al-Qaeda's lifeblood:

By designing specialized courses and constructing secret camps to train its volunteers for martyrdom operations, Al-Qaeda institutionalized the techniques of suicide terrorism. More than in any other Islamist group, the culture of martyrdom is firmly embedded in its collective psyche. The indoctrinated bomber aims to inflict maximum damage on the enemy target by fearlessly striking it, in the process also destroying himself. As the first terrorist group which has demonstrated the capability to conduct suicide attacks on land (U.S. embassies in East Africa, 1988), on the sea (USS Cole, Yemen, 2000) and in the air (September 11, 2001), Al-Qaeda has expanded and refined its deadly repertoire.

GURATNA, *supra* note 118, at 10; *see also* UBL Indictment, *supra* note 3, at 3-9; Al-Qahtani Testimony, *supra* note 82, at 2-4.

²²⁶ *See* UBL Indictment, *supra* note 3, at 3-9; KSM Testimony, *supra* note 82, at 24-27.

²²⁷ Al-Qaeda thrives in hiding:

Al-Qaeda is above all else a secret, almost virtual, organization, one that denies its own existence in order to remain in the shadows. This explains why it always uses other names and identities (such as the World Islamic Front for the Jihad Against the Jews and Crusaders) when referring to its actions, beliefs or statements, thereby keeping us guessing about its true motives, its true intentions. Al-Qaeda maintains its practice of absolute secrecy even when dealing with Islamist parties to the group's true aspirations.

GURATNA, *supra* note 118, at 4.

²²⁸ Al-Qaeda operatives hail from different countries and possess paramilitary skills, among them poisoning, surveillance, communications, navigation, weapons-making, espionage, assassination, hand-to-hand combat, and document forgery. GURATNA, *supra* note 118, at 95-97.

²²⁹ *See* UBL Indictment, *supra* note 3, at 2-4; KSM Testimony, *supra* note 82, at 2.

this author's view, Al-Qaeda is best conceptualized as a series of concentric rings.²³⁰ The inner ring steers Al-Qaeda's international strategy; it consists of Usama bin Laden, the *emir*-general, and his advisory multi-national council, the *shura majlis*.²³¹ Al-Qaeda's next ring of influence is made up of four operational committees that report directly to bin Laden and his council: (1) the military committee; (2) the finance and business committee; (3) the *fatwa* and Islamic study committee; and (4) the media and publicity committee.²³² Each operational committee within this middle ring is compartmentalized and headed by an *emir* and deputy *emir*.²³³ Operational committee members are periodically interchanged for special assignments by the middle ring *emir* or the inner ring *shura* council, depending on the mission.²³⁴ Each operational committee is tasked with a specific Al-Qaeda function.²³⁵ Attack functions belong to the military committee, the paramilitary subdivision that Khalid Sheikh Mohammed previously managed, to plan and execute the 9/11 attacks as Al-Qaeda's Chief of External Operations.²³⁶ The military committee then tasks compartmentalized cells,

²³⁰ See GURATNA, *supra* note 118, at 75-78.

²³¹ In order to maximize Al-Qaeda's worldwide reach, bin Laden has repeatedly "invited representatives of Islamist terrorist groups and Islamic political movements to join Al-Qaeda's *shura majlis*." This practice has allowed Al-Qaeda to build strategic "relationships with 30 Islamist terrorist groups, inspiring and assisting them, both directly and indirectly, to attack targets at home and abroad," thereby, empowering Al-Qaeda "with ideological political financial and military control over several Islamist terrorist groups." See GURATNA, *supra* note 118, at 8; UBL Indictment, *supra* note 3, at 3.

²³² See GURATNA, *supra* note 118, at 75-78; 9/11 COMMISSION REPORT, *supra* note 5, at 60, 65, 68.

²³³ See GURATNA, *supra* note 118, at 77.

²³⁴ See GURATNA, *supra* note 118, at 77; UBL Indictment, *supra* note 3, at 4.

²³⁵ See GURATNA, *supra* note 118, at 77.

²³⁶ Al-Qaeda's military committee handles "recruiting, training, procuring, transporting, and launching military operations, as well as developing tactics and acquiring and manufacturing special weapons." Al-Qaeda's camps are headed by an *emir* who reports to the military committee's middle ring. See GURATNA, *supra* note 118, at 77; KSM Testimony, *supra* note 82, at 2-3.

like those identified in the *Moussaoui* and *Youssef* trials, to support and carry out martyr attacks in different parts of the world.²³⁷ Applying the first prong of the *Darden* association-in-fact analysis to them, it appears that Al-Qaeda's martyr attacks exhibit "some continuity of structure and personnel" worthy of criminal enterprise liability:

"Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what it does, rather than by abstract analysis of its structure." *United States v. Coonan*, 938 F.2d 1553, 1559 (2d Cir. 1991) (emphasis in original) (internal quotation marks and citations omitted), cert. denied, 503 U.S. 941 (1992). While the government must prove both the pattern and enterprise elements, "the same piece of evidence may . . . help to establish both." *United States v. Indelicato*, 865 F.2d 1370, 1383-84 (2d Cir.) (en banc), cert. denied, 493 U.S. 811, 107 L. Ed. 2d 24, 110 S. Ct. 56 (1989).

The second element to consider in a 9/11 criminal enterprise context, is whether Al-Qaeda is an association in fact, if it exhibits "a common or shared purpose" per *Darden*.²³⁸

b. A Common or Shared Purpose

Jihad is Al-Qaeda's declared "common or shared purpose."²³⁹ While Usama bin Laden is not Al-Qaeda's founder, he is the pioneer *mujahadeen* who implements the deceased founder's jihadist vision.²⁴⁰ Bin Laden is Al-Qaeda's senior leader, and it is his

²³⁷ See KSM Testimony, *supra* note 82, at 24-27.

²³⁸ See *United States v. Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995).

²³⁹ See note 106, *supra*.

²⁴⁰ Palestinian-Jordanian philosopher Abdullah Azzam is generally credited with envisioning Al-Qaeda back in 1987. His jihadist viewpoint was published in the Afghani journal *Al-Jihad*, in an April 1988 article entitled "Al-Qai'dah al-Sulbah":

sole prerogative to approve or disapprove attacks managed by Al-Qaeda's military committee.²⁴¹ He does not share his trigger with the advisory council.²⁴² It is also bin Laden's role, not the council's, to indoctrinate the people of Al-Qaeda with proclamations, speeches, and publications broadcast on videotape, radio, and the Internet.²⁴³ He does so by borrowing Islamic concepts found in the teachings of the Qur'an.²⁴⁴ The mixed composition of Al-Qaeda's suicide squad ranks evidence that bin Laden's doctrine forges a "common or shared purpose" among the mujahadeen; they accommodate Sunni and Shiites, Arabs and Europeans, men and women alike.²⁴⁵ Bin Laden's anti-American statements reach out to

Every principle needs a vanguard to carry it forward and, while focusing its way into society, puts up with heavy tasks and enormous sacrifices. There is no ideology, neither earthly nor heavenly, but that does not require such a vanguard that gives everything it possesses in order to achieve victory for this ideology. It carries the flag all along the sheer, endless and difficult path until it reaches its destination and the reality of life, since Allah has destined that it should make it and manifests itself. The standard constitutes Al-Qaeda al-Sulbah for the expected society.

GURATNA, *supra* note 118, at 4-5.

²⁴¹ See KSM Testimony, *supra* note 82, at 56.

²⁴² *Id.*

²⁴³ A 6 October 2002, Al Jazeera satellite television broadcast of an Al-Qaeda audiotape aired a classic example of bin Laden's recognizable jihadist rhetoric:

I am telling you, and God is my witness, whether America escalates or de-escalates this conflict, we will reply to it in kind, God willing. God is my witness, the youth of Islam are preparing things that will fill your hearts with tears. They will target the key sectors of your economy until you stop your injustice and aggression or until the more short-lived of the U.S. die.

GURATNA, *supra* note 118, at xvii.

²⁴⁴ See App. A, *infra*.

²⁴⁵ See note 121, *supra*.

Muslims as citizens, warriors, political parties, and governments.²⁴⁶ He urges them to kill Americans.²⁴⁷ Quite simply, he wins Islamic hearts and minds for Al-Qaeda:

Usama's aim is to mobilize Muslims worldwide and turn them against the West, primarily the United States. The blurring of the political and the religious differences in Islam and the *hadith* explains why he conducts himself and his actions within a religious framework, continually projecting himself in his writings and propaganda videos as a man of God-an image he reinforces by quoting from the Qur'an and suggesting that his actions are guided by Allah. Even in his choice of names for Al-Qaeda camps-Beit al-Suhhadaa (house of martyrs), Beit al-Ansaar (house of companions) and Beit al-Salaam (house of peace) - he portrays himself, his organization and his actions in a spiritual light. From the beginning of his campaign, Usama has projected to the Muslim world the idea that he is a man of peace, justifying his actions as a necessary response to halt the destruction of Islam and the loss of Muslim life and property. He has clearly won a following by tapping into a broader sense of social and political injustice among many Muslim communities who believe that the U.S. their real enemy.²⁴⁸

Applying *Darden's* second association-in-fact element to decide whether Al-Qaeda is a criminal enterprise per American case law, one must recognize that a "common or shared purpose" exists within Al-Qaeda, not only in the form of bin Laden's martyr dogma, but also in the apprenticeship system that continuously implements his *fatwas*, as part of a clandestine

²⁴⁶ See App. A, *infra*.

²⁴⁷ Bin Laden is on record as saying that killing Americans is a religious duty for all practitioners of Islam:

The ruling to kill the Americans and their allies, civilians and military, is an individual duty for every Muslim who can do it in any country in which it is possible to do it, in order to liberate the al-Aqsa mosque and the holy mosque [Mecca] from their grip, and in order for their armies to move out of all the lands of Islam, defeated and unable to threaten any Muslim. This is in accordance with the words of Almighty God: "And fight the pagans all together as they fight you all together," and "fight them until there is no more tumult or oppression, and there prevail justice and faith in God."

1998 *fatwa*, note 122, *supra*.

²⁴⁸ See GURATNA, *supra* note 118, at 68-69.

cell network.²⁴⁹ Al-Qaeda's base camps exist to re-supply Usama bin Laden with martyr understudies to his mujahadeen.²⁵⁰ This point brings us to the third and last *Darden* element to consider in the 9/11 criminal enterprise context; whether Al-Qaeda is an association in fact, if it exhibits "an ascertainable structure distinct from transactional patterns."²⁵¹

c. An Ascertainable Structure Distinct From a Pattern of Racketeering

The final *Darden* element requires that Al-Qaeda exhibit "an ascertainable structure distinct from that inherent in the conduct of a pattern of racketeering activity," before it can incur criminal enterprise liability as an association-in-fact.²⁵² In 9/11 terms, this means separating the martyrs from the targets.²⁵³ First, one learns from Khalid Sheikh Mohammed himself, that very few Al-Qaeda members knew of, or participated in, the 9/11 operation.²⁵⁴

²⁴⁹ In secret camps, like Al-Farouq, Al-Qaeda recruits receive their paramilitary training before they are assigned to an outer ring of worldwide agent handlers. Camp cadre also cross-train fellow jihadists from other guerrilla or terrorist groups conducting joint operations with Al-Qaeda. Outer ring agent handlers oversee Al-Qaeda camp graduates and their "cut-outs" in the field. Agent handlers create their own command, control and communications systems to manage their people on a "need-to-know basis" within Al-Qaeda's outer ring. Clandestine operatives in the outer ring work with Al-Qaeda cells embedded in different parts of the world, to conduct surveillance, reconnaissance, and intelligence of attack targets in support of mission rehearsals and training. Some Al-Qaeda cell operatives engage in field operations full-time, while others remain undercover until they receive a pre-arranged attack order. In either case, the military committee's main offensive tactic is for one or more of the agent handler's urban commandos to conduct a suicide attack by land, air, or sea. See UBL Indictment, *supra* note 3, at 3, 8, 9, 12, 14; Al-Qahtani Testimony, *supra* note 81, at 2-4; Hambali Testimony, *supra* note 81, at 1; GURATNA, *supra* note 118, at 10.

²⁵⁰ See GURATNA, *supra* note 118, at 10.

²⁵¹ See *United States v. Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995).

²⁵² *Id.*

²⁵³ See KSM Testimony, *supra* note 82, at 11-14, 24-27; 9/11 COMMISSION REPORT, *supra* note 5, at 238-39, 312-13.

²⁵⁴ See KSM Testimony, *supra* note 82, at 21.

Al-Qaeda has more people than just the 9/11 crews.²⁵⁵ This empirical fact is corroborated by Zacarias Moussaoui in his own trial, as one learns that he was passed up by Khalid Sheikh Mohammed for a follow-on martyr attack to 9/11.²⁵⁶ Second, one also realizes that Usama bin Laden and Khalid Sheikh Mohammed compartmentalized the two Al-Qaeda attack waves, choosing different dates, targets, and martyrs for each.²⁵⁷ The training and support structure for both attack waves came from different sources, to maximize operational security.²⁵⁸ Coordinating these martyr attacks required intense preparations between undercover field personnel, both inside and outside the United States, to synchronize the hijackings and optimize the planes' collective damage:

Another hallmark of an Al-Qaeda attack is its huge investment in the planning and preparatory stages. To ensure success, Al-Qaeda has an elaborate, highly skilled organization for mounting surveillance and reconnaissance of targets. After gathering critical data on the intended target, its cadres study it patiently and meticulously before rehearsing and executing an operation. Al-Qaeda spent one and a half years training its operatives before targeting the U.S. on September 11. As such, its preference is for qualitative rather than quantitative targeting. By selectively attacking high prestige, symbolic targets, Al-Qaeda aims to denigrate its opponent, expose his vulnerability and prompt further retaliation.²⁵⁹

²⁵⁵ See KSM Testimony, *supra* note 82, at 21-22, 24; Al-Qahtani Testimony, *supra* note 82, at 2; Khallad Testimony, *supra* note 82, at 1.

²⁵⁶ See KSM Testimony, *supra* note 82, at 37-43.

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ See GURATNA, *supra* note 118, at 10.

The 9/11 attacks exhibit “an ascertainable structure distinct from” the individual hijacker’s transactional patterns between themselves and other Al-Qaeda cells.²⁶⁰ Before they immigrated to the United States, each 9/11 team member was specifically instructed by Khalid Sheikh Mohammed not to mingle with American Muslims.²⁶¹ The 9/11 crews held no outside employment in America, and instead lived off wire transfers from overseas Al-Qaeda operatives, who also reported to Khalid Sheikh Mohammed.²⁶² Even from a rhetoric perspective, the 9/11 crews’ downtown lifestyle and hi-tech communication methods also poses a stark contrast to bin Laden’s pseudo-clerical calls for a no-frills Qur’anic lifestyle, yet more evidence of an ascertainable structure distinct from transactional patterns:

Although its ideology is puritanical, Al-Qaeda is an essentially a modern organization, one that exploits up-to-date technology for its own hands, relying on satellite phones, laptop computers, encrypted communications websites for hiding messages, and the like. Its modes of attack range from low-tech assassinations, bombings and ambushes to experiments with explosive-laden gliders and helicopters and crop-spraying aircraft adapted to disburse a highly potent agents. It will have no compunction about employing chemical, biological, radiological, and nuclear weapons against population centers...Al-Qaeda’s sophisticated use of communications exemplifies its truly global reach and the sheer range of its activities and ambitions.²⁶³

This doctrinal-operational paradox within Al-Qaeda’s association-in-fact evidences “an ascertainable structure distinct from transactional patterns” under American case law, because it shows that while Al-Qaeda may talk a jihadist talk, it does not walk a Qur’anic

²⁶⁰ See 9/11 COMMISSION REPORT, *supra* note 5, at 163-69; Al-Qahtani Testimony, *supra* note 82, at 6.

²⁶¹ See KSM Testimony, *supra* note 82, at 36.

²⁶² See 9/11 COMMISSION REPORT, *supra* note 5, at 220, 225, 252; MAH Testimony, *supra* note 82, at 1.

²⁶³ See GURATNA, *supra* note 118, at 15; UBL Indictment, *supra* note 3, at 10.

walk to legitimize their conduct under domestic or international law.²⁶⁴ Considering Al-Qaeda's attacks on Americans under the three *Darden* elements of an American association-in-fact enterprise, one may say that criminal enterprise is a military and civilian principle of law that precedes the MCA and fits the 9/11 operational facts.²⁶⁵ Like the MCA, compound liability statutes and their case-developed criminal enterprise versions, aim to prosecute object crimes that involve violence as both an end and a means.²⁶⁶ As military charge, the concept of enterprise seems to reflect the perpetrators' infliction of terror upon the public; whereas, as part of a civilian prosecution, the concept of enterprise seems to reflect the perpetrators' transactional evils upon society.²⁶⁷ In either case, the killing of Americans has no legal justification and is criminal.²⁶⁸ These evidentiary and policy paradigms also co-exist in the international version of criminal enterprise trials adjudicating law of war offenses.²⁶⁹

²⁶⁴ See, e.g., PETER BERGEN, THE RETURN OF AL QAEDA, THE NEW REPUBLIC, WHERE YOU BIN? (2007), available at <http://www.peterbergen.com/bergen/articles/details.aspx?id=288> (last visited Apr. 5, 2007).

²⁶⁵ See UCMJ art. 116 (2005); The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, § 848(c)(2); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

²⁶⁶ See UCMJ art. 116; The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, § 848(c)(2); The Continuing Financial Crimes Enterprise Act, § 225(a); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

²⁶⁷ See UCMJ art. 116; The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Continuing Criminal Enterprise Act, § 848(c)(2); The Continuing Financial Crimes Enterprise Act, § 225(a); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

²⁶⁸ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a – 950p); The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970); The Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 17, 2001).

²⁶⁹ See, e.g., O'Rourke, *supra* note 38, at 317-23; James D. Fry, *Comment: Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L. & FOR. AFF. 169 (2002).

B. Enterprise is a Principle of International Law: The Mass Atrocity Model

In the international community, the concept of “joint criminal enterprise” (JCE) is not a new crime, but a new method of proving old crimes.²⁷⁰ The international JCE approach is a post-World War II way to single out individuals for mass atrocities perpetrated by a group.²⁷¹

International tribunals like the International Criminal Court (ICC),²⁷² the International

²⁷⁰ See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999).

²⁷¹ See O’Rourke, *supra* note 38, at 307-08; Danner & Martinez, *supra* note 38, at 105; Powles, *supra* note 38, at 6; *Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195.

²⁷² The Rome Statute treaty established the International Criminal Court (ICC) on 1 July 2002, as a permanent tribunal to prosecute individuals for *genocide, crimes against humanity, war crimes, and the crime of aggression*, so long as the alleged offenses occurred on or after 1 July 2002. The United States is not a party to the Rome Statute. See Rome Statute of the International Criminal Court, available at http://www.un.org/law/icc/statute/99_corr/2.htm (last visited Apr. 3, 2007) (emphasis added); Embassy of India, Explanation of vote on the adoption of the Statute of the International Criminal Court, available at http://www.indianembassy.org/policy/ICC/ICC_Adoption_July_17_1998.html (last visited Apr. 3, 2007) (statement by Mr. Dilip Lahiri, Additional Secretary (UN) on 17 July 1998). Note that the international tribunals’ use of JCE to try mass atrocities was initially based on customary international law and now yields a decade of ad hoc precedents; so, the fact that the United States does not allow ICC jurisdiction over American service members is legally irrelevant to MCA prosecutions of unlawful alien enemy combatants. See *Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195. The MCA’s tribunal jurisdiction over enumerated federal crimes and law of war crimes flows from Congress and the Constitution, in conjunction with basic law of war principles; it does not flow from United Nations comity or ICC reciprocity. See *Boumediene v. Bush*, 2007 U.S. LEXIS 3783; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948c, 948d(a)); U.S. Department of Defense Press Resources, Detainee Affairs, CRST Reviews, available at <http://www.defenselink.mil/news/Aug2006/d20060809CSRTPcedures.pdf> (last visited Apr. 5, 2007). A sovereign need not be a signatory to the Geneva Conventions to prosecute breaches of basic law of war principles; a sovereign also need not embrace United Nations membership and/or ad hoc tribunal jurisdiction. See Corn, *supra* note 30, at 819-820:

The distinction between military tribunals and traditional domestic criminal tribunals is reflected in the Constitution of the United States, laws created by Congress, and in judicial decisions adjudicating the legality of prosecutions carried out under this authority. Article I, section 8, clause 14 of the Constitution gives Congress the power to “make Rules for the Government and Regulation of the land and naval forces.” Congress is also vested in Article I of the Constitution with the power to “define and punish ... Offenses against the Law of Nations,” and the power to “make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States... .” Pursuant to these constitutional provisions, Congress promulgated the UCMJ. This statute provides for the prosecution of both United States service members and enemy personnel who violate the law of war. The authority to prosecute such individuals is expressly granted to general courts-martial. However, Article 21 of the UCMJ recognizes the concurrent jurisdiction of military tribunals over such offenses so long

Criminal Tribunal for the former Yugoslavia (ICTY),²⁷³ the Special Court for Sierra Leone,²⁷⁴ the Serious Crimes Court in East Timor,²⁷⁵ and the International Criminal Tribunal for Rwanda (ICTR)²⁷⁶ used JCE to decide trials of genocide²⁷⁷ and similar crimes against humanity,²⁷⁸ and in the case of ICTR and the Special Court for Sierra Leone, even “acts of

as use of such tribunals is permitted under the law of war.

Remember, JCE is not a substantive crime of any sort, under either domestic law or the law of war; it is just a theory of liability. See O’Rourke, *supra* note 38, at 307-08; Danner & Martinez, *supra* note 38, at 105; Powles, *supra* note 38, at 6.

²⁷³ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly known as the International Criminal Tribunal for the former Yugoslavia (ICTY), is an ad hoc United Nations tribunal established at The Hague on 25 May 1993. The ICTY seeks to prosecute certain crimes perpetrated since 1991 by *individuals (not organizations or governments)*, in the former Yugoslavia territory. The ICTY jurisdictional list of crimes includes: *grave breaches of the 1949 Geneva Conventions; violations of the laws or customs of war; genocide; and crimes against humanity* (emphasis added). The ICTY at a Glance, General Information (Feb. 7, 2007), available at <http://www.un.org/icty/> (last visited Apr. 6, 2007).

²⁷⁴ On 16 January 2002, the United Nations and the Government of Sierra Leone agreed to establish the Special Court for Sierra Leone in Freetown. Pursuant to Security Council Resolution 1315, The Special Court exists to “try those who bear greatest responsibility” for *war crimes* and *crimes against humanity* perpetrated during the Sierra Leone Civil War (after Nov. 30, 1996), to include *acts of terror*. S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000), available at <http://www.sc-sl.org/about.html> (emphasis added).

²⁷⁵ Under Security Council Resolution 1272, the United Nations Transitional Administration in East Timor (UNTAET) established a Serious Crimes Panel in Dili to prosecute “Indonesian and pro-Indonesian East Timorese persons responsible for the mass killings in 1999”. S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999), available at <http://jurist.law.pitt.edu/world/easttimor.htm#Courts>. The Crimes Panel exercises both “exclusive” and “universal” jurisdiction to adjudicate *genocide, war crimes, crimes against humanity, murder, sexual offense, and torture* committed between 1 January and 25 October 1999.

²⁷⁶ The United Nations Security Council created The International Criminal Tribunal for Rwanda (ICTR) in Arusha, Tanzania, as an *ad hoc* forum on 8 November 1994, to adjudicate criminal responsibility for “acts of genocide and other serious violations of the international law performed in the territory of Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994”. The ICTR Homepage, General Information, English version, available at <http://69.94.11.53> (last visited Apr. 5, 2007). The ICTR’s jurisdictional crimes encompass *genocide, crimes against humanity and war crimes*, to include *violations of Common Article Three and Additional Protocol II of the Geneva Conventions*, thereby specifically proscribing *acts of terrorism* (emphasis added). S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), available at <http://www.un.org/ict/english/Resolutions/955e.htm> (last visited Apr. 5, 2007).

²⁷⁷ The 1948 Convention’s definition of genocide applies here as well.

²⁷⁸ Consider that the Rome Statute’s “Explanatory Memorandum” opines that “*crimes against humanity*”:

[A]re particularly odious offences in that they constitute a serious attack on human dignity or grave humiliation or a degradation of one or more human beings. They are not isolated or sporadic events,

terror.”²⁷⁹ To pinpoint guilt between alleged contributors to mass atrocities,²⁸⁰ tribunal judges interpreted the object and purpose²⁸¹ of their respective jurisdictional statutes. In doing so, these judges studied the meanings of the statutory terms “criminal responsibility,” “individual,” and “direct,” for each atrocity blamed on the defendants.²⁸² The judges then weighed the evidence against the cumulative impact each accused had on each individual act of violence.²⁸³ This moral calculation of hundreds, and often thousands, of deaths charged by tribunal prosecutors is now called JCE.²⁸⁴ It is a thought process that allows criminal courts to assess group crimes by accounting for an offense’s overall “size and structure.”²⁸⁵

but are part either of a government policy (although the perpetrators need not identify themselves with this policy) or of a wide practice of atrocities tolerated or condoned by a government or a *de facto* authority. However, murder, extermination, torture, rape, *political, racial, or religious persecution and other inhumane acts reach the threshold of crimes against humanity only if they are part of a widespread or systematic practice.* Isolated inhumane acts of this nature may constitute grave infringements of human rights, or depending on the circumstances, war crimes, but may fall short of meriting the stigma attaching to the category of crimes under discussion (emphasis added). RSICC/C, Volume 1, page 360.

Rome Statute of the International Criminal Court, Part 2. Jurisdiction., Admissibility and Applicable Law (July 12, 1999), *available at* http://www.un.org/law/icc/statute/99_corr/2.htm (last visited Apr. 3, 2007) (expounding on jurisdictional scope of Article 7).

²⁷⁹ The contemporary emergence of “joint criminal enterprise” tribunal jurisprudence is closely aligned with United Nations’ policies and interests. *See* International Commission of Inquiry on Darfur, *Report to the Secretary-General* 542-16 (Jan. 25, 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

²⁸⁰ *See* Powles, *supra* note 38, at 5-6. A former ICTY and Sierra Leone defense counsel, Barrister Powles best states the textualist objection to the tribunal creation/evolution of joint criminal enterprise: “There is no specific reference in the International Criminal Tribunal for the Former Yugoslavia (ICTY) Statute to criminal liability pursuant to the joint criminal enterprise doctrine.” *Id.*

²⁸¹ Interview with Major Sean Watts, International & Operational Law Professor, The Judge Advocate General’s Legal Center and School, in Charlottesville, Va. (Nov. 14, 2006) [hereinafter MAJ Watts Interview].

²⁸² *See* O’Rourke, *supra* note 38, at 311.

²⁸³ *See* Danner & Martinez, *supra* note 38, at 108-12.

²⁸⁴ *See* Powles, *supra* note 38, at 2-3.

²⁸⁵ *See* O’Rourke, *supra* note 38, at 310.

Conceptually, the international and American versions of criminal enterprise address similar evidentiary challenges when confronted with catastrophic group scenarios like 9/11, Kosovo, Croatia, and Rwanda.²⁸⁶ So closely aligned, in fact, that scholars have campaigned for the international prosecution of the 9/11 attacks, as genocide and/or crimes against humanity, subject to universal jurisdiction over individual Al-Qaeda members.²⁸⁷

In size and structure, the 9/11 attacks certainly fit the evidentiary expanse historically tackled by the international crimes of genocide and crimes against humanity.²⁸⁸ For example, an American or international prosecutor evaluating 9/11 crime scenes for trial, would need to simultaneously account for physical evidence and witnesses from New York, Virginia, Pennsylvania, Florida, Germany, France, Pakistan, Afghanistan, Yemen, Malaysia, Oklahoma, Minnesota, California, Washington-D.C., and UAE.²⁸⁹ The sheer body count is equally daunting.²⁹⁰ In New York alone, that 9/11 crime scene would yield 2,819 fatalities in a single day, and of those, only 289 victim bodies remain reasonably intact, vice the 19,898

²⁸⁶ When framing 9/11 in terms of crimes against humanity, one must concede that the Rome Statute's version is textually more like the ICTR codification than ICTY's, thereby reducing Al-Qaeda's group actions, in this instance, to a two-pronged factual analysis: (1) were Al-Qaeda's martyr attacks "part of a widespread and systematic war against the United States"? and (2) do the actual crash sites evidence jihadist attacks "against a civilian population"? Usama bin Laden's published interviews and *fatwas* make the answer to both questions: "yes." Fry, *supra* note 270, at 183-99.

²⁸⁷ To consider 9/11 genocide, one need not reconcile the words used in the Rome Statute, ICTR and ICTY, since they are identical; instead, the issue is a three-pronged analysis: (1) did the attacks "cause serious injury to a group of U.S. nationals"; (2) were the attacks "committed with the intent to destroy that group in whole or in part"; and (3) were the attacks upon these U.S. citizens "committed against the nation of the United States"? Again, Usama bin Laden's published interviews and *fatwas* make the answer to both questions: "yes." *Id.*

²⁸⁸ *Id.*

²⁸⁹ See 9/11 COMMISSION REPORT, *supra* note 5, at 231-40.

²⁹⁰ See Maragaret Talbot, *The Lives They Lived*, N.Y. TIMES, Dec. 30, 2001, at F16 (3,225 death toll estimate).

mutilated body parts collected by rescue personnel.²⁹¹ Add to that exhibit inventory, the potential need of translators, criminologists, physicians, counter-terrorists, forensic experts, Islamic clerics, structural engineers, avionic models, classified materials, and media coverage at trial, and these intense legal proceedings easily take a life of their own.²⁹² Precedent shows that if an international tribunal with universal jurisdiction amassed such a mammoth amount of evidence and adjudicated the 9/11 attacks as genocide or crimes against humanity, it would likely use JCE to determine Usama bin Laden's responsibility as Al-Qaeda's leader, in terms of his functional role within the terrorist group's plan.²⁹³

The JCE method of proving group crimes recognizes that cronies share a "common purpose, intent, or design."²⁹⁴ Criminal kinship explains why regardless of international tribunal, two constants control these kinds of group cases: "(1) the nature of the crime, usually its size, requires many perpetrators, and (2) the crime is compartmentalized and distributed across many perpetrators performing distinct but mutually dependent functions toward one purpose."²⁹⁵ At trial, JCE helps a court identify malfeasants and connect the dots

²⁹¹ *Id.*

²⁹² No less than 1,202 exhibits were admitted in the federal prosecution of terrorist trainee Zacarias Moussaoui, and he had not even killed anyone for Al-Qaeda yet. *United States v. Zacarias Moussaoui*, Trial Exhibits, available at, <http://www.vaed.uscourts.gov/notablecases/moussaoui/index.html>; but see, *United States v. Usama Bin Laden*, __ F.Supp. 2d __ (S.D.N.Y., 2001); 2001 U.S. Dist. LEXIS 2897 (Denying co-defendant's motion to suppress clothing seized in Pakistan, noting that the inventory log submitted by the prosecution established that "[t]his is thus not a situation in which the chain of custody is missing a vital link. The objection, if any, is instead that some of the various links are weak and under-detailed.").

²⁹³ See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004) (ICTY trial of Yugoslavia's president concerning Serb on Croat violence); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (ICTR trial of the Taba commune's mayor concerning Hutu on Tutsi violence), available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm> (last visited Apr. 4, 2007).

²⁹⁴ *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999).

²⁹⁵ See O'Rourke, *supra* note 38, at 309.

between them.²⁹⁶ The international JCE approach is particularly useful when courts are confronted with mounds of fragmented evidence, which is somehow supposed to link a group's illegal activity to countless victims, like 9/11, the Rwanda conflict massacres, or the Balkan Wars.²⁹⁷ International law tribunals wrestling with big, lengthy, and messy genocide-type cases like the ICTY trial of Slobodan Milosevic for ethnic cleansing in the Balkans and the ICTR trial of Jean-Paul Akayesu for tribal atrocities in Rwanda, have found in JCE, an intuitive algorithm that serves up a realistic view of contemporary criminal "teamwork."²⁹⁸ This is because the classic World War view of mass violence is outdated and out of touch with the Twenty-First Century's information society:

Conspiracy theory, which depends on the perpetrators forming an agreement, often cannot apply since these crimes are usually accomplished without an overt agreement between every perpetrator. Command responsibility theory, which focuses on superior-subordinate relationships, might account for crimes committed within rigid command structures but cannot easily accommodate

²⁹⁶ See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004) (ICTY); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (ICTR), available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm>.

²⁹⁷ See *Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (ICTY); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998) (ICTR).

²⁹⁸ The 466 days of the Milosevic trial produced more than 1,200,000 pages: 50,000 pages of transcript, detailing the testimony of approximately 350 witnesses; more than 1,250 exhibits, photographs, maps, reports stamped with the words "official" or "confidential"; nearly 200 videotapes; and more than 2,256 written petitions. STÉPHANIE MAUPAS, THE LEGACY OF AN UNFINISHED CASE, CRIMES OF WAR PROJECT (Mar. 16, 2006), available at <http://www.crimesofwar.org/print/onnews/milosevic7.html> (last visited Apr. 5, 2007). Within the Milosevic indictment, the deportation charge alone listed eight different forms of criminal conduct in sixty-four locations spanning thirteen municipalities. The ICTY Prosecutor's exhibits amounted to 85,526 pages of printed material and 117 videos. HELEN WARRELL, GLOBAL FORUM POLICY, MILOSEVIC TRIAL: FAIR, FAKED OR JUSTICE? INSTITUTE FOR WAR AND PEACE REPORTING (May 5, 2006), available at <http://www.globalpolicy.org/intljustice/tribunals/yugo/2006/0505fair.htm> (last visited Apr. 5, 2007). The ICTR Prosecutor closed his case on Akayesu after producing 134 exhibits and twenty-nine witnesses; the defense called twelve witnesses, to include the accused, who ultimately received three life sentences for genocide and crimes against humanity, and eighty years for other violations, including rape and encouraging widespread sexual violence. *Prosecutor v. Jean Paul Akayesu*, No. ICTR-96-4-T, Case History, available at <http://www.un.org/ict/english/casehist/akayesu.html> (last visited Apr. 5, 2007).

the same crimes committed by groups that are arranged non-hierarchically or that operate without commands and responses. The aiding and abetting framework, designed to inculcate the principal perpetrator's less responsible helpers, usually distributes responsibility unequally among group members and cannot accommodate collective action where each perpetrator makes equally significant contributions and shares the criminal intent.²⁹⁹

The JCE version of enterprise has come of age in the last twenty years within the international community, thanks in large part to the United Nations (UN) tribunal system.³⁰⁰ Within that community, ICTY stands tall as JCE's biggest fan.³⁰¹ The ICTY's influence over sister UN tribunals grew over a series of related prosecutions in the late 1990s, namely: *Prosecutor v. Delalic*;³⁰² *Prosecutor v. Furundzija*;³⁰³ and *Prosecutor v. Tadic*.³⁰⁴ Of these

²⁹⁹ See O'Rourke, *supra* note 38, at 310. Mr. O'Rourke aptly points out that criminal "teamwork is often not pre-arranged. For example, the teamwork could develop *from shared ideology and concurrent opportunity* . . . Typically, some individuals provide resources, some coordinate activity, and others act 'on the ground' to bring the crime to fruition." (emphasis added). *Id.*

³⁰⁰ See Danner & Martinez, *supra* note 38, at 82, 104; Powles, *supra* note 38, at 2-3.

³⁰¹ See O'Rourke, *supra* note 38, at 310.

³⁰² See *Prosecutor v. Delalic*, Case No. IT-96-21-T, Judgment, ¶ 322 (Nov. 16, 1998) (first reference to "common purpose"). Delalic was one of four accused joined in an international prosecution of grave breaches of the Geneva Conventions that lasted over nineteen months, during which the ICTY Chamber heard the testimony of 122 witnesses and received 691 exhibits. Zejnil Delalic was ultimately acquitted of all eleven charges. Press Release, ICTY, The Hague (Nov. 16, 1998), Judgment of the Trial Chamber, *available at* <http://www.un.org/icty/pressreal/p364-e.htm> (last visited Apr. 5, 2007).

³⁰³ See *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment, ¶ 253 (Dec. 10, 1998) (distinguishing between "co-perpetrators in a joint criminal enterprise" versus "aiders and abettors", as two distinct international law theories of "criminal participation"). Anto Furundzija was a Special Forces commander accused of facilitating the mistreatment and sexual assault of prisoners in Vitez. He was charged with two violations of the Law of War, torture, and outrages upon personal dignity, including rape. The ICTY Trial Chamber transcribed 700 pages over six days, heard from eight witnesses, and received twenty exhibits. Press Release, ICTY, The Hague (Nov. 18, 1998), *Dokmanovic Case and Furundzija Case*, *available at* <http://www.un.org/icty/pressreal/p325-e.htm> (last visited Apr. 5, 2007). Furundzija was found guilty as a co-perpetrator of torture, and guilty of aiding and abetting rape. He was sentenced to ten years for torture and eight years for rape, served concurrent. CHRISTINE POULON & MAIR MCCAFFERTY, NEWS FROM THE INTERNATIONAL WAR CRIMES TRIBUNALS, *available at* <http://www.wcl.american.edu/hrbrief/v6i2/warcrimes.htm> (last visited Apr. 5, 2007).

³⁰⁴ See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999), *available at* <http://www.un.org/icty/tadic/appeal/judgement/index.htm> (last visited Apr. 4, 2007) (tracing JCE's customary

ICTY cases that decided group crimes with JCE, *Tadic* quickly took the lead as JCE precedent among UN tribunals.³⁰⁵ After *Tadic*, a prosecutor has three JCE categories to choose from to prove group crime liability at trial.³⁰⁶ But before a prosecutor can prove guilt of a group crime using one of the three JCE categories, he or she has to first plead that three JCE elements apply to the facts.³⁰⁷

United Nations tribunals used JCE to adjudicate fact patterns dealing with deadly violence systemically targeted upon masses of victims.³⁰⁸ Depending on the ethnic composition and scale of these organized violence scenarios, the offenses charged before UN tribunals included mass atrocities, like genocide and crimes against humanity.³⁰⁹ These criminal fact patterns often crossed national borders and legal systems, thereby evolving into more than just domestic charges of homicide, assault, and rape.³¹⁰ Nothing in the UN

international law origin through “post-World War II case law, international conventions, and domestic criminal law”, plus finding that “the doctrine fell within the scope of ‘committed’ in Article 7(1) of the ICTY Statute.”).

³⁰⁵ On this seminal point of judicial interpretation, Mr. O’Rourke adds:

Article 7(1) provides 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.” Subsequent cases before the International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber reaffirmed this interpretation. The International Criminal Tribunal for Rwanda (ICTR) also adopted this interpretation for Article 6(1) of the ICTR Statute, which mirrors Article 7(1) of the ICTY Statute.

O’Rourke, *supra* note 38, at 311.

³⁰⁶ See *Tadic*, Case No. IT-94-1-A, Judgment, ¶ 195.

³⁰⁷ *Id.*

³⁰⁸ See O’Rourke, *supra* note 38, at 307.

³⁰⁹ *Id.*

³¹⁰ *Id.*

tribunals' JCE opinions or jurisdictional statutes, restricts the application of JCE to the criminal offenses of genocide and crimes against humanity.³¹¹ Scholars note that JCE is, in essence, an evidentiary means to evaluate large scale violent crimes in a courtroom.³¹² Therefore, it is the violence's objective, factual, "size and structure," and not the codified elements of a given criminal offense, that is the main reason to plead and prove JCE in the international tribunal system.³¹³ The pleading and proving requirements of JCE seek to measure the number of perpetrators, victims, and injuries involved.³¹⁴ The first JCE prosecutorial step to do so is pleading three objective elements.³¹⁵

1. The Three JCE Pleading Elements

Before he or she can prove a mass crime at trial using any of the three liability categories of JCE, an international prosecutor must first plead in the charging document that three objective conditions exist: (1) "a plurality of persons;" (2) "a common plan, design or purpose which [sic] amounts to or involves the commission of a crime provided for in the Statute" which "need not be previously arranged or formulated, but may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;" and (3) "participation (direct or indirect) of the

³¹¹ *See id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Id.*

³¹⁵ *See* Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999).

accused in the common design.”³¹⁶ The JCE indictments used by ICTY and ICTR read as general pleadings in good faith, whose specificity should satisfy the probable cause and bill of particulars rules for either American civilian prosecutions or courts-martial.³¹⁷

a. A Plurality of Persons

The first JCE pleading requirement - a “plurality of persons”, means simply that more than one person is involved in the crime charged.³¹⁸ As previously discussed, insider testimony on hand indicates that Al-Qaeda ranks number more than just the mujahadeen who hijacked and crashed the planes used in the 9/11 attacks.³¹⁹ MCA prosecutors should maximize this empirical fact in the merits and sentencing phases of a terrorism echelon prosecution of Usama bin Laden or Khalid Sheik Mohammed.³²⁰ From all accounts, the moral of the story appears to be that while bin Laden seeks to recruit martyrs against the

³¹⁶ See *Tadic*, Case No. IT-94-1-A, Judgment, ¶ 227(i), (ii); *Prosecutor v. Krnojelac*, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002).

³¹⁷ See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>; *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998), available at <http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/akay001.htm>. American precedent shows that artful “overt act” pleading is a labor intensive process when prosecuting Al-Qaeda operatives as an amalgam of indicted and un-indicted co-conspirators. Compare *United States v. Usama Bin Laden*, 92 F.Supp. 2d 225, 236-43 (S.D.N.Y., 2000) (court required prosecution to submit a bill of particulars specifying generally plead conspiracy allegations despite a list of 114 overt acts in the indictment; also required prosecution to disclose the identities, aliases, and code names of all un-indicted co-conspirators to be referenced at trial, despite the prosecution’s voluntary disclosure of “hundreds of thousands of pages of documents, dozens of audio and video tapes, transcripts and translations of these materials, hundreds of crime scene and other photographs, several dozen laboratory reports reflecting forensic tests of thousands of items and numerous other FBI Reports.”). *Bin Laden*, at 236-43.

³¹⁸ See O’Rourke, *supra* note 38, at 313, 325.

³¹⁹ See KSM Testimony, *supra* note 82, at 21-22, 24; MAH Testimony, *supra* note 82, at 1; Al-Qahtani Testimony, *supra* note 82, at 2-4; Khallad Testimony, *supra* note 82, at 1.

³²⁰ See, e.g., *United States v. Usama Bin Laden*, 92 F.Supp. 2d 225, 236-43 (S.D.N.Y., 2000).

United States; it does not appear that either he or Khalid Sheikh Mohammed is interested in becoming one, as part of Al-Qaeda's Jihad.³²¹ Next is the second JCE pleading - "a common plan, design or purpose" between Al-Qaeda echelon leaders and clandestine operatives.

b. A Common Plan, Design or Purpose

The second JCE pleading requirement - "a common plan, design or purpose" that results in a punishable codified crime, means that the prosecution can prove, with direct or circumstantial evidence, that the accused's group were of like mind.³²² Al-Qaeda's transnational network certainly qualifies, particularly in a 9/11 context.³²³ Al-Qaeda's decentralized attacks worldwide support a functional methodology of sacrificial violence, that is, they work together to kill others not like them as a group ritual.³²⁴ Granted, their attack ideology may be based on the unique Qur'anic³²⁵ concept of *Jihad* as a cathartic

³²¹ *Id.*; KSM Testimony, *supra* note 82, at 2, 4.

³²² *See* O'Rourke, *supra* note 38, at 313, 315, 317, 324.

³²³ *See* 9/11 COMMISSION REPORT, *supra* note 5, at 234; *see also* JAMESTOWN FOUNDATION, *supra* note 118, at 16, 26.

³²⁴ *See* GURATNA, *supra* note 118, at 296-302.

³²⁵ *Qur'an*, 2:190-194, decrees:

And fight in the way of Allah with those who fight against you and do not transgress bounds [in this fighting]. God does not love the transgressors. Kill them wherever you find them and drive them out [of the place] from which they drove you out and [remember] persecution is worse than carnage. But do not initiate war with them near the Holy Kabah unless they attack you there. But if they attack you, put them to the sword [without any hesitation]. Thus shall such disbelievers be rewarded. However, if they desist [from this disbelief], Allah is Forgiving and Merciful. Keep fighting against them, until persecution does not remain and [in the land of Arabia] Allah's religion reigns supreme. But if they mend their ways, then [you should know that] an offensive is only allowed against the evil-doers. A sacred month for a sacred month; [similarly] other sacred things too are subject to retaliation. So if any one transgresses against you, you should also pay back in equal coins. Have fear of Allah and [keep in mind that] Allah is with those who remain within the bounds [stipulated by religion].

theological struggle;³²⁶ however, their means of attack are based on secular guerrilla tactics to maximize a cell's operational autonomy.³²⁷ The effect of an Al-Qaeda attack in any given country, whether Muslim or not (to include the United States), is to inflict indiscriminate mass violence³²⁸ upon a civilian population or government,³²⁹ not create martyrs for Allah.³³⁰ Bin Laden's *fatwa* belie this moral façade.³³¹ His political agenda tracks the group's

³²⁶ Muslim scholars recognize five kinds of *Jihad fi sabilillah* (struggle in the cause of God). Usama bin Laden and Al-Qaeda premise their declarations of violence and mass attacks on the fifth kind of *Jihad*: (1) *Jihad* of the heart/soul (*Jihad bin nafs/qalb*) - an inner (mental) struggle between good and evil; (2) *Jihad* by the tongue (*Jihad bil lisan*) - a struggle between good against evil waged in writing and speech; (3) *Jihad* by the pen and knowledge (*Jihad bil qalam/ilm*) - a struggle between good and evil through the scholarly study of Islam and science; (4) *Jihad* by the hand (*Jihad bil yad*) - a struggle between good and evil waged by personal action or wealth; and (5) *Jihad* by the sword (*Jihad bis saif*)- refers to *qital fi sabilillah* (armed fighting in the way of God, or holy war). al-Hibri Interview, *supra* note 126; JAMESTOWN FOUNDATION, *supra* note 118, at 25-26.

³²⁷ See KSM Testimony, *supra* note 82, at 21, 24-27; see also United States v. Usama Bin Laden, 109 F.Supp. 2d 211, 213-222 (S.D.N.Y., 2001) (prosecution charged each Al-Qaeda operative in the Embassy bombings as contributing a different "cell" function in support of the Embassy bombing operations: (1) target approval; (2) reconnaissance and surveillance; (3) logistics; and (4) demolitions.).

³²⁸ See Khallad Testimony, *supra* note 82, at 1. *Qur'an*, 4:76, charges jihadists with the duty to distinguish friend from foe, and believer from non-believer:

Those who believe, fight in the cause of Allah, and those who disbelieve, fight in the cause of Satan. So fight you against the friends of Satan. Ever feeble indeed is the plot of Satan.

Moreover, *Qur'an*, 4:90 specifically demands that jihadists spare those who refrain from actual battle:

Or those who approach you such that they neither have the courage to fight you nor their own people [and are such that] had Allah willed, indeed He would have given them power over you, and they would have fought you. So if they withdraw from you, and fight not against you, and offer you peace, then Allah does not give you permission to take any action against them.

³²⁹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified 10 U.S.C. §§ 948a – 950p).

³³⁰ *Qur'an*, 3:169-71, proclaims the spiritual reward for righteous jihadist warriors who fall in battle:

Consider not those who are killed in the way of Allah as dead. Nay, they are alive with their Lord, and they will be provided for. They rejoice in what Allah has bestowed upon them of His bounty and rejoice for the sake of those who have not yet joined them, but are left behind [not yet martyred] that on them too no fear shall come, nor shall they grieve. They rejoice in a grace and a bounty from Allah, and that Allah will not waste the reward of the believers.

³³¹ See App. A, *infra*.

paramilitary origin and global franchising.³³² Around 1988, Al-Qaeda³³³ was initially established by Usama bin Laden and others to finance, recruit, transport and train approximately five thousand foreign fighters into the Afghan resistance³³⁴ against the former Soviet Union.³³⁵ With the Soviet Union's subsequent pull out from Afghanistan after nine costly years and national regime collapse, Al-Qaeda's militant agenda graduated to multi-national status, forging ideological alliances,³³⁶ and franchising their conflict operations to other countries, like Algeria, Australia, Chechnya, Eritrea, Kosovo, Tajikistan, Indonesia, Iraq, Kashmir, Yemen, Somalia, Bosnia, Pakistan, Sudan, Egypt, Jordan, Lebanon, and the United States.³³⁷ Physical evidence corroborates Bin Laden's *fatwa* and Al-Qaeda operations are designed to be carried out by others, in groups; for example, Appendix D of this dissertation outlines the table of contents for an eleven volume training manual recovered in Kandahar, which purports to be Al-Qaeda's "Encyclopedia of Afghan Jihad."³³⁸ This

³³² See UBL Indictment, *supra* note 3, at 3-9.

³³³ See 9/11 COMMISSION REPORT, *supra* note 5, at 55-57.

³³⁴ See AHMAD RASHID, TALIBAN: ISLAM, OIL AND THE NEW GREAT GAME IN CENTRAL ASIA (2002) (providing a definitive account of the Afghan origins and refugee effects associated with the Taliban's pre-9/11 symbiotic connection to bin Laden and the organizational growth of Al-Qaeda).

³³⁵ Specifically, the Mujahid organization *Maktab al-Khadamat* (Office of Services, MAK) fought to impose an Islamic state in Afghanistan during the 1980s. (emphasis added). Usama Bin Laden and notable Palestinian militant Abdullah Yusuf Azzam were among MAK's founders and financial masterminds. See 9/11 COMMISSION REPORT, *supra* note 5, at 55-57.

³³⁶ See App. G, *infra*.

³³⁷ Additionally, reputable open sources strongly advocate Al-Qaeda's links to "conflicts and attacks in Africa, Asia, Europe, the former Soviet Republics, the Middle East, as well as North and South America". See Global Security.org, Homeland Security, Al-Qaeda, available at <http://www.globalsecurity.org/military/world/para/al-qaida.htm> (last visit Apr. 3, 2007).

³³⁸ See App. D, *infra*. (commentators believe the 800 page compendium was written between the late 1980's and early 1990's, then ultimately published circa 1992. The text is dedicated to *Jihad* leaders Usama bin Laden and Abdullah Azzam. It was also reportedly found in compact disc format.). Global Security.org, Homeland

product implies Al-Qaeda training is modular.³³⁹ Such a modular training approach exists in portable format to enable the global franchising of Al-Qaeda clandestine operatives and support cells.³⁴⁰ This point brings up the third JCE pleading – an accused’s “direct or indirect participation in the group’s common design.”

c. Participation in Foreseeable Violence

The third JCE pleading requirement – “direct or indirect participation in the group’s common design,” means that the defendant’s acts “somehow furthered” the group crime charged.³⁴¹ Many times before 9/11, Usama bin Laden called upon Al-Qaeda and other radical Muslim factions to wage Jihad upon Americans by killing “Crusaders and Jews” worldwide.³⁴² Symbolically, bin Laden referred to his controversial incitements as Islamic *fatwa*, though he lacks any clerical credentials to speak for the Muslim faithful.³⁴³ Bin Laden

Security, Al-Qaeda, available at <http://www.globalsecurity.org/military/world/para/al-qaida.htm> (providing a link to the *Encyclopedia of Afghan Jihad*).

³³⁹ See JAMESTOWN FOUNDATION, *supra* note 118, at 33 (referencing four major jihadi tactics publications posted on the internet.). *Id.* at 21-22 (listing monographs on the internet). *Id.* at 23. (explaining interactive jihadi cell forums.).

³⁴⁰ See App. D, *infra*; see also 9/11 COMMISSION REPORT, *supra* note 5, at 175.

³⁴¹ See O’Rourke, *supra* note 38, at 314:

The accused need not commit any element of any crime under the Statute nor personally witness the intended crime's commission (to “*participate*”). Assistance or contribution to the JCE's execution may suffice, such as encouraging the person who finally executes the offense. The role played by the accused must have some causal significance, but need not have been a necessary condition of the crime's accomplishment. Thus under the third element, the accused need not make significant or substantial contributions, but need only perform acts somehow directed to furthering the JCE.

³⁴² See 9/11 COMMISSION REPORT, *supra* note 5, at 59; JAMESTOWN FOUNDATION, *supra* note 118, at 3-5.

³⁴³ See note 106, *supra*.

went so far as to characterize the indiscriminate killing of Americans as a Muslim's spiritual duty.³⁴⁴ His use of *fatwa* is, in form and substance, the main ideological means of spreading Al-Qaeda's message in Qur'anic terms; however, Al-Qaeda employs an active media arm that copies and distributes training manuals, broadcasts execution videos, and Internet products.³⁴⁵

Though bin Laden did not fly a plane on 9/11, Al-Qaeda mujahadeen did at his direction, under the direct supervision of Khalid Sheikh Mohammed.³⁴⁶ Bin Laden and Mohammed's jihadist militant network, Al-Qaeda, enabled the deaths of thousands on 9/11 with rhetoric, funds, personnel, and training.³⁴⁷ The *Moussaoui* trial bears out that the 9/11 mujahadeen were in constant contact with their Al-Qaeda echelon superiors prior to the attacks, via cell-phones, chat rooms, e-mails, couriers, and letters.³⁴⁸ Bin Laden and Sheikh Mohammed picked the 9/11 targets for symbolic and logistical reasons that directly supported Al-Qaeda's Jihad *fatwas*.³⁴⁹ Poignantly, some time after some of his people were captured, Usama bin Laden eventually acknowledged in the media, that the 9/11 attacks had

³⁴⁴ *Id.*

³⁴⁵ See KSM Testimony, *supra* note 82, at 2; MAH Testimony, *supra* note 82, at 2-3; 9/11 COMMISSION REPORT, *supra* note 5, at 238-39, 252-53; JAMESTOWN FOUNDATION, *supra* note 118, at 13-15, 22-23.

³⁴⁶ See 9/11 COMMISSION REPORT, *supra* note 5, at 241-53; KSM Testimony, *supra* note 82, at 24-27; Khallad Testimony, *supra* note 82, at 1.

³⁴⁷ See 9/11 COMMISSION REPORT, *supra* note 5, at 231-40; see also JAMESTOWN FOUNDATION, *supra* note 118, at 18-19; KSM Testimony, *supra* note 82, at 24-27; MAH Testimony, *supra* note 82, at 1.

³⁴⁸ See 9/11 COMMISSION REPORT, *supra* note 5, at 245-50; KSM Testimony, *supra* note 82, at 18, 30-31, 37.

³⁴⁹ See KSM Testimony, *supra* note 82, at 11-15.

encompassed part of Al-Qaeda's Jihad.³⁵⁰ Having considered 9/11 within the three JCE pleading elements in an international mass atrocity case, the next prosecutorial step is to consider the resulting mass violence, as one three JCE categories under which a group's member may be found liable.³⁵¹

2. *The Three JCE Liability Categories*

As discussed, the *Tadic* case produced three JCE categories among ICC, ICTY, ICTR, Sierra Leone, and East Timor group crime decisions.³⁵² These three JCE categories are different ways a prosecutor can prove that a group's member should be punished just like his cohorts for the group's mass crime, even if that particular member did not physically commit the crime charged, but the other members did.³⁵³ The key to this legal concept is determining whether the defendant's role actually equals the team's expected level of participation.³⁵⁴ All three JCE categories share the view that group crimes hinge on "teamwork."³⁵⁵ What the three JCE categories measure in different degrees is how closely, in thought and action, the defendant's role comes to bringing about the group's actual

³⁵⁰ See App. A, *infra*.

³⁵¹ See O'Rourke, *supra* note 38, at 312-14.

³⁵² Some legal commentators brand the three "joint criminal enterprise" categories by their respective scopes of liability as: "basic", "systematic", and "extended." See O'Rourke, *supra* note 38, at 307-12; Powles, *supra* note 38, at 2-3. Others sequence the doctrinal categories by number as: "Category One", "Category Two, and "Category Three." Danner & Martinez, *supra* note 38, at 105-06. The distinction is merely visual.

³⁵³ See Danner & Martinez, *supra* note 38, at 105-06.

³⁵⁴ *Id.*

³⁵⁵ See O'Rourke, *supra* note 38, at 309-10.

outcome.³⁵⁶ For purposes of this JCE discussion, there are two ways to cooperate³⁵⁷ with criminals – one may either participate³⁵⁸ or contribute.³⁵⁹ If one does either and the charged crime is foreseeable, one potentially faces punishment for that charged crime under one of three JCE liability categories.³⁶⁰ A prosecutor may plead the three JCE categories in the alternative, if the evidence allows it.³⁶¹

The first JCE category to plead and prove is that in which members of a group act “pursuant to a common design” via an “agreement” and share “the same criminal intention.”³⁶² Here, all Category One actors share equal blame and punishment.³⁶³ International scholars agree that these “common design” cases easily fit moral notions of right and wrong, in that:

To be found guilty of the crime of murder via this “Category One” of JCE, for example, the prosecution must prove that the common plan was to kill the victim, that the defendant voluntarily participated in at least one aspect of this

³⁵⁶ *Id.* at 312-14.

³⁵⁷ By cooperation, accessory-type help is envisioned to facilitate a group’s crime. It is a qualitative term.

³⁵⁸ By participation, conspiracy-type help is envisioned to facilitate a group’s crime. It is a qualitative term.

³⁵⁹ By contribution, attempt-type help is envisioned to facilitate a group’s crime. It is a quantitative term.

³⁶⁰ *See* Danner & Martinez, *supra* note 38, at 105-06, 108.

³⁶¹ *See* Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004), available at <http://www.un.org/icty/indictment/english/mil-ii990524e.htm>.

³⁶² *See* Prosecutor v. Tadic, Case No. IT-94-I-A, Judgment, ICTY Appeals Chamber, ¶ 196 (July 15, 1999); and Prosecutor v. Multinovic, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 23 (May 21, 2003).

³⁶³ *See* Danner & Martinez, *supra* note 38, 105-06.

common design, and that the defendant intended to assist in the commission of murder, even if he did not himself perpetrate the killing.³⁶⁴

The second JCE category to plead and prove is really a subset of the first.³⁶⁵ A Category Two JCE case exists when a group “adheres” to “systems of ill-treatment,” i.e., concentration camp scenarios.³⁶⁶ Again, all Category Two actors (like Category One actors) share equal blame and punishment.³⁶⁷ Like Category One cases, tribunals see Category Two as group guilt for criminal acts “within the common design” in that:

For this category, the prosecution need not prove a formal or informal agreement among the participants, but must demonstrate their adherence to a system of repression. To convict an individual under this rubric, the prosecution must prove the existence of an organized system of repression; active participation in the enforcement of this system of repression by the accused; knowledge of the nature of the system by the accused; and the accused's intent to further the system of repression.³⁶⁸

The third JCE category to plead and prove is the most controversial among legal commentators; because unlike Category One or Two, the Category Three method of prosecution punishes individuals for group crimes that happen “outside the common design,”

³⁶⁴ See *Tadic*, Case No. IT-91-1-A, Judgement, ICTY Appeals Chamber, ¶ 196; *Mutinovic*, Case No. IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 23.

³⁶⁵ See Danner & Martinez, *supra* note 38, at 105-06.

³⁶⁶ See *Tadic*, Case No. IT-91-1-A, Judgement, ICTY Appeals Chamber, ¶ 196; *Mutinovic*, Case No. IT-99-37-AR72, on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 23.

³⁶⁷ See Danner & Martinez, *supra* note 38, at 105-06.

³⁶⁸ See *Prosecutor v. Tadic*, Case No. IT-91-1-A, Judgement, ICTY Appeals Chamber, ¶ 196; *Prosecutor v. Mutinovic*, Case No. IT-99-37-AR72, on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 23 (May 21, 2003).

if these crimes are a “natural and foreseeable consequence of the effecting of that common purpose.”³⁶⁹ Category Three is thus considered an unconventional form of group guilt:

As an example of the kind of act that would fall within this third category, the Appeals Chamber offered the illustration of a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region ... with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of these civilians. The Appeals Chamber also noted that all participants in the common enterprise would be guilty of this murder if the risk of death was a “predictable consequence of the execution of the common design” and if they were “reckless or indifferent” to that risk.³⁷⁰

A number of legal commentators are uncomfortable with the prosecutorial potential of JCE liability in Category Three cases.³⁷¹ They feel it casts too large a net in shallow water.³⁷² Mindful of a lazy lure towards “guilt by association,” one scholar comments:

³⁶⁹ See *Tadic*, Case No. IT-91-1-A, Judgement, ICTY Appeals Chamber, ¶ 196; *Multinovic*, Case No. IT-99-37-AR72, on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 23.

³⁷⁰ See *Tadic*, Case No. IT-91-1-A, Judgement, ICTY Appeals Chamber, ¶ 196; *Multinovic*, Case No. IT-99-37-AR72, on Dragoljub Ojdanic's Motion Challenging Jurisdiction - Joint Criminal Enterprise, ICTY Appeals Chamber, ¶ 23.

³⁷¹ See Danner & Martinez, *supra* note 38, at 106-09.

³⁷² Critics of JCE levy similar, if not identical objections to those of RICO's statutory legitimacy. First, some initially questioned whether JCE could be read into the UN tribunals' jurisdictional statutes at all. Powles, *supra* note 38, at 1. This initial jurisdictional argument tapered off and subsided, as post-*Tadic* JCE decisions made it clear international tribunals stood by the doctrine as a judicial interpretation of their convening statutes, and to a lesser degree, judicial recognition of emerging customary international law. The second JCE objection questioned the legitimacy of JCE as a principle rooted in the traditions or jurisprudence of customary international law, because a number of national legal systems do not employ such a theory of criminal liability. Powles, *supra* note 38, at 6-7. Admittedly, this second objection has some empirical support to it; however, commentators eventually yield to the fact that ten years later, enough JCE tribunal judgments and appeals grounded in the UN jurisdictional statutes, now exist to establish JCE as a trial proof method for primary liability crimes. In the third academic objection to JCE, critics challenged the doctrine's causal scope,

Underlying these doctrinal questions are fears about the possible size and structure of future JCEs [Joint Criminal Enterprises]. When JCEs are very large or have circuitous command structures, the accused and triggerman can be far removed from each other. On one hand, the ad hoc Tribunals are faced with mass crimes whose size and complexity call for creative legal theories to enable their prosecution. Moreover, those most responsible for the crimes may hold political or other authority positions that distance them from triggermen without diminishing their culpability. On the other hand, fairness and the need to establish legitimacy oppose allowing JCE to become a doctrine of guilt by association.³⁷³

One thing JCE critics concede is that procedurally, JCE marshals tough mass violence evidence in group crime trials, and there are few better showcases of this issue than the JCE indictment of Slobodan Milosevic at The Hague.³⁷⁴ The ICTY trial of Slobodan Milosevic is perhaps the most high profile and controversial JCE prosecution at The Hague to date.³⁷⁵ Milosevic's case is unique in that he was indicted for sparking off mass violence³⁷⁶ in two

specifically in "Category Three" cases, as an unprecedented judicial step outside of due process bounds, by punishing an individual for a crime he did not specifically intend, but "risked," since it was nevertheless "foreseeable" and "committed" by his associates for a "common purpose." This third argument seems to raise a "guilt by association" objection in causal terms, as opposed to RICO (and the Antiterrorism and Effective Death Penalty Act) "guilt by association" denunciations, which invoke First Amendment protections. Powles, *supra* note 38, at 4; Danner & Martinez, *supra* note 38, at 106-09. Since the First Amendment does not protect violent conduct, this paper will reserve objections to the MMC's take on enterprise as a type of conspiracy offense (and the proposal to use enterprise as a *prima facie* way of proving terrorism) until Part IV. See *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) ("The First Amendment does not protect violence."); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (holds that violent demonstrations lose First Amendment protections). One concedes that laws prohibiting "sacrilegious" speech would simultaneously chill the freedoms of expression and religion in violation of the void for vagueness doctrine, under *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 502-06 (1952); yet, nothing in the MMC or MCA targets Muslims or Islam *per se*.

³⁷³ See O'Rourke, *supra* note 38, at 315.

³⁷⁴ See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004).

³⁷⁵ *Id.*

³⁷⁶ Milosevic was initially charged with committing "crimes against humanity" in Kosovo; however, his initial Kosovo indictment was later amended to include violating "the laws or customs of war" and "grave breaches of the Geneva Conventions" in Croatia, in addition to committing "genocide" in Bosnia. *Id.*

different ideological conflicts,³⁷⁷ as a *de jure* government executive – a head of state and a political party leader, i.e., a state-actor.³⁷⁸ The JCE concepts plead in the Milosevic indictment exemplify “individual criminal responsibility” in an immense group setting:

Slobodan MILOSEVIC is individually criminally responsible for the crimes referred to in Articles 2, 3, and 5 of the Statute of the Tribunal and described in this indictment, which he planned, instigated, ordered, committed, or in whose planning, preparation, or execution he otherwise aided and abetted. By using the word committed in this indictment the Prosecutor does not intend to suggest that the accused physically committed any of the crimes charged personally. Committing in this indictment refers to participation in a joint criminal enterprise as co-perpetrator.³⁷⁹

As part of the prosecutor’s *prima facie* case, the indictment goes on to first plead the enterprise’s purpose to commit an underlying codified offense:

The purpose of this joint criminal enterprise was the forcible removal of the majority of the Croat and other non-Serb population from the approximately one-third of the territory of the Republic of Croatia that he planned to become part of a new Serb-dominated state through the commission of crimes in violation of Articles 2, 3, and 5 of the Statute of the Tribunal.³⁸⁰

³⁷⁷ Milosevic’s transgressions accrued throughout the 1990s’ during the Yugoslav Wars, and in 1999 during the Kosovo War. *Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6.

³⁷⁸ Milosevic was both President of Serbia (1989-1997) and the Federal Republic of Yugoslavia (1997-2000). He also led Serbia’s Socialist Party from its inception in 1992. *Id.*

³⁷⁹ Prosecutor v. Milosevic, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004).

³⁸⁰ *Id.*

Next in the prosecutor's *prima facie* case, the indictment identifies the enterprise's alleged duration in calendar months, and its participants by name and alias, whether specifically known or unknown:

This joint criminal enterprise came into existence before 1 August 1991 and continued until at least June 1992. Individuals participating in this joint criminal enterprise included **Slobodan MILOSEVIC**, Borisav JOVIC, Branko KOSTIC, Veljko KADIJEVIC, Blagoje ADZIC, Milan BABIC, Milan MARTIC, Goran HADZIC, Jovica STANISIC, Franko SIMATOVIC, also known as "Frenki", Tomislav SIMOVIC, Vojislav SESELJ, Momir BULATOVIC, Aleksandar VASILJEVIC, Radovan STOJICIC, also known as "Badza", Zeljko RAZNATOVIC, also known as "Akan", and other known and unknown participants.³⁸¹

The indictment goes on to plead, in the alternative, whether the prosecution's theory entails a Category One, Category Two, or Category Three scenario:

The crimes enumerated in Counts 1 to 32 of this indictment were within the object of the joint criminal enterprise. Alternatively, the crimes enumerated in Counts 1 to 13 and 17 to 32 were the natural and foreseeable consequences of the execution of the object of the joint criminal enterprise and the accused was aware that such crimes were the possible outcome of the execution of the joint criminal enterprise.³⁸²

In defining the functional roles of the enterprise's participants, the indictment next itemizes each person's contributions towards the group's ideological objective:

In order for the joint criminal enterprise to succeed in its objective, **Slobodan MILOSEVIC** worked in concert with or through several individuals in the

³⁸¹ *Id.*

³⁸² *Id.*

joint criminal enterprise. Each participant or co-perpetrator within the joint criminal enterprise played his own role or roles that significantly contributed to the overall objective of the enterprise. The roles of the participants or co-perpetrators include, but are not limited to, the following.³⁸³

The indictment then pleads the *mens rea* for each underlying codified offense and participation in the enterprise itself, the *actus reus*:

Slobodan MILOSEVIC knowingly and willfully participated in the joint criminal enterprise, sharing the intent of other participants in the joint criminal enterprise or aware of the foreseeable consequences of their actions. On this basis, he bears individual criminal responsibility for these crimes under Article 7 (1) of the Statute of the Tribunal in addition to his responsibility under the same Article for having planned, instigated, ordered or otherwise aided and abetted in the planning, preparation and execution of these crimes... The accused and other participants in the joint criminal enterprise shared the intent and state of mind required for the commission of each of the crimes charged in counts 1 to 32.³⁸⁴

Milosevic died before his JCE prosecution was formally finished, but the case's investigation, pleading, and trial preparation were the most extensive to date.³⁸⁵ It involved

³⁸³ The same is true of Milosevic himself. Note the different types of "participation" characterized:

Slobodan MILOSEVIC, acting alone and in concert with other members of the joint criminal enterprise, participated in the joint criminal enterprise in the following ways: a) provided direction and assistance to; b) provided financial, material and logistical support for; c) directed organs of ; d) participated in the formation, financing, supply, support and direction of; e) participated in providing financial, logistical, and political support and direction to; f) participated in the planning and preparation of the take-over of; g) exerted effective control or substantial influence over; h) provided financial, logistical and political support to; i) effectively ordered; j) directed, commanded, controlled, or otherwise provided substantial assistance or support to; k) directed, commanded, controlled, or otherwise provided substantial assistance or support to; l) financed; m) controlled, contributed to, or otherwise utilized. *Id.*

³⁸⁴ *Id.*

³⁸⁵ See note 299, *supra*.

thousands of ethnic victims, dozens of associates, and several countries.³⁸⁶ These trial concerns translate to a terrorism prosecution of Usama bin Laden for 9/11; one must first prove that Al-Qaeda's suicide attacks were conducted by a criminal enterprise.³⁸⁷ To do so using the international model of criminal enterprise, one must interpret the *Tadic* decision.³⁸⁸

When analyzing the legal elements of criminal enterprise liability from an Old World perspective, the *Tadic* appellate judgment is to the international mass atrocity model, what the *Darden* appellate judgment is to the American association-in-fact model.³⁸⁹ Consequently, *Tadic*'s conceptual framework is where MCA prosecutors can compare and contrast any advantages or shortcomings, between proving an Al-Qaeda terrorist attack as either a mass atrocity's instrumentality, or an association-in-fact's transaction.³⁹⁰ Factually, *Tadic* is an enterprise case whose ideological violence contemporaneously impacts nationalities against the backdrop of a morally ambiguous failed state armed conflict; a

³⁸⁶ *Id.*

³⁸⁷ See MMC, *supra* note 14, Pt. IV, § 950v(b)(24) and (28)b and c.

³⁸⁸ During the course of the *Tadic* trial, ICTY heard a total of 125 witnesses, received over 500 exhibits in evidence, and accumulated more than 6,000 pages of transcripts, thereby finding the accused guilty and imposing a sentence of twenty years. See BRIAN TITTEMORE, NEWS FROM THE INTERNATIONAL TRIBUNALS, ICTY, UPDATE OF THE TADIC TRIAL, available at <http://www.wcl.american.edu/hrbrief/v4i1/tribun41.htm> (last visited Apr. 5, 2007).

³⁸⁹ See *United States v. Darden*, 70 F.3d 1507, 1520 (8th Cir. 1995).

³⁹⁰ See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgment, ICTY Appeals Chamber, ¶ 196 (July 15, 1999).

prosecutorial setting reminiscent of 9/11's eve and its aftermath.³⁹¹ Unlike *Darden's* JLO-MTSA drug-ring back in Saint Louis; however, *Tadic's* enterprise is one of pure violence.³⁹²

Dusko Tadic was charged with crimes against humanity during the Yugoslav war, arising out of Muslim Serb deaths, along various prison camps in northwestern Bosnia.³⁹³ The case's initial phase was fairly ordinary³⁹⁴ - prosecutors alleged Tadic was legally responsible for detainees he personally executed or kicked to death; but on appeal, the record became fairly esoteric once the defense filed a flurry of dispositive motions assigning jurisdictional and substantive errors.³⁹⁵ The defense's main factual issue was that Tadic had not personally killed every Muslim alleged, and in their view, this translated into a number of

³⁹¹ *Id.*

³⁹² See *Tadic*, Case No. IT-94-1A, Judgement, ICTY Appeals Chamber, ¶ 196.

³⁹³ Specifically, the Prijedor region, including the Omarska, Trnopolje and Keraterm detention camps. *Id.*

³⁹⁴ Relatively ordinary, that is. At trial, a Balkans expert from London University testified behind bulletproof glass on behalf of the *Tadic* prosecution. Projecting documents onto the courtroom's computer screens and television monitors, Dr. James Gow related how Yugoslavia's republics and ethnic groups had devolved into an assimilative identity crisis, following the death of Tito in 1980: "Among Serbian intellectuals at that time, the question was not only of the status and the sovereignty of Serbia, but also of the position of the Serbs living outside of the republic of Serbia." Dr. Gow had no personal knowledge of Tadic's actions with respect to the Muslim decedents; he merely set the ideological tone of the alleged violence as an academic matter - that Yugoslavia had fragmented into Serbia, Bosnia, Croatia, and Slovenia with racist results. Dr. Gow's encased expert testimony was not the only unusual safeguard for *Tadic* trial witnesses; some declarants were literally reduced to paper. On a daily basis, the political tension surrounding *Tadic's* trial translated into some truly extraordinary discovery measures and prosecutorial motions. To prevent reprisal, the ICTY Chamber issued numerous protective orders that withheld the identities of prosecution witnesses from the defense, on the condition that prosecutors provide the accused with an unredacted copy of each unidentified witnesses' sworn confidential testimony. This created some practical discovery problems, once the defense requested access to exhibits used by the prosecution, to develop an unidentified witness' confidential testimony. Both measures typify trial concerns germane to MCA terrorism prosecutions. See GILLIAN SHARPE, YUGOSLAV WAR CRIMES UPDATE, VOICE OF AMERICA (May 8, 1996), available at <http://www.hri.org/news/usa/voa/1996/96-05-08.voa.html>; Prosecutor v. Brdjanin and Tadic, ICTY Trial Chamber II, Decision on Prosecution Application (Apr. 2, 2001), available at <http://www.un.org/icty/brdjanin/trialc/decision-e/10402DE215230.htm>.

³⁹⁵ See United Nations Homepage, ICTY, Tadic Appeal Judgement (July 15, 1999), available at <http://www.un.org/icty/tadic/appeal/judgement/index.htm> (last visited Apr. 4, 2007).

criminal responsibility issues.³⁹⁶ The ICTY Appellate Chamber conceded that Tadic had not personally killed every Muslim Serb alleged, but nevertheless found Tadic had otherwise facilitated the victims “seizure, murder, and maltreatment” outside of the three detention camps.³⁹⁷ The Chamber noted that Tadic’s open brutality inside the camps instigated others around him to do the same outside the camps, in ideological support of the Serb uprising against Bosnia’s Muslim-led government.³⁹⁸ In its decision, *Tadic*’s appellate judgment enumerated the three elements of the liability concept now known as “joint criminal enterprise” or JCE: (1) “a plurality of persons;” (2) “a common plan, design or purpose which [sic] amounts to or involves the commission of a crime provided for in the Statute” which “need not be previously arranged or formulated, but may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise;” and (3) “participation (direct or indirect) of the accused in the common design.”³⁹⁹ Recall that *Tadic* is a case convened under the United Nations Charter, a social compact that protects both human rights and international peace.⁴⁰⁰

Thus, *Tadic*’s mandate implies that in contrast to an American accountant view of organized crime, the international model of criminal enterprise may be described as an

³⁹⁶ *Id.*

³⁹⁷ *Id.*

³⁹⁸ *Id.*

³⁹⁹ See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 227(i),(ii) (July 15, 1999); Prosecutor v. Krnojelac, Case No. IT-97-25-T, Judgment, ¶ 80 (Mar. 15, 2002).

⁴⁰⁰ See U.N. Charter pmbl.

insurer's view of human catastrophe.⁴⁰¹ In generic terms, this actuarial vision of criminal enterprise assesses injuries between communities to ultimately decide whether the public faces a shared menace.⁴⁰² As an evidence matrix, a joint criminal enterprise packages persons, places, functions, and effects.⁴⁰³ In a mass atrocity case like *Milosevic*, *Tadic*, or *Akayesu*, the factual focus of a joint criminal enterprise is dehumanization, if not outright extermination, so any evidence of an individual's participation within a suspect group is characterized as an instrumentality.⁴⁰⁴ Take 9/11 for instance.

On 9/11, Al-Qaeda's simultaneous attacks on multiple U.S. targets culminated as "a national state of emergency," against "the continued and immediate threat of (terrorist) attacks."⁴⁰⁵ Congress followed up the President's "national emergency" proclamation with a joint resolution authorizing him to employ "all necessary and appropriate force" to "prevent any future acts of international terrorism against the United States."⁴⁰⁶ In doing so, Congress specifically characterized the 9/11 terrorist attacks as "acts of treacherous violence" and "grave acts of violence," which "continue to pose an unusual and extraordinary threat to the

⁴⁰¹ Compare notes 38 and 28, *supra*. (Powles, Danner, Martinez, and O'Rourke address humanitarian concerns in the JCE cases reviewed and describe how JCE seeks to make the victim's dignity whole; whereas, Brenner describes the American compound liability framework as a sovereign's need to audit illicit revenue activities.).

⁴⁰² *Id.*

⁴⁰³ *Id.*

⁴⁰⁴ See *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004); *Tadic*, Case No. IT-94-1-A, Judgment, ICTY Appeals Chamber, ¶ 196 (July 15, 1999); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment, (Sept. 2, 1998).

⁴⁰⁵ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001); Authorization for Use of Military Force Joint Resolution, 10 U.S.C. 836 (1998); S.J. Res. 23 107th Cong. (2001).

⁴⁰⁶ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001); Authorization for Use of Military Force Joint Resolution, 10 U.S.C. 836 (1998); S.J. Res. 23 107th Cong. (2001).

national security and foreign policy of the United States.”⁴⁰⁷ So far, it looks like a mass atrocity, a potential affront to human rights, and a potential breach of international peace.⁴⁰⁸

Recall that UN tribunals decide JCE cases in terms of a person’s “participation,” because that is the word used in their jurisdictional statutes to define “individual criminal liability” for each codified crime; that is, UN judges used JCE to determine if the individual and the group were one and the same with respect to the codified jurisdictional crime.⁴⁰⁹ Al-Qaeda’s brand of jihadist terrorism presents a special type of criminal cooperative effort that belies a formal pecking order, like that of organized crime in America, because it is not structured like that.⁴¹⁰ Al-Qaeda is an international, de-centralized, and clandestine cell network.⁴¹¹ To some degree, the fluid, secret way Al-Qaeda inflicts casualties fits better under the UN tribunals’ mass atrocity prosecutorial model, than under a strict application of the American association-in-fact model.⁴¹² This is because Al-Qaeda’s field operations at the

⁴⁰⁷ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001); Authorization for Use of Military Force Joint Resolution, 10 U.S.C. 836 (1998); S.J. Res. 23 107th Cong. (2001).

⁴⁰⁸ See U.N. Charter pmb.; Fry, *supra* note 270, at 183-99.

⁴⁰⁹ See O’Rourke, *supra* note 38, at 310, 312-13, 317, 320-21, 325; Powles, *supra* note 38, at 4; Danner & Martinez, *supra* note 38, at 104-08.

⁴¹⁰ See 9/11 COMMISSION REPORT, *supra* note 5, at 363; KSM Testimony, *supra* note 82, at 55-56; Khallad Testimony, *supra* note 82, at 1.

⁴¹¹ Network defined in this context as a system of violence that does not rely in hierarchical levels, but functional nodes. See 9/11 COMMISSION REPORT, *supra* note 5, at 363; GURATNA, *supra* note 118, at 295-97; KSM Testimony, *supra* note 82, at 24-27.

⁴¹² See 9/11 COMMISSION REPORT, *supra* note 5, at 339-44; see also JAMESTOWN FOUNDATION, *supra* note 118, at 36-39; United States v. Moussaoui, Indictment, (E.D. Va. 2001), *supra* note 223; United States v. Padilla, Superseding Indictment (S.D. Fl. 2005) *supra* note 223; UBL Indictment, *supra* note 3, at 7-9.

clandestine cell level manifest more like instrumentalities than transactions.⁴¹³ This is especially true of martyr attacks like 9/11, since in those cases, the transaction's preparatory purpose literally disappears into thin air, while the instrumentality's first, second, and third order effects remain with everyone who survives the ordeal.⁴¹⁴ The dual nature of terrorism as a domestic and international hate crime, that threatens national security in a manner tantamount to genocide or crimes against humanity, calls for a worldly criminal enterprise approach to MCA prosecution.⁴¹⁵ One that factually quantifies the transactional number of associates at issue, like the CCE and CFCE, yet holistically accounts for second and third order effects of dehumanizing violence, like JCE approach used in United Nations tribunals.⁴¹⁶ That universal approach is considered next.

C. Proposal: Use Criminal Enterprise to Prove a *Prima Facie* Terrorism Case

⁴¹³ See *United States v. Usama Bin Laden*, 109 F.Supp. 2d 211, 213-22 (S.D.N.Y., 2001) (prosecution charged each Al-Qaeda operative in the Embassy bombings as part of a different "cell" function in support of the Embassy bombing operations: (1) target approval; (2) reconnaissance and surveillance; (3) logistics; and (4) demolitions.); see also 9/11 COMMISSION REPORT, *supra* note 5, at 60, 65, 68-69, 109, 116, 127-28, 163-65.

⁴¹⁴ The 9/11 attacks not only killed those aboard planes and inside buildings, they also traumatized rescuers, bystanders, and next-of-kin; moreover, scientists are still studying the toxic debris effect of the planes' explosive emissions on the environment and residents near the crash sites, to include newborns. See *Fallout: The Health Impact of 9/11* (BBC World broadcast May 2006). Economically, the 9/11 attacks shut down the New York Stock Exchange, the American Stock Exchange, and NASDAQ for six days, thereby resulting in the biggest single day point drop in Dow Jones history, as U.S. stocks lost \$1.2 trillion in market value that week alone. This tally does not include New York City's loss of public services and surrounding infrastructure, or site clean-up and reconstruction. See FLOYD NORRIS JONATHAN FUERBRINGER, A DAY OF TERROR: THE MARKETS; STOCKS TUMBLE ABROAD; EXCHANGES IN NEW YORK NEVER OPENED FOR THE DAY, N.Y. TIMES (Sept. 12, 2001), available at <http://select.nytimes.com/gst/abstract.html?res=F30C15FF395C0C718DDDA00894D9404482&n=Top%2fReference%2fTimes%20Topics%2fOrganizations%2fN%2fNew%20York%20Stock%20Exchange%20>

⁴¹⁵ See Fry, *supra* note 270, at 183-99.

⁴¹⁶ See O'Rourke, *supra* note 38, at 307-12; Powles, *supra* note 38, at 5-6; Danner & Martinez, *supra* note 38, at 104-08; and Brenner, *supra* note 28, at 253-55.

For the sake of constitutional clarity and moral legitimacy, the Secretary of Defense should consider adopting a more versatile approach to the use of criminal enterprise in the Manual for Military Commissions; one which unifies the current American association-in-fact model and the international mass atrocity model, to fit the dual nature of terrorism as a domestic and international offense, and the dual nature of MCA jurisdiction, as both a federal and law of war penal statute.⁴¹⁷ The American association-in-fact model is a compound liability approach; that is, being in an association-in-fact enterprise is not a crime *per se*, but such an enterprise can conspire to commit a white collar offense, whether a predicate or object one, which is why an association-in-fact conspiracy, like a MCA conspiracy, requires an overt act to factually distinguish between the two.⁴¹⁸ For example, under RICO, an association-in-fact enterprise need not commit a conspiracy to racketeer; it can just racketeer, though some ambitious prosecutors like to pursue both tracks.⁴¹⁹ Since RICO targets

⁴¹⁷ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified at 10 U.S.C. §§ 948a – 950p); MMC, *supra* note 14, Pt. IV, § 950v(b)(24) and (28)b and c; Fry, *supra* note 270, at 183-99; *but see*, Kim Lane Scheppele, *Terrorism and the Constitution: Civil Liberties in a New America: Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1023-68 (2004) (critiquing the Executive Branch’s systemic response to 9/11 with emphasis on the PATRIOT Act and military commissions); *cf.*, Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 32-36 (2003) (juxtaposing civil rights and international terrorism views over the establishment of terrorism courts and their effect on due process, arguing that “The essential characteristic of the court, wherever placed, must be an independent forum from where all individuals accused of a ‘terrorist affiliation’ – citizen or non-citizen, unlawful or lawful combatant – would receive due process and a civilian judicial review.”).

⁴¹⁸ See, e.g., Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 33 (2003) (“[A]n important theory of the case in terrorism is a terrorist conspiracy analogous to a ‘criminal enterprise’ under RICO.”).

⁴¹⁹ See Brenner, *supra* note 28, at 249-53.

profiteers, that statute's packaging of persons as an association-in-fact enterprise fashions criminal snapshots in terms of transactions.⁴²⁰

In contrast, the international mass atrocity model is a primary liability approach to enterprise prosecutions.⁴²¹ The United Nations' jurisdictional statutes have no independent conspiracy or enterprise crime, because they do not require predicate acts to prove mass atrocities, as one need not factually distinguish the type of dehumanizing violence inflicted on noncombatants during a mass atrocity.⁴²² This is a practical consequence of the United Nations' mandate; if one is murdered as part of a hate crime, from a deterrence standpoint, it makes little evidentiary difference that one was also beaten, raped, and/or tortured beforehand, because the underlying policy is to stop the inhuman/extermination treatment of innocent people, and murder is as bad as it gets.⁴²³ In such a paradigm, a single victim's personal affront, as one of many, limits the individual parceling of mass injury evidence blow-by-blow.⁴²⁴ An international JCE model does not look at crime scene evidence in the same transactional way its American RICO counterpart does; it is the logical and factual inverse, JCE is holistic.⁴²⁵ The international JCE model sums up a scene's forensics for

⁴²⁰ *Id.*

⁴²¹ See O'Rourke, *supra* note 38, at 323; Powles, *supra* note 38, at 4-5; Danner & Martinez, *supra* note 38, at 104-08; and Brenner, *supra* note 28, at 249-55.

⁴²² See Rome Statute, *supra* note 272.

⁴²³ See Rome Statute Explanatory Memorandum, *supra* note 278, at vol. 1, 360.

⁴²⁴ See Powles, *supra* note 38, at 6-7 (discussing Essen Lynch and Borkum Island cases.); Danner & Martinez, *supra* note 38, at 133-35.

⁴²⁵ See the charges plead in *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Second Amended Indictment, ¶ 6 (July 28, 2004), set out in Pt. III, *supra*.

evidence of hate's mass effects, it does not divide it.⁴²⁶ So in trial presentation terms, JCE is a means to substantiate that an enterprise member participated as a principal in that dehumanization/extinction, and should be so punished for a mass atrocity.⁴²⁷

This dissertation favors the JCE holistic approach, but sees the need to inject post-RICO statutory refinements in an American setting; this paper advocates quantifying a CFCE-like quorum of at least four participants to prosecute MCA terrorism as a criminal enterprise, in order to avoid civil liberty issues and maximize the tribunals' legitimacy.⁴²⁸ There are three main reasons for doing so: (1) one need not conspire to commit MCA terrorism, but Al-Qaeda gets away with it, because they compartmentalize suicide attacks - they do not use real names, do not disclose targets, outsource logistical support, and change martyrs at the last minute; (2) it is forensically hard, if not legally impossible, to charge a blown up mujahadeen as an un-indicted co-conspirator to prove his brother's overt Jihad acts; and (3) enterprise as a stand alone type of MCA conspiracy, without a hard and fast quorum of bad guys, sends a policy message that the United States is looking to punish jihadist gatherings or communications, in an "overt" preparatory stage that does not fit

⁴²⁶ *Id.*

⁴²⁷ *Id.*; see also Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶ 195 (July 15, 1999).

⁴²⁸ See Pt. IV, *infra*; see also Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 30-36 (2003); Brenner, *supra* note 28, at 249-55.

solicitation, attempt, or accessory.⁴²⁹ In this author's view, that is a dangerous paradigm to wish for, as it could sabotage the constitutional legitimacy of the Global War on Terror.⁴³⁰

A better policy approach for MCA terrorism prosecutions is to use enterprise, not as an alternate type of conspiracy offense to be charged and punished separately from the crime of terrorism, but as a means to proving the *prima facie* elements of a terrorism offense.⁴³¹ This approach reflects the dual nature of terrorism as a domestic and international hate crime, factually tantamount to extermination efforts typical of genocide and/or crimes against humanity.⁴³² It accounts for and protects an accused's unlawful alien enemy combatant status per *Hamdan* and international law.⁴³³ To do this, the Manual for Military Commissions (MMC) should be amended to unequivocally state that criminal enterprise will serve as an evidentiary method for MCA prosecutions, and not a crime *per se*.⁴³⁴ The amendment should clarify that criminal enterprise will serve as a packaging of persons and common purpose, to substantiate the ultimate hate crime of terrorism before a panel, and punish all players deemed terrorists as principals.⁴³⁵ Such a prosecutorial policy is firmly

⁴²⁹ See 9/11 COMMISSION REPORT, *supra* note 5, at 78-90 (exploring law enforcement investigative constraints); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761, 2785 n.40 (2006); UBL Indictment, *supra*, note 3.

⁴³⁰ See Pt. IV, *infra*.

⁴³¹ See O'Rourke, *supra* note 38, at 307, 322-25 (criticizing Bradnin case for reducing JCE to a conspiracy agreement); Powles, *supra* note 38, at 7-8 (explaining prosecutorial pleading issues for JCE cases); Danner & Martinez, *supra* note 38, at 142-46; see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761, 2785 n.40 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁴³² See Fry, *supra* note 270, at 183-99.

⁴³³ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761-63 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁴³⁴ MMC, *supra* note 14, Pt. IV, § 950v(28)b. and c.

⁴³⁵ *Id.*; see also, MMC, *supra* note 14, Pt. IV, § 950q.

grounded in fact.⁴³⁶ The indiscriminate nature of Al-Qaeda's violence to wage bin Laden's Jihad, blurs the equitable need for the commissions to discriminate criminal sentences between Al-Qaeda's ranks, because yesterday's martyr begets today's trainee and tomorrow's volunteer.⁴³⁷ Though amending the MMC is not necessary to jurisdictionally import JCE into a MCA terrorism trial through the law of war; as Part IV explores next, amending the MMC will likely preclude constitutional confusion and tension over what enterprise means in a MCA federal conspiracy context.

IV. Terrorism: Potential Defense Objections to MMC Enterprise

Part I mentioned that post-MCA unlawful combatants lack interlocutory *habeas* petition rights to dispute their detainment and possible prosecution status; they must first exhaust their administrative rights under the CRST process.⁴³⁸ The Supreme Court begrudgingly acknowledged this unresolved remedy hurdle that exists since *Hamdan*, in its recent *Boumediene v. Bush* decision; however, the Court was quick to note it was anxious to ultimately resolve the question of whether the Constitution allowed the MCA and the Detainee Treatment Act (DTA) to divest Guantanamo detainees of *habeas* rights.⁴³⁹

⁴³⁶ See 9/11 COMMISSION REPORT, *supra* note 5, at 365-367.

⁴³⁷ *Id.*; see also, App. F, *infra*.

⁴³⁸ See Pt. I, *supra*.

⁴³⁹ *Boumediene v. Bush*, 2007 U.S. LEXIS 3783. Foreshadowing their ultimate resolve on this burning issue, the Court's dissent noted in *Boumediene*:

Here, as in *Hamdan*, petitioners argue that the tribunals to which they have already been subjected were infirm (by, *inter alia*, denying Petitioners counsel and access to evidence, Pet. for Cert. in No. 06-1195, p. 7). *Hamdan, supra*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (*slip op.*, 35-36). Here, as in *Hamdan*, petitioners assert that these procedural infirmities cannot be

Therefore, this section assumes *arguendo* that an unlawful combatant prosecuted as an alleged MCA conspirator, may one day mount a *Hamdan-Boumediene* “infirm tribunal” attack on MCA enterprise trials, based on the MMC’s editorial shortcomings.⁴⁴⁰

At the outset, this paper noted that the MMC currently crafts criminal enterprise liability as a type of conspiracy not enumerated or defined in the MCA, a yet untested prosecutorial approach.⁴⁴¹ One may foresee that potential defense objections to the current MMC’s crafting of criminal enterprise liability, as a type of MCA conspiracy offense, could generally arise in one of three forms: (1) authority; (2) grammar; and (3) logic.⁴⁴² First, an objection to legal authority insists that the implementing manual has added, by executive means, federal crime elements not found in the enacted penal statute; a common law practice frowned upon by Supreme Court precedent.⁴⁴³ Second, an objection to conceptual grammar contends that the implementing manual fails to define the conduct it purports to criminalize;

corrected by review under the DTA which provides for no augmentation of the record on appeal and, as noted above, will provide no remedy for any constitutional violation. See DTA § 1005(e)(2)(C), 119 Stat. 2742; *476 F.3d at 1005* (Rogers, J., dissenting). Here, as in *Hamdan, supra*, 126 S. Ct. 2749, 165 L. Ed. 2d 723 (*slip op.*, at 25), petitioners have a compelling interest in assuring in advance that the procedures to which they are subject are lawful. And here, *unlike Hamdan*, the military tribunals in Guantanamo have completed their work; all that remains are the appeals. For all these reasons, I would grant the petitions.

⁴⁴⁰ *Id.*; see also AMY GOLDSTEIN, JUSTICES WON’T HEAR DETAINEE RIGHTS CASES – FOR NOW, WashingtonPost.com, National Security, Page A09 (Apr. 3, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/02/AR2007040200470.htm> (last visited Apr. 6, 2007).

⁴⁴¹ MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

⁴⁴² See, e.g., Ernest Gellhorn, Symposium: Justice Breyer on Statutory Review and Interpretation, 8 Admin. L.J. Am. U. 755, 756-64 (1995) (exploring analytical approaches to Supreme Court jurisprudence between the doctrinal paradigms of textualism, judicial deference, and the interpretive role of legislative history.).

⁴⁴³ See *Bass v. United States*, 404 U.S. 336, 347-49 (1971) (rule of lenity limits statutory construction of codified offense and precludes common law creation of an unlegislated crime.).

thereby calling into question the enacted penal statute's ambiguity, as vague on its face.⁴⁴⁴ Lastly, an objection to logic challenges the MMC's mandate for the term enterprise and attacks the vagueness of that crime, as applied, not simply as written, by showing that such a type of conspiracy could punish everyday, innocuous acts.⁴⁴⁵ In this author's mind, these three potential defense challenges to the MMC's current criminal enterprise formula, will force Trial Counsel to contrast the constitutional pedigree between RICO and the MCA.⁴⁴⁶

RICO enjoys great judicial deference and legislative tenure, which the MCA has not yet earned.⁴⁴⁷ Part of that judicial deference arises from RICO's built-in liberal interpretation clause, section 904(a); while on the Congressional side, RICO's continued expansion of its predicate crimes arsenal through amendments, "signals legislative tenure and political satisfaction with *stare decisis*."⁴⁴⁸ However, in view of *Hamdan* and the latest *habeas* petitions from Guantanamo Bay detainees, it is questionable whether the politically charged MCA will lead RICO's charmed legal existence.⁴⁴⁹ The MCA has no built-in liberal interpretation clause, but Congress' 9/11 track record begs for an amiable judicial

⁴⁴⁴ See *Lanzetta v. New Jersey*, 306 U.S. 451, 455-58 (1939).

⁴⁴⁵ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-71 (1972) (vagrancy ordinance is void for vagueness, when it: (1) failed to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by statute; (2) encouraged arbitrary and erratic arrests and convictions; (3) criminalized activities that by modern standards are normally innocent; and (4) placed almost unfettered discretion in police hands.).

⁴⁴⁶ See, e.g., Brian Slocum, *RICO and the Legislative Supremacy Approach to Federal Criminal Lawmaking*, 31 LOY. U. CHI. L.J. 639, 641-48 (2000).

⁴⁴⁷ *Id.*

⁴⁴⁸ *Id.*

⁴⁴⁹ See AMY GOLDSTEIN, JUSTICES WON'T HEAR DETAINEE RIGHTS CASES – FOR NOW, *WashingtonPost.com*, National Security, Page A09 (Apr. 3, 2007), available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/04/02/AR2007040200470.htm> (last visited Apr. 6, 2007).

interpretation of its 9/11 Joint Resolution, and its post-9/11 construction of Chapter 47, UCMJ, with respect to MCA tribunals.⁴⁵⁰ Accordingly, one must consider some potential defense objections, the first of which is that the implementing manual's formulation of enterprise, as a type of conspiracy, is not an offense at all under the enacted penal statute.

A. MMC Enterprise is not a Codified Crime

The first defense objection to MCA enterprise liability, as implemented by the Departments of Defense, is that the Executive Branch's manual does not track Congress' penal statute.⁴⁵¹ This argument invokes both the Separation of Powers doctrine and Due Process clauses.⁴⁵² Defense Counsel would argue that a fair reading of the MCA's conspiracy section reveals the MMC gratuitously added "enterprise" language, which Congress did not legislate as jurisdictional offense.⁴⁵³ Counsel would point to the fact that there is no language in the statute or the implementing manual, which incorporates by reference, the compound liability framework of RICO, the CCE, the CFCE, or any other federally enacted penal definition of enterprise, as conspiracy *a la carte*.⁴⁵⁴ Counsel would allege the MMC purports to

⁴⁵⁰ See Joint Resolution, *supra* note 163; Geoffrey S. Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1,11; see also LTC (S) Joseph P. Blake, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency and the International Law of Armed Conflict*, 55 A.F. L. REV. 1-15 (2004); but see Kim Lane Scheppele, *Terrorism and the Constitution: Civil Liberties in a New America: Law in a Time of Emergency: States of Exception and the Temptations of 9/11*, 6 U. PA. J. CONST. L. 1001, 1023-68 (2004).

⁴⁵¹ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified 10 U.S.C. §§ 948a – 950p) and MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

⁴⁵² See MMC, *supra* note 14, Pt. IV, § 950v(28)b and c; U.S. CONST. AMEND. V, XIV; U.S. CONST., ART. III.

⁴⁵³ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified 10 U.S.C. §§ 948a – 950p) and MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

⁴⁵⁴ See, e.g., Brenner, *supra* note 28, at 249-55.

enumerate enterprise terms as alternate *prima facie* elements to a MCA federal conspiracy charge, i.e., a type-two variant to a criminal agreement.⁴⁵⁵ As such, the MMC's editorial amplification of MCA conspiracy as a criminal enterprise, instead of a criminal agreement, would seem to run afoul of *United States v. Bass*.⁴⁵⁶ This is a strong defense argument.

As a matter of precedent, *Bass* is the Supreme Court's textual gospel for interpreting federal crime statutes, by applying the following judicial canons of statutory construction:

First, as we have recently reaffirmed, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). See also *Ladner v. United States*, 358 U.S. 169, 177 (1958); *Bell v. United States*, 349 U.S. 81 (1955); *United States v. Five Gambling Devices*, 346 U.S. 441 (1953) (plurality opinion for affirmance). In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.). See also *United States v. Cardiff*, 344 U.S. 174 (1952). Second, because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurter and the Reading of Statutes, in *Benchmarks* 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. Here, we conclude that Congress has not "plainly and unmistakably," *United States v. Gradwell*, 243 U.S. 476, 485 (1917), made it a federal crime for a

⁴⁵⁵ See MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

⁴⁵⁶ See *Bass v. United States*, 404 U.S. 336, 347-49 (1971).

convicted felon simply to possess a gun absent some demonstrated nexus with interstate commerce.⁴⁵⁷

Trial Counsel could theoretically proffer two MCA counter-arguments to a *Bass* objection by the defense: (1) the MMC does not add conspiracy elements, it just offers evidentiary guidance to prove up a MCA conspiracy; or (2) the MMC does add conspiracy elements, but the Secretary of Defense consulted with the Attorney General per the MCA, and is thus entitled to Agency deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁴⁵⁸ The latter position seems to offer Trial Counsel the best chance of success, given the Court's guidance for narrowly tailored rule of lenity readings, and its two-pronged judicial deference analysis: (1) whether "Congress has directly spoken to the precise question at issue," and (2) "the statute is silent or ambiguous with respect to the specific issue," meriting judicial deference to an agency's "reasonable interpretation," in order to "give effect to the unambiguously expressed intent of Congress."⁴⁵⁹ Since the MCA does not mention an enterprise form of conspiracy, and the Secretary of Defense consulted with the Attorney General per MCA terms, *Chevron* agency deference is due to the MMC, provided

⁴⁵⁷ See *id.* at 347-49; see also Ernest Gellhorn, *Symposium: Justice Breyer on Statutory Review and Interpretation*, 8 ADMIN. L.J. AM. U. 755, 756-64 (1995) (exploring analytical approaches to Supreme Court jurisprudence between the doctrinal paradigms of textualism, judicial deference, and the interpretive role of legislative history.).

⁴⁵⁸ See *Chevron v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984) (If a statute grants power to an administrative agency and is ambiguous with respect to the specific issue, courts will defer to the Agency's reasonable interpretation of that statute.).

⁴⁵⁹ *Id.* Note that the rule of lenity is a textualist canon of statutory construction used by American judges; that says when construing an ambiguous criminal statute the court should resolve the ambiguity in favor of the defendant. In turn, the canon of constitutional avoidance says - if a statute is susceptible to more than one reasonable construction, courts should choose a logical interpretation that avoids raising issues under the United States Constitution. *Id.*

“Congress has directly spoken to the precise question at issue.”⁴⁶⁰ So the question arises, is the MMC’s textual interplay between enterprise and conspiracy on Congressional point? The answer could be “yes,” if Trial Counsel can develop a legislative nexus between the MCA’s enactment and prior enterprise liability within the United States Code’s framework.⁴⁶¹ In doing so, the Trial Counsel will likely have to distinguish *Hamdan*’s pre-MCA jurisdictional rebuke of conspiracy as a military tribunal offense.⁴⁶² Trial Counsel will also need to explain why enterprise is not a means to conspire in the more senior Manual for Courts-Martial, but somehow it is under the more junior Manual for Military Commissions.⁴⁶³ This legislative crossroad brings up the second potential defense objection, the conceptual grammar objection – the implementing manual fails to define the conduct it purports to criminalize; thereby calling into question the enacted penal statute’s ambiguity, as vague on its face.

B. Joining a MMC Enterprise is Joining a Gang

⁴⁶⁰ *Id.*

⁴⁶¹ See Harvey Rishikof, *Is It Time for a Federal Terrorist Court? Terrorists and Prosecutions: Problems, Paradigms, and Paradoxes*, 8 SUFFOLK J. TRIAL & APP. ADV. 1, 33 (2003) (“[A]n important theory of the case in terrorism is a terrorist conspiracy analogous to a ‘criminal enterprise’ under RICO.”); *United States v. Usama Bin Laden*, 93 F.Supp. 2d 484-87 (S.D.N.Y., 2001) (denying defendants’ motion to dismiss Count I for failure to state a violation of 18 U.S.C. § 2332(b), conspiring to kill United States nationals, in connection with the August, 1998 bombings of the United States Embassies in Nairobi, Kenya and Dar es Salaam, Tanzania. Reviewing the statute’s legislative history, the Court held that American nationals killed outside the continental United States still qualified as conspiracy victims.); see also *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761, 2785 n.40 (2006) (distinguishing law of war application to conspiracy as a substantive crime charged by an military tribunal, from joint criminal enterprise liability for committing a codified offense charged by an international ad hoc tribunal.).

⁴⁶² See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2761, 2785 n.40 (2006); see also George P. Fletcher, *The Hamdan Case and Conspiracy as a War Crime*, I.C.J. 4 3 (442), (2006); Geoffrey S. Corn, *Hamdan, Fundamental Fairness, and the Significance of Additional Protocol II*, ARMY LAW., Aug. 2006, at 1,11.

⁴⁶³ See UCMJ art. 81 and art. 116 (2005); see also, MMC, *supra* note 14, Pt. IV, at § 950v(28)b and c.

A patent wordsmith objection to the MMC’s associative term, enterprise, is best illustrated by the facts of *Lanzetta v. New Jersey*, a Supreme Court case where a RICO clone statute whose legislative purpose was “the pursuit of criminal enterprises,” boldly purported to criminalize the act of joining a “gang”:

[A]ny person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared to be a gangster.⁴⁶⁴

The Court took exception with the *Lanzetta* statute’s conceptual grammar on due process grounds, because the crime’s context offered no “comprehensible course of conduct,” despite formulating a “gang,” as a group “consisting of two or more persons.”⁴⁶⁵ In doing so, the Court focused on the group’s functional label and found the law inadequate on its face, since “the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.”⁴⁶⁶ In other words, the Court applied the void for vagueness doctrine to decipher the penal law’s textual and conceptual ambiguities.⁴⁶⁷

⁴⁶⁴ See *Lanzetta v. New Jersey*, 306 U.S. 451, 455-58 (1939).

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ The vagueness doctrine flows from the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution. It essentially requires that criminal laws be drafted in objective language that is clear enough for the average person to comprehend. See U.S. Const. amend. V, XIV, and those relating to separation of powers under Article III, see U.S. CONST., ART. III, and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 164-69 (1972).

In a MCA context, Defense Counsel could theoretically attempt to equate the MMC's undefined "enterprise" to *Lanzetta's* vague "gang," as a conspiracy option that offers no "comprehensible course of conduct", in violation of the Fifth Amendment's mandate that "no person shall be... deprived of life, liberty, or property, without due process of law."⁴⁶⁸ The Government could counter, citing Justice Scalia's dissent in *Chisom v. Roemer*, to argue the MMC is merely "fleshing out" the crime of MCA conspiracy, by describing an enterprise as a quasi-contract factual variant, to a formal meeting of the minds conspiracy by agreement.⁴⁶⁹ Applying *United States v. Aguilar*, another judicial restraint dissent by Justice Scalia, the determinative factor for this second defense objection to the MMC's edit, would be whether "extratextual" legal terms are needed to interpret and apply enterprise to a MCA conspiracy case, or whether the term enterprise itself adds elements not otherwise needed to prove the codified crime of conspiracy.⁴⁷⁰ This distinction will ultimately rest on the facts at issue, as it is logically and legally possible for a group of persons to both agree and work towards a mutual goal, whether or not they share contractual privity.⁴⁷¹ This mutual goal aspect of

⁴⁶⁸ See *Lanzetta v. New Jersey*, 306 U.S. 451, 455-58 (1939).

⁴⁶⁹ See *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting):

I thought we had adopted a regular method for interpreting the meaning of language in a statute: first, find the ordinary meaning of the language in its textual context; and second, using established canons of construction, ask whether there is any clear indication that some permissible meaning other than the ordinary one applies.

Id.

⁴⁷⁰ See *United States v. Aguilar*, 515 U.S. 593, 612 (1995).

⁴⁷¹ See O'Rourke, *supra* note 38, at 307, 309 ("teamwork is often not pre-arranged...teamwork could develop from shared ideology and concurrent opportunity."); see also UCMJ art. 81 (2005) and MMC, *supra* note 14, Pt. IV, § 950v(28)b and c.

enterprise liability conveys a third potential defense objection - the MMC renders the MCA crime of enterprise conspiracy, vague as applied.

C. An Enterprise that Shares an Illegal Purpose at Least in Part Loiters

A third defense objection the MMC's precocious use of the term "enterprise," would contend that kind of conspiracy is vague as applied, by showing it could punish innocuous acts, when one "joined an enterprise of persons who shared a common criminal purpose that involved, *at least in part*, the commission or intended commission of one or more substantive offenses triable by military commission." (emphasis added).⁴⁷² Case in point is *Papachristou v. City of Jacksonville*, where the Supreme Court struck down a "loitering" and "vagrancy" ordinance that criminalized "loafing," "strolling," or "wandering around from place to place," because the activity at issue was an innocuous part of everyday life.⁴⁷³ Back then, Jacksonville Ordinance Code 26-57, proscribed:

Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served, persons able to work but

⁴⁷² See note 467, *supra*. In this case the MCA statute is allegedly "vague as applied" via the MMC.

⁴⁷³ See *Papachristou v. City of Jacksonville*, 405 U.S. 156, 161-71 (1972). Justice Douglas noted that the Jacksonville vagrancy ordinance was void for vagueness, in that it: (1) failed to give a person of ordinary intelligence fair notice that the contemplated conduct is forbidden by statute; (2) encouraged arbitrary and erratic arrests and convictions; (3) criminalized activities that by modern standards are normally innocent; and (4) placed almost unfettered discretion in the hands of the police. *Id.*

habitually living upon the earnings of their wives or minor children shall be deemed vagrants and, upon conviction in the Municipal Court shall be punished as provided for Class D offenses.⁴⁷⁴

Using *Papachristou*'s "vague as applied" rationale, Defense Counsel may demand that the Government explain exactly how persons in a MMC enterprise may share a conspiratorial purpose "at least in part."⁴⁷⁵ Trial Counsel may counter with *United States v. Turkette*, by arguing that the penal aspect of MMC enterprise membership is not one of innate thought; it is one of "overt" action, i.e., both legitimate and illegitimate enterprises may conspire to commit one of the enumerated offenses under the MCA, all of which a "person of ordinary intelligence" may recognize; therefore, a member's part-time enterprise status proves or disproves nothing inherently illegal within a suspect group.⁴⁷⁶ This interpretive stalemate over the characterization of a MMC enterprise, as a MCA conspiracy, ends the aforementioned federal survey of three potential defense objections.

V. Conclusion:

⁴⁷⁴ *Id.* at 156-57.

⁴⁷⁵ Or to paraphrase the adage: "It's like being a little pregnant; either you are or you aren't."

⁴⁷⁶ *See United States v. Turkette*, 452 U.S. 576, 580-81 (1981) (holding that the RICO term "enterprise" encompasses both legitimate and illegitimate enterprises within its jurisdiction); *see also United States v. Usama Bin Laden*, 91 F.Supp. 2d, 600-13 (S.D.N.Y., 2001) (denying defendants' motion to dismiss the 157 page Indictment on Due Process grounds, concluding that "although the Indictment alleges the conspiracies' criminal objectives in general terms, its inclusion of so many specific overt acts allegedly committed in furtherance thereof, more than adequately satisfies the requirements of Federal Rule of Criminal Procedure 7(c) and of the Sixth Amendment."). Please note that not all the 114 overt acts alleged by the Bin Laden prosecution furthered all five conspiracies alleged in the Indictment. *Bin Laden* at 600-13.

Constitutional suspicion of MCA trials will not yield, unless the proceedings' legitimacy remains beyond moral question.⁴⁷⁷ Al-Qaeda remains dedicated to killing Americans, but traditional conspiracy prosecutions are ill-suited to the task, because few, if any, suicide bombers survive to charge as indicted or un-indicted co-conspirators.⁴⁷⁸ The threat of death by execution or death during a suicide attack is an inapposite deterrent to jihadist terrorism, since the perpetrators fancy themselves martyrs.⁴⁷⁹ Criminal enterprise liability can hold surviving echelon leaders and clandestine operatives accountable, and thereby null the group's deadly efficiency.⁴⁸⁰ But to do so, criminal enterprise liability must abide by the Constitution, or face invalidating the MCA's moral mandate.⁴⁸¹

The Secretary of Defense should amend the MMC to craft enterprise, not as an unlegislated conspiracy crime, but a *prima facie* proof method for the MCA crime of terrorism, though he could also jurisdictionally import JCE to prosecute atrocities like 9/11, using basic law of war principles.⁴⁸² Such a versatile approach captures the criminal duality of terrorism as a domestic and international crime, as well as the criminal duality between

⁴⁷⁷ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2767-69, 2780, 2853-54 (2006); *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁴⁷⁸ See 9/11 COMMISSION REPORT, *supra* note 5, at 363; UBL Indictment, *supra* note 3, at 7-9.

⁴⁷⁹ See December 2001 Video; October 2001 Video; ABC Interview; Al-Jazeera Interview, note 106, *supra*.

⁴⁸⁰ See, e.g., THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA (2006).

⁴⁸¹ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2773 (2006) "Exigency alone, of course, will not justify the establishment and use of penal tribunals not contemplated by Article I, § 8 and Article III, § 1 of the Constitution unless some other part of that document authorizes a response to the felt need." See also, *Boumediene v. Bush*, 2007 U.S. LEXIS 3783.

⁴⁸² See Pt. III, *supra*.

jihadist echelon leaders like Usama bin Laden and Al-Qaeda's mujahadeen.⁴⁸³ Adopting this amendment proposal would not change any MCA offense's maximum punishment or the MCA's definition of a principal.⁴⁸⁴

Let history be the judge of whether, in the end, the Rule of Law prevailed over the specter of terror.

⁴⁸³ *Id.*

⁴⁸⁴ *See* Pt. II, *supra*.

Appendix A. Combatant Status Review Board Processing

SN



DEPUTY SECRETARY OF DEFENSE
1010 DEFENSE PENTAGON
WASHINGTON, DC 20301-1010

JUL 14 2006

MEMORANDUM FOR SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARY OF DEFENSE FOR POLICY

SUBJECT: Implementation of Combatant Status Review Tribunal Procedures for Enemy
Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba

References: (a) Deputy Secretary of Defense Order of July 7, 2004
(b) Convening Authority Appointment Letter of July 9, 2004
(c) Detainee Treatment Act of 2005
(d) Deputy Secretary of Defense Administrative Review Board Implementation Order
(current)

Enclosures: (1) Combatant Status Review Tribunal Process
(2) Recorder Qualifications, Roles and Responsibilities
(3) Personal Representative Qualifications, Roles and Responsibilities
(4) Combatant Status Review Tribunal Notice to Detainees
(5) Sample Detainee Election Form
(6) Sample Nomination Questionnaire
(7) Sample Appointment Letter for Combatant Status Review Tribunal Panel
(8) Combatant Status Review Tribunal Hearing Guide
(9) Combatant Status Review Tribunal Decision Report Cover Sheet
(10) Implementation of the Detainee Treatment Act of 2005

1. Introduction

By reference (a), the Secretary of Defense has established a Combatant Status Review Tribunal (CSRT) process to determine, in a fact-based proceeding, whether the individuals detained by the Department of Defense at the U.S. Naval Base Guantanamo Bay, Cuba, are properly classified as enemy combatants and to permit each detainee the opportunity to contest such designation. The Deputy Secretary of Defense has been appointed to operate and oversee this process.

The Combatant Status Review Tribunal process provides a detainee: the assistance of a Personal Representative; an interpreter if necessary; an opportunity to review unclassified information relating to the basis for his detention; the opportunity to appear personally to present reasonably available information relevant to why he should not be classified as an enemy combatant; the opportunity to question witnesses testifying at the Tribunal; and, to the extent they are reasonably available, the opportunity to call witnesses on his behalf.

2. Authority

The Combatant Status Review Tribunal process was established by Deputy Secretary of Defense Order dated July 7, 2004 (reference (a)), which designated the undersigned to operate and



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oversee the Combatant Status Review Tribunal process. The Tribunals will be governed by the provisions of reference (a) and this implementing directive, which sets out procedures for Tribunals and establishes the position of Director, Combatant Status Review Tribunals. Reference (b) designates the Director, CSRT, as the convening authority for the Tribunal process. Reference (c) requires that the procedures governing the CSRT process provide for periodic review of any new evidence that may become available relating to the enemy combatant status of a detainee (Section 1405, (a)(3) of Reference (c)). Reference (c) also requires that the procedures governing the CSRT process ensure that, in making a determination of a detainee's status, a CSRT, to the extent practicable, assess whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of such statement (Section 1405(b)(1) of Reference (c)). Procedures for implementation of the Detainee Treatment Act are described in Enclosure 10.

3. Implementing Process

The Combatant Status Review Tribunal Process is set forth in enclosure (1). Enclosures (2) and (3) set forth detailed descriptions of the roles and responsibilities of the Recorder and Personal Representative respectively. Enclosure (4) is a Notice to detainees regarding the CSRT process. Enclosure (5) is a Sample Detainee Election Form. Enclosure (6) is a Sample Nominee Questionnaire for approval of Tribunal members, Recorders, and Personal Representatives. Enclosure (7) is an Appointment Letter that will be signed by the Director of CSRT as the convening authority. Enclosure (8) is a CSRT Hearing Guide. Tribunal decisions will be reported to the convening authority by means of enclosure (9). The CSRT shall follow the requirements of the Detainee Treatment Act delineated in enclosure (10). This implementing directive is subject to revision at any time.



CC:
Secretary of State
Secretary of Defense
Attorney General
Secretary of Homeland Security
Director, Central Intelligence Agency
Assistant to the President for National Security Affairs
Counsel to the President
Director, Federal Bureau of Investigation
Director, Office of Administrative Review of the Detention
Of Enemy Combatants

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Combatant Status Review Tribunal Process

A. Organization

Combatant Status Review Tribunals (CSRT) will be administered by the Director, Combatant Status Review Tribunals. The Director will staff and structure the Tribunal organization to facilitate its operation. The CSRT staff will schedule Tribunal proceedings, provide for interpreter services, provide legal advice to the Director and to Tribunal panels, provide clerical assistance and other administrative support, ensure information security, and coordinate with other agencies as appropriate.

B. Purpose and Function

This process will provide a non-adversarial proceeding to determine whether each detainee in the control of the Department of Defense at the Guantanamo Bay Naval Base, Cuba, meets the criteria to be designated as an enemy combatant, defined in reference (a) as follows:

An "enemy combatant" for purposes of this order shall mean an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.

Each detainee whose status will be reviewed by a Tribunal has previously been determined, since capture, to be an enemy combatant through multiple levels of review by military officers and officials of the Department of Defense.

The Director, CSRT, shall convene Tribunals pursuant to this implementing directive to conduct such proceedings as necessary to make a written assessment as to each detainee's status as an enemy combatant. Each Tribunal shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant.

Adoption of the procedures outlined in this directive is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, instrumentalities or entities, its officers, employees or agents, or any other person.

C. Combatant Status Review Tribunal Structure

- (1) Each Tribunal shall be composed of a panel of three neutral commissioned officers of the U.S. Armed Forces convened to make determinations of enemy combatant status pursuant to this implementing directive. Each of the officers shall possess the appropriate security clearance and none of the officers appointed shall have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The senior member of each Tribunal shall be an officer serving in the grade of O-6 and shall be its President. The other members of the Tribunal shall be officers in the grade of O-4 and above. One of

Enclosure (1)

the officers appointed to the Tribunal shall be a judge advocate. All Tribunal members have an equal vote as to a detainee's enemy combatant status.

- (2) **Recorder.** Each Tribunal shall have a commissioned officer serving in the grade of O-3 or above, preferably a judge advocate, appointed by the Director, CSRT, to obtain and present all relevant evidence to the Tribunal and to cause a record to be made of the proceedings. The Recorder shall have an appropriate security clearance and shall have no vote. The Recorder shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Recorder are set forth in enclosure (2).
- (3) **Personal Representative.** Each Tribunal shall have a commissioned officer appointed by the Director, CSRT, to assist the detainee in reviewing all relevant unclassified information, in preparing and presenting information, and in questioning witnesses at the CSRT. The Personal Representative shall be an officer in the grade of O-4 or above, shall have the appropriate security clearance, shall not be a judge advocate, and shall have no vote. The Personal Representative shall not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process. The role and responsibilities of the Personal Representative are set forth in enclosure (3).
- (4) **Legal Advisor.** The Director, CSRT, shall appoint a judge advocate officer as the Legal Advisor to the Tribunal process. The Legal Advisor shall be available in person, telephonically, or by other means, to each Tribunal as an advisor on legal, evidentiary, procedural or other matters. In addition, the Legal Advisor shall be responsible for reviewing each Tribunal decision for legal sufficiency. The Legal Advisor shall have an appropriate security clearance and shall have no vote. The Legal Advisor shall also not have been involved in the apprehension, detention, interrogation, or previous determination of status of the detainees other than the CSRT process.
- (5) **Interpreter.** If needed, each Tribunal will have an interpreter appointed by the President of the Tribunal who shall be competent in English and a language understood by the detainee. The interpreter shall have no vote and will have an appropriate security clearance.

D. Handling of Classified Material

- (1) All parties shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Tribunal, Recorder and Personal Representative shall coordinate with an Information Security Officer in the handling and safeguarding of classified material before, during and after the Tribunal proceeding.
- (2) The Director, CSRT, and the Tribunal President have the authority and duty to ensure that all proceedings of, or in relation to, a Tribunal under this Order shall comply with Executive Order 12958 regarding national security information in all respects. Classified information may be used in the CSRT process with the concurrence of the

originating agency. Classified information for which the originating agency declines to authorize for use in the CSRT process is not reasonably available. For any information not reasonably available, a substitute or certification will be requested from the originating agency as cited in paragraph E (3)(a) below.

- (3) The Director, CSRT, the CSRT staff, and the participants in the CSRT process do not have the authority to declassify or change the classification of any classified information.

E. Combatant Status Review Tribunal Authority

The Tribunal is authorized to:

- (1) Determine the mental and physical capacity of the detainee to participate in the hearing. This determination is intended to be the perception of a layperson, not a medical or mental health professional. The Tribunal may direct a medical or mental health evaluation of a detainee, if deemed appropriate. If a detainee is deemed physically or mentally unable to participate in the CSRT process, that detainee's case will be held as a Tribunal in which the detainee elected not to participate. The Tribunal President shall ensure that the circumstances of the detainee's absence are noted in the record.
- (2) Order U.S. military witnesses to appear and to request the appearance of civilian witnesses if, in the judgment of the Tribunal President those witnesses are reasonably available as defined in paragraph G (9) of this enclosure.
- (3) Request the production of such reasonably available information in the possession of the U.S. Government bearing on the issue of whether the detainee meets the criteria to be designated as an enemy combatant, including information generated in connection with the initial determination to hold the detainee as an enemy combatant and in any subsequent reviews of that determination, as well as any records, determinations, or reports generated in connection with such proceedings (cumulatively called hereinafter the "Government Information").
 - (a) For any relevant information not provided in response to a Tribunal's request, the agency holding the information shall provide either an acceptable substitute for the information requested or a certification to the Tribunal that none of the withheld information would support a determination that the detainee is not an enemy combatant. Acceptable substitutes may include an unclassified or, if not possible, a lesser classified, summary of the information; or a statement as to the relevant facts the information would tend to prove.
- (4) Require each witness (other than the detainee) to testify under oath. The detainee has the option of testifying under oath or unsworn. Forms of the oath for Muslim and non-Muslim witnesses are in the Tribunal Hearing Guide (enclosure (8)). The Tribunal Recorder will administer the oath.

F. The Detainee's Participation In the CSRT Process

- (1) The detainee may elect to participate in a Combatant Status Review Tribunal or may waive participation in the process. Such waiver shall be submitted to the Tribunal in writing by the detainee's Personal Representative and must be made after the Personal Representative has explained the Tribunal process and the opportunity of the detainee to contest this enemy combatant status. The waiver can be either an affirmative statement that the detainee declines to participate or can be inferred by the Personal Representative from the detainee's silence or actions when the Personal Representative explains the CSRT process to the detainee. The detainee's election shall be noted by the Personal Representative on enclosure (5).
- (2) If a detainee waives participation in the Tribunal process, the Tribunal shall still review the detainee's status without requiring the presence of the detainee.
- (3) A detainee who desires to participate in the Tribunal process shall be allowed to attend all Tribunal proceedings except for proceedings involving deliberation and voting by the members and testimony or other matters that would compromise national security if held in the presence of the detainee.
- (4) The detainee may not be compelled to testify or answer questions before the Tribunal other than to confirm his identity.
- (5) The detainee shall not be represented by legal counsel but will be aided by a Personal Representative who may, upon the detainee's election, assist the detainee at the Tribunal. He shall be provided with an interpreter during the Tribunal hearing if necessary.
- (6) The detainee may present evidence to the Tribunal, including the testimony of witnesses who are reasonably available and whose testimony is considered by the Tribunal to be relevant. Evidence on the detainee's behalf (other than his own testimony, if offered) may be presented in documentary form and through written statements, preferably sworn.
- (7) The detainee may present oral testimony to the Tribunal and may elect to do so under oath or affirmation or as unsworn testimony. If the detainee testifies, either under oath or unsworn, he may be questioned by the Recorder, Personal Representative, or Tribunal members, but may not be compelled to answer questions before the Tribunal.
- (8) The detainee's Personal Representative shall be afforded the opportunity to review the Government Information, and to consult with the detainee concerning his status as an enemy combatant and any challenge thereto. The Personal Representative may share the unclassified portion of the Government Information with the detainee.
- (9) The detainee shall be advised of the foregoing by his Personal Representative before the Tribunal is convened, and by the Tribunal President at the beginning of the hearing.

G. Tribunal Procedures

- (1) By July 17, 2004, the convening authority was required to notify each detainee of the opportunity to contest his status as an enemy combatant in the Combatant Status Review Tribunal process, the opportunity to consult with and be assisted by a Personal Representative, and of the jurisdiction of the courts of the United States to entertain a habeas corpus petition filed on the detainee's behalf. The English language version of this Notice to Detainees is at enclosure (4). All detainees were so notified July 12-14, 2004.
- (2) An officer appointed as a Personal Representative will meet with the detainee and, through an interpreter if necessary, explain the nature of the CSRT process to the detainee, explain his opportunity to personally appear before the Tribunal and present evidence, and assist the detainee in collecting relevant and reasonably available information and in preparing for and presenting information to the CSRT.
- (3) The Personal Representative will have the detainee make an election as to whether he wants to participate in the Tribunal process. Enclosure (5) is a Detainee Election Form. If the detainee elects not to participate, or by his silence or actions indicates that he does not want to participate, the Personal Representative will note this on the election form and this detainee will not be required to appear at his Tribunal hearing. The Director, CSRT, as convening authority, shall appoint a Tribunal as described in paragraph C (1) of this enclosure for all detainees after reviewing Nomination Questionnaires (enclosure (6)) and approving Tribunal panel members. Enclosure (7) is a sample Appointment Letter.
- (4) The Director, CSRT, will schedule a Tribunal hearing for a detainee within 30 days after the detainee's Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above. The Personal Representative will submit a completed Detainee Election Form to the Director, CSRT, or his designee when the Personal Representative has completed the actions above. The 30-day period to schedule a Tribunal will commence upon receipt of this form.
- (5) Once the Director, CSRT, has scheduled a Tribunal, the President of the assigned Tribunal panel may postpone the Tribunal for good cause shown to provide the detainee or his Personal Representative a reasonable time to acquire evidence deemed relevant and necessary to the Tribunal's decision, or to accommodate military exigencies as presented by the Recorder.
- (6) All Tribunal sessions except those relating to deliberation or voting shall be recorded on audiotape. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.

- (7) **Admissibility of Evidence.** The Tribunal is not bound by the rules of evidence such as would apply in a court of law. Instead, the Tribunal shall be free to consider any information it deems relevant and helpful to a resolution of the issues before it. At the discretion of the Tribunal, for example, it may consider hearsay evidence, taking into account the reliability of such evidence in the circumstances.
- (8) **Control of Case.** The President of the Tribunal is authorized to order the removal of any person from the hearing if that person is disruptive, uncooperative, or otherwise interferes with the Tribunal proceedings following a warning. In the case of the removal of the detainee from the Tribunal hearing, the detainee's Personal Representative shall continue in his role of assisting the detainee in the hearing.
- (9) **Availability of Witnesses.** The President of the Tribunal is the decision authority on reasonable availability of witnesses.
- (a) If such witnesses are from within the U.S. Armed Forces, they shall not be considered reasonably available if, as determined by their commanders, their presence at a hearing would adversely affect combat or support operations.
- (b) If such witnesses are not from within the U.S. Armed Forces, they shall not be considered reasonably available if they decline properly made requests to appear at a hearing, if they cannot be contacted following reasonable efforts by the CSRT staff, or if security considerations preclude their presence at a hearing. Non-U.S. Government witnesses will appear before the Tribunal at their own expense. Payment of expenses for U.S. Government witnesses will be coordinated by the CSRT staff and the witness's organization.
- (c) For any witnesses who do not appear at the hearing, the President of the Tribunal may allow introduction of evidence by other means such as e-mail, fax copies, and telephonic or video-telephonic testimony. Since either video-telephonic or telephonic testimony is equivalent to in-person testimony, the witness shall be placed under oath and is subject to questioning by the Tribunal.
- (10) **CSRT Determinations on Availability of Evidence.** If the detainee requests witnesses or evidence deemed not reasonably available, the President of the Tribunal shall document the basis for that decision; to include, for witnesses, efforts undertaken to procure the presence of the witness and alternatives considered or used in place of that witness's in-person testimony.
- (11) **Burden of Proof.** Tribunals shall determine whether the preponderance of the evidence supports the conclusion that each detainee meets the criteria to be designated as an enemy combatant. There is a rebuttable presumption that the Government Evidence, as defined in paragraph H (4) herein, submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate.

- (12) **Voting.** The decisions of the Tribunal shall be determined by a majority of the voting members of the Tribunal. A dissenting member shall prepare a brief summary of the basis for his/her opinion, which shall be attached to the record forwarded for legal review. Only the Tribunal members shall be present during deliberation and voting.

H. Conduct Of Hearing

A CSRT Hearing Guide is attached at enclosure (8) and provides guidance on the conduct of the Tribunal hearing. The Tribunal's hearing shall be substantially as follows:

- (1) The President shall call the Tribunal to order, and announce the order appointing the Tribunal (see enclosure (7)). The President shall also ensure that all participants are properly sworn to faithfully perform their duties.
- (2) The Recorder shall cause a record to be made of the time, date, and place of the hearing, and the identity and qualifications of all participants. All proceedings shall be recorded on audiotape except those portions relating to deliberations and voting. Tribunal sessions where classified information is discussed shall be recorded on separate and properly marked audiotapes.
- (3) The President shall advise the detainee of the purpose of the hearing, the detainee's opportunity to present evidence, and of the consequences of the Tribunal's decision. In cases requiring an interpreter, the President shall ensure the detainee understands these matters through the interpreter.
- (4) The Recorder shall present to the Tribunal such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the evidence so presented shall constitute the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also separately provide such evidence to the Tribunal.
- (5) The Recorder shall present to the Tribunal an unclassified report summarizing the Government Evidence and any evidence to suggest that the detainee should not be designated as an enemy combatant. This report shall have been provided to the detainee's Personal Representative in advance of the Tribunal hearing.
- (6) The Recorder shall call the witnesses, if any. Witnesses shall be excluded from the hearing except while testifying. An oath or affirmation shall be administered to each witness by the Recorder. When deemed necessary or appropriate, the Tribunal members can call witnesses who are reasonably available to testify or request the production of reasonably available documentary or other evidence.
- (7) The detainee shall be permitted to present evidence and question any witnesses. The Personal Representative shall assist the detainee in obtaining unclassified documents and in arranging the presence of witnesses reasonably available and, if the detainee elects, the Personal Representative shall assist the detainee in the presentation of

information to the Tribunal. The Personal Representative may, outside the presence of the detainee, present or comment upon classified information that bears upon the detainee's status if it would aid the Tribunal's deliberations.

- (8) When deemed necessary and appropriate by any member of the Tribunal, the Tribunal may recess the Tribunal hearing to consult with the Legal Advisor as to any issues relating to evidence, procedure, or other matters. The President of the Tribunal shall summarize on the record the discussion with the Legal Advisor when the Tribunal reconvenes.
- (9) The Tribunal shall deliberate in closed session with only voting members present. The Tribunal shall make its determination of status by a majority vote. The President shall direct a Tribunal member to document the Tribunal's decision on the Combatant Status Review Tribunal Decision Report cover sheet (enclosure (9)), which will serve as the basis for the Recorder's preparation of the Tribunal record. The unclassified reasons for the Tribunal's decision shall be noted on the Tribunal Decision Report cover sheet, and should include, as appropriate, the detainee's organizational membership or affiliation with a governmental, military, or terrorist organization (*e.g.*, Taliban, al Qaida, etc.). A dissenting member shall prepare a brief summary of the basis for his/her opinion.
- (10) Both documents shall be provided to the Recorder as soon as practicable after the Tribunal concludes.

I. Post-Hearing Procedures

- (1) The Recorder shall prepare the record of the hearing and ensure that the audiotape is preserved and properly classified in conformance with security regulations.
- (2) The detainee's Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.
- (3) The Recorder shall provide the completed record to the President of the Tribunal for signature and forwarding for legal review.
- (4) In all cases the following items will be attached to the decision which, when complete and signed by the Tribunal President, shall constitute the record:
 - (a) A statement of the time and place of the hearing, persons present, and their qualifications;
 - (b) The Tribunal Decision Report cover sheet;
 - (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;

- (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with all applicable security regulations; and
 - (e) A dissenting member's summary report, if any.
- (5) The President of the Tribunal shall forward the Tribunal's decision and all supporting documents as set forth above to the Director, CSRT, acting as Convening Authority, via the CSRT Legal Advisor, within three working days of the date of the Tribunal decision. If additional time is needed, the President of the Tribunal shall request an extension from the Director, CSRT.
 - (6) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with all applicable security regulations. These tapes may be reviewed and transcribed as necessary for the legal sufficiency and Convening Authority reviews.
 - (7) The CSRT Legal Advisor shall conduct a legal sufficiency review of all cases. The Legal Advisor shall render an opinion on the legal sufficiency of the Tribunal proceedings and forward the record with a recommendation to the Director, CSRT. The legal review shall specifically address Tribunal decisions regarding reasonable availability of witnesses and other evidence.
 - (8) The Director, CSRT, shall review the Tribunal's decision and may approve the decision and take appropriate action, or return the record to the Tribunal for further proceedings. In cases where the Tribunal decision is approved and the case is considered final, the Director, CSRT, shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies.
 - (9) If the Tribunal determines that the detainee shall no longer be classified as an enemy combatant, and the Director, CSRT, approves the Tribunal's decision, the Director, CSRT, shall forward the written report of the Tribunal's decision directly to the Secretary of the Navy. The Secretary of the Navy shall so advise the DoD Office of Detainee Affairs, the Secretary of State, and any other relevant U.S. Government agencies, in order to permit the Secretary of State to coordinate the transfer of the detainee with representatives of the detainee's country of nationality for release or other disposition consistent with applicable laws. In these cases the Director, CSRT, will ensure coordination with the Joint Staff with respect to detainee transportation issues.
 - (10) The detainee shall be notified of the Tribunal decision by the Director, CSRT. If the detainee has been determined to no longer be designated as an enemy combatant, he shall be notified of the Tribunal decision upon finalization of transportation arrangements or at such earlier time as deemed appropriate by the Commander, JTF-GTMO.

Recorder Qualifications, Roles and Responsibilities

A. Qualifications of the Recorder

- (1) For each case, the Director, CSRT, shall select a commissioned officer in the grade of O-3 or higher, preferably a judge advocate, to serve as a Recorder.
- (2) Recorders must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Recorders.

B. Roles of the Recorder

- (1) Subject to section C (1), below, the Recorder has a duty to present to the CSRT such evidence in the Government Information as may be sufficient to support the detainee's classification as an enemy combatant, including the circumstances of how the detainee was taken into the custody of U.S. or allied forces (the "Government Evidence"). In the event the Government Information contains evidence to suggest that the detainee should not be designated as an enemy combatant, the Recorder shall also provide such evidence to the Tribunal.
- (2) The Recorder shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Recorder shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and following the Tribunal process.

C. Responsibilities of the Recorder

- (1) For each assigned detainee case under review, the Recorder shall obtain and examine the Government Information as defined in paragraph E (3) of enclosure (1).
- (2) The Recorder shall draft a proposed unclassified summary of the relevant evidence derived from the Government Information.
- (3) The Recorder shall ensure appropriate coordination with original classification authorities for any classified information presented that was used in the preparation of the proposed unclassified summary.
- (4) The Recorder shall permit the assigned Personal Representative access to the Government Information and will provide the unclassified summary to the Personal Representative in advance of the Tribunal hearing.
- (5) The Recorder shall ensure that coordination is maintained with Joint Task Force-Guantanamo Bay and the Criminal Investigative Task Force to deconflict any other ongoing activities and arrange for detainee movements and security.
- (6) The Recorder shall present the Government Evidence orally or in documentary form to the Tribunal. The Recorder shall also answer questions, if any, asked by the Tribunal.

Enclosure (2)

- (7) The Recorder shall administer an appropriate oath to the Tribunal members, the Personal Representative, the paralegal/reporter, the interpreter, and all witnesses (including the detainee if he elects to testify under oath).
- (8) The Recorder shall prepare a Record of Proceedings, and, if applicable, a record of the dissenting member's report. The Record of Proceedings should include:
 - (a) A statement of the time and place of the hearing, persons present, and their qualifications;
 - (b) The Tribunal Decision Report cover sheet;
 - (c) The classified and unclassified reports detailing the findings of fact upon which the Tribunal decision was based;
 - (d) Copies of all documentary evidence presented to the Tribunal and summaries of all witness testimony. If classified material is part of the evidence submitted or considered by the Tribunal, the report will be properly marked and handled in accordance with applicable security regulations; and
 - (e) A dissenting member's summary report, if any.
- (9) The Recorder shall provide the detainee's Personal Representative the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.
- (10) The Recorder shall submit the completed Record of Proceedings to the President of the Tribunal who shall sign and forward it to the Director, CSRT via the CSRT Legal Advisor. Once signed by the Tribunal President, the completed record is considered the official record of the Tribunal's decision.
- (11) The Recorder shall ensure that all audiotapes of the Tribunal hearing are properly marked with identifying information and classification markings, and stored in accordance with applicable security regulations. These tapes are considered part of the case record and may be reviewed and transcribed as necessary for the legal sufficiency and convening authority reviews.

Personal Representative Qualifications, Roles and Responsibilities

A. Qualifications of Personal Representative

- (1) For each case, the Director, CSRT, shall select a commissioned officer serving in the grade of O-4 or higher to serve as a Personal Representative. The Personal Representative shall not be a judge advocate.
- (2) Personal Representatives must have at least a TOP SECRET security clearance. The Director shall ensure that only properly cleared officers are assigned as Personal Representatives.

B. Roles of the Personal Representative

- (1) The detainees were notified of the Tribunal process per reference (a). When detailed to a detainee's case the Personal Representative shall further explain the nature of the CSRT process to the detainee, explain his opportunity to present evidence and assist the detainee in collecting relevant and reasonably available information and in preparing and presenting information to the Tribunal.
- (2) The Personal Representative shall have due regard for classified information and safeguard it in accordance with all applicable instructions and regulations. The Personal Representative shall coordinate with an Information Security Officer (ISO) in the handling and safeguarding of classified material before, during, and after the Tribunal process.

C. Responsibilities of the Personal Representative

- (1) The Personal Representative is responsible for explaining the nature of the CSRT process to the detainee. Upon first contact with the detainee, the Personal Representative shall explain to the detainee that no confidential relationship exists or may be formed between the detainee and the Personal Representative. The Personal Representative shall explain the detainee's opportunity to make a personal appearance before the Tribunal. The Personal Representative shall request an interpreter, if needed, to aid the detainee in making such appearance and in preparing his presentation. The Personal Representative shall explain to the detainee that he may be subject to questioning by the Tribunal members, but he cannot be compelled to make any statement or answer any questions. Paragraph D, below, provides guidelines for the Personal Representative meeting with the enemy combatant prior to his appearance before the Tribunal.
- (2) After the Personal Representative has reviewed the Government Information, had an opportunity to consult with the detainee, and notified the detainee of his opportunity to contest his status, even if the detainee declines to participate as set forth above, the Personal Representative shall complete a Detainee Election Form (enclosure (5)) and provide this form to the Director, CSRT.

Enclosure (3)

- (3) The Personal Representative shall review the Government Evidence that the Recorder plans to present to the CSRT and shall permit the Recorder to review documentary evidence that will be presented to the CSRT on the detainee's behalf.
- (4) Using the guidelines set forth in paragraph D, the Personal Representative shall meet with the detainee, using an interpreter if necessary, in advance of the CSRT. In no circumstance shall the Personal Representative disclose classified information to the detainee.
- (5) If the detainee elects to participate in the Tribunal process, the Personal Representative shall present information to the Tribunal if the detainee so requests. The Personal Representative may, outside the presence of the detainee, comment upon classified information submitted by the Recorder that bears upon the presentation made on the detainee's behalf, if it would aid the Tribunal's deliberations.
- (6) If the detainee elects not to participate in the Tribunal process, the Personal Representative shall assist the detainee by presenting information to the Tribunal in either open or closed sessions and may, in closed sessions, comment upon classified information submitted by the Recorder that bears upon the detainee's presentation, if it would aid the Tribunal's deliberations.
- (7) The Personal Representative shall answer questions, if any, asked by the Tribunal.
- (8) The Personal Representative shall be provided the opportunity to review the record prior to the Recorder forwarding it to the President of the Tribunal. The Personal Representative may submit, as appropriate, observations or information that he/she believes was presented to the Tribunal and is not included or accurately reflected on the record.

D. Personal Representative Guidelines for Assisting the Enemy Combatant

In discussing the CSRT process with the detainee and completing the Detainee Election Form, the Personal Representative shall use the guidelines provided below to assist the detainee in preparing for the CSRT:

You have already been advised that a Combatant Status Review Tribunal has been established by the United States government to review your classification as an enemy combatant.

A Tribunal of military officers shall review your case in "x" number of days [or other time frame as known], and I have been assigned to ensure you understand this process. The Tribunal shall review your case file, offer you an opportunity to speak on your own behalf if you desire, and ask questions. You also can choose not to appear at the Tribunal hearing. In that case I will be at the hearing and will assist you if you want me to do so.

You will be provided with an opportunity to review unclassified information that relates to your classification as an enemy combatant. I will be able to review additional information that is classified. I can discuss the unclassified information with you.

You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence and I will attend.

You will have the opportunity to question witnesses testifying at the Tribunal.

You will have the opportunity to present evidence to the Tribunal, including calling witnesses to testify on your behalf if those witnesses are reasonably available. If a witness is not considered by the Tribunal as reasonably available to testify in person, the Tribunal can consider evidence submitted by telephone, written statements, or other means rather than having a witness testify in person. I am available to assist you in gathering and presenting these materials, should you desire to do so. After the hearing, the Tribunal shall determine whether you should continue to be designated as an enemy combatant.

I am neither a lawyer nor your advocate, but have been given the responsibility of assisting your preparation for the hearing. None of the information you provide me shall be held in confidence and I may be obligated to divulge it at the hearing. I am available to assist you in preparing an oral or written presentation to the Tribunal should you desire to do so. I am also available to speak for you at the hearing if you wish that kind of assistance.

Do you understand the process or have any questions about it?

The Tribunal is examining one issue: whether you are an enemy combatant against the United States or its coalition partners. Any information you can provide to the Tribunal relating to your activities prior to your capture is very important in answering this question. However, you may not be compelled to testify or answer questions at the Tribunal hearing.

Do you want to participate in the Tribunal process and appear before the Tribunal?

Do you wish to present information to the Tribunal or have me present information for you?

Is there anyone here in the camp or elsewhere who can testify on your behalf regarding your capture or status?

Do you want to have anyone else submit any information to the Tribunal regarding your status? [If so,] how do I contact them? If feasible and you can show the Tribunal how the information is relevant to your case, the Tribunal will endeavor to arrange for evidence to be provided by other means such as mail, e-mail, faxed copies, or telephonic or video-telephonic testimony.

Do you have any questions?

Combatant Status Review Tribunal Notice to Detainees*

You are being held as an enemy combatant by the United States Armed Forces. An enemy combatant is an individual who was part of or supporting Taliban or al Qaida forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. The definition includes any person who has committed a belligerent act or has directly supported such hostilities.

The U.S. Government will give you an opportunity to contest your status as an enemy combatant. Your case will go before a Combatant Status Review Tribunal, composed of military officers. This is not a criminal trial and the Tribunal will not punish you, but will determine whether you are properly held. The Tribunal will provide you with the following process:

1. You will be assigned a military officer to assist you with the presentation of your case to the Tribunal. This officer will be known as your Personal Representative. Your Personal Representative will review information that may be relevant to a determination of your status. Your Personal Representative will be able to discuss that information with you, except for classified information.
2. Before the Tribunal proceeding, you will be given a written statement of the unclassified factual basis for your classification as an enemy combatant.
3. You will be allowed to attend all Tribunal proceedings, except for proceedings involving deliberation and voting by the members, and testimony or other matters that would compromise U.S. national security if you attended. You will not be forced to attend, but if you choose not to attend, the Tribunal will be held in your absence. Your Personal Representative will attend in either case.
4. You will be provided with an interpreter during the Tribunal hearing if necessary.
5. You will be able to present evidence to the Tribunal, including the testimony of witnesses. If those witnesses you propose are not reasonably available, their written testimony may be sought. You may also present written statements and other documents. You may testify before the Tribunal but will not be compelled to testify or answer questions.

As a matter separate from these Tribunals, United States courts have jurisdiction to consider petitions brought by enemy combatants held at this facility that challenge the legality of their detention. You will be notified in the near future what procedures are available should you seek to challenge your detention in U.S. courts. Whether or not you decide to do so, the Combatant Status Review Tribunal will still review your status as an enemy combatant.

If you have any questions about this notice, your Personal Representative will be able to answer them.

[*Text of Notice translated, and delivered to detainees 12-14 July 2004]

Enclosure (4)

Sample Detainee Election Form

Date/Time: _____

ISN#: _____

Personal Representative: _____
[Name/Rank]

Translator Required? _____ Language? _____

CSRT Procedures Read to Detainee or Written Copy Read by Detainee? _____

Detainee Election:

- Wants to Participate in Tribunal
- Wants Assistance of Personal Representative
- Affirmatively Declines to Participate in Tribunal
- Uncooperative or Unresponsive

Personal Representative Comments:

Personal Representative

Enclosure (5)

Sample Nomination Questionnaire



Department of Defense
Director, Combatant Status Review Tribunals

As a candidate to become a Combatant Status Review Tribunal member, Recorder, or Personal Representative, please complete the following questionnaire and provide it to the Director, Combatant Status Review Tribunal (CSRT). Because of the sensitive personal information requested, no copy will be retained on file outside of the CSRT.

1. Name (Last, First MI) _____ 2. Rank/Grade _____
3. Date of Rank _____ 4. Service _____ 5. Active Duty Service Date _____
6. Desig/MOS _____ 7. Date Current Tour Began: _____
8. Security Clearance Level _____ 9. Date of clearance: _____
10. Military Awards / Decorations: _____

11. Current Duty Position _____ 12. Unit: _____
13. Date of Birth _____ 14. Gender _____ 15. Race or Ethnic Origin _____
16. Civilian Education. College/Vocational/Civilian Professional School: _____
17. Date graduated or dates attended (and number of years), school, location, degree/major: _____

18. Military Education. Dates attended, school/course title. _____

19. Duty Assignments. Last four assignments, units, and dates of assignments. _____

20. Have you had any relative or friend killed or wounded in Afghanistan or Iraq? _____ Explain.

Enclosure (6)

21. Have you had any close relative or friend killed, wounded, or impacted by the events of September 11, 2001? ____ Explain. _____

22. Have you ever been in an assignment related to enemy prisoners of war or enemy combatants, to include the apprehension, detention, interrogation, or previous determination of status of a detainee at Guantanamo Bay? _____ Explain. _____

23. Do you believe you may be disqualified to serve as a Tribunal member, Recorder, or Personal Representative for any reason? Explain. _____

24. Your name or image as well as information related to the enemy combatant may be released to the public in conjunction with the Combatant Status Review Tribunal process. Could this potential public affairs release affect your ability to objectively serve in any capacity in the Tribunal process? Y/N _____ Explain. _____

SIGNATURE OF OFFICER: _____ DATE: _____

Approved ____ Disapproved ____ Director, CSRT

Sample Appointment Letter for Combatant Status Review Tribunal Panel



Department of Defense
Director, Combatant Status Review Tribunals

Ser

From: Director, Combatant Status Review Tribunals

Subj: APPOINTMENT OF COMBATANT STATUS REVIEW TRIBUNAL

Ref: (a) Convening Authority Appointment Letter of 7 July 2004

By the authority given to me in reference (a), a Combatant Status Review Tribunal established by DCN XXX "Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba" is hereby convened. It shall hear such cases as shall be brought before it without further action of referral or otherwise.

The following commissioned officers shall serve as members of the Tribunal:

MEMBERS:

XXX, 999-99-9999; President*

YYY, 999-99-9999; Member*

ZZZ, 999-99-9999; Member*

J.M. MCGARRAH
RADM, CEC, USNR

[* The Order should note which member is the Judge Advocate required to be on the Tribunal.]

Enclosure (7)

Combatant Status Review Tribunal Hearing Guide

RECORDER: All rise. (The Tribunal enters)

[In Tribunal sessions where the detainee has waived participation, the Tribunal can generally omit the *italicized* portions.]

PRESIDENT: This hearing shall come to order.

RECORDER: This Tribunal is being conducted at [Time/Date] on board Naval Base Guantanamo Bay, Cuba. The following personnel are present:

_____, President
_____, Member
_____, Member
_____, Personal Representative
_____, Interpreter,
_____, Reporter/Paralegal, and
_____, Recorder

[Rank/Name] is the Judge Advocate member of the Tribunal.

PRESIDENT: The Recorder will be sworn. Do you, (name and rank of the Recorder) swear (or affirm) that you will faithfully perform the duties assigned in this Tribunal (so help you God)?

RECORDER: I do.

PRESIDENT: The reporter/paralegal will now be sworn.

RECORDER: Do you (name and rank of reporter/paralegal) swear or affirm that you will faithfully discharge your duties as assigned in this tribunal?

REPORTER/PARALEGAL: I do.

PRESIDENT: *The interpreter will be sworn. [If needed for witness testimony when detainee not present]*

RECORDER: *Do you swear (or affirm) that you will faithfully perform the duties of interpreter in the case now hearing (so help you God)?*

INTERPRETER: *I do.*

Enclosure (8)

PRESIDENT: We will take a brief recess while the detainee is brought into the room.

RECORDER: All Rise.

[Tribunal members depart, followed by the Recorder, Personal Representative, Interpreter, and Court Reporter. The detainee is brought into the room. All participants except the Tribunal members return to the Tribunal room.]

RECORDER: All Rise. [The Tribunal members enter the room.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This hearing will come to order. You may be seated.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (NAME OF DETAINEE), this Tribunal is convened by order of the Director, Combatant Status Review Tribunals under the provisions of his Order of XX July 2004. It will determine whether you [or Name of Detainee] meet the criteria to be designated as an enemy combatant against the United States or its allies or otherwise meet the criteria to be designated as an enemy combatant.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This Tribunal shall now be sworn. All rise.

INTERPRETER: (TRANSLATION OF ABOVE).

[All persons in the room stand while Recorder administers the oath. Each voting member raises his or her right hand as the Recorder administers the following oath:]

RECORDER: Do you swear (affirm) that you will faithfully perform your duties as a member of this Tribunal; that you will impartially examine and inquire into the matter now before you according to your conscience, and the laws and regulations provided; that you will make such findings of fact and conclusions as are supported by the evidence presented; that in determining those facts, you will use your professional knowledge, best judgment, and common sense; and that you will make such findings as are appropriate according to the best of your understanding of the rules, regulations, and laws governing this proceeding, and guided by your concept of justice (so help you God)?

MEMBERS OF TRIBUNAL: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: The Recorder will now administer the oath to the Personal

Representative.

INTERPRETER: (TRANSLATION OF ABOVE).

[The Tribunal members lower their hands but remain standing while the following oath is administered to the Personal Representative:]

RECORDER: Do you swear (or affirm) that you will faithfully perform the duties of Personal Representative in this Tribunal (so help you God)?

PERSONAL REPRESENTATIVE: I do.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Please be seated. The Reporter, Recorder, and Interpreter have previously been sworn. This Tribunal hearing shall come to order.

[All personnel resume their seats.]

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: *(NAME OF DETAINEE), you are hereby advised that the following applies during this hearing:*

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may be present at all open sessions of the Tribunal. However, if you become disorderly, you will be removed from the hearing, and the Tribunal will continue to hear evidence.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may not be compelled to testify at this Tribunal. However, you may testify if you wish to do so. Your testimony can be under oath or unsworn.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may have the assistance of a Personal Representative at the hearing. Your assigned Personal Representative is present.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You may present evidence to this Tribunal, including the testimony of witnesses who are reasonably available. You may question witnesses testifying at the Tribunal.

INTERPRETER: (TRANSLATION OF ABOVE).
PRESIDENT: You may examine documents or statements offered into evidence other than classified information. However, certain documents may be partially masked for security reasons.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: Do you understand this process?

INTERPRETER: (TRANSLATION OF ABOVE)

PRESIDENT: Do you have any questions concerning the Tribunal process?

INTERPRETER: (TRANSLATION OF ABOVE)

[In Tribunal sessions where the detainee has waived participation substitute:

PRESIDENT: [Rank/Name of Personal Representative] you have advised the Tribunal that [Name of Detainee] has elected to not participate in this Tribunal proceeding. Is that still the situation?

PERSONAL REPRESENTATIVE: Yes/No. [Explain].

PRESIDENT: Please provide the Tribunal with the Detainee Election Form marked as Exhibit D-a.]

[Presentation of Unclassified Information by Recorder and Detainee or his Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc.]

[The Interpreter shall translate as necessary during this portion of the Tribunal.]

PRESIDENT: Recorder, please provide the Tribunal with the unclassified evidence.

RECORDER: I am handing the Tribunal what has previously been marked as Exhibit R-1, the unclassified summary of the evidence that relates to this detainee's status as an enemy combatant. A translated copy of this exhibit was provided to the Personal Representative in advance of this hearing for presentation to the detainee. In addition, I am handing to the Tribunal the following unclassified exhibits, marked as Exhibit R-2 through R-x. Copies of these Exhibits have previously been provided to the Personal Representative.

PRESIDENT: Does the Recorder have any witnesses to present?

RECORDER: Yes/no.

If witnesses appear before the Tribunal, the Recorder shall administer an appropriate oath:

Form of Oath for a Muslim

Do you [Name], in the Name of Allah, the Most Compassionate, the Most Merciful, swear that your testimony before this Tribunal will be the truth?

Form of Oath or Affirmation for Others

Do you (swear) (affirm) that the statements you are about to make shall be the truth, the whole truth, and nothing but the truth (so help you God)?

INTERPRETER: (TRANSLATION AS NECESSARY)

[Witnesses may be questioned by the Tribunal members, the Recorder, the Personal Representative, or the detainee.]

RECORDER: Mr./Madam President, I have no further unclassified information for the Tribunal but request a closed Tribunal session at an appropriate time to present classified information relevant to this detainee's status as an enemy combatant.

PRESIDENT: [Name of detainee] (or Personal Representative), do you (or does the detainee) want to present information to this Tribunal?

[If detainee not present, Personal Representative may present information to the Tribunal.]

INTERPRETER: (TRANSLATION OF ABOVE).

[If the detainee elects to make an oral statement:]

PRESIDENT: [Name of detainee] would you like to make your statement under oath?

INTERPRETER: (TRANSLATION OF ABOVE).

[After statement is completed:]

PRESIDENT: [Name of detainee] does that conclude your statement?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: [Determines whether Tribunal members, Recorder, or Personal Representative have any questions for detainee.]

PRESIDENT: [Name of detainee] do you have any other evidence to present to this Tribunal?

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: All unclassified evidence having been provided to the Tribunal, this concludes this Tribunal session.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: (Name of detainee), you shall be notified of the Tribunal decision upon completion of the review of these proceedings by the convening authority in Washington, D.C.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: If the Tribunal determines that you should not be classified as an enemy combatant, you will be released to your home country as soon as arrangements can be made.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: If the Tribunal confirms your classification as an enemy combatant you shall be eligible for an Administrative Review Board hearing at a future date.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: That Board will make an assessment of whether there is continued reason to believe that you pose a threat to the United States or its allies in the ongoing armed conflict against terrorist organizations such as al Qaida and its affiliates and supporters or whether there are other factors bearing upon the need for continued detention.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: You will have the opportunity to be heard and to present information to the Administrative Review Board. You can present information from your family that might help you at the Board. You are encouraged to contact your family as soon as possible to begin to gather information that may help you.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: A military officer will be assigned at a later date to assist you in the Administrative Review Board process.

INTERPRETER: (TRANSLATION OF ABOVE).

PRESIDENT: This Tribunal hearing is adjourned.

RECORDER: All Rise. [If moving into Tribunal session in which classified material will be discussed add:] This Tribunal is commencing a closed session. Will everyone but the Tribunal members, Personal Representative, and Reporter/Paralegal please leave the Tribunal room.

PRESIDENT: [When Tribunal room is ready for closed session.] You may be seated. The Tribunal for [Name of detainee] is now reconvened without the detainee being present to prevent a potential compromise of national security due to the classified nature of the evidence to be considered. The Recorder will note the date and time of this session for the record.

[Closed Tribunal Session Commences, as necessary, with only properly cleared personnel present. Presentation of classified information by Recorder and, when appropriate, Personal Representative. Recorder evidence shall be marked in sequence R-1, R-2, etc. while evidence presented for the detainee shall be marked in sequence D-a, D-b, etc. All evidence will be properly marked with the security classification.]

PRESIDENT: This Tribunal session is adjourned and the Tribunal is closed for deliberation and voting.

RECORDER: Notes time and date when Tribunal closed.

[CLASSIFICATION]

Combatant Status Review Tribunal Decision Report Cover Sheet

[CLASSIFICATION]: UNCLASSIFIED Upon Removal of Enclosure(s) (2) [and (3)]

TRIBUNAL PANEL: _____

ISN #: _____

DATE: _____

- Ref: (a) Convening Order of XX YYY 2004
 (b) CSRT Implementation Directive of XX July 2004
 (c) DEPSECDEF Memo of 7 July 2004

- Encl: (1) Unclassified Summary of Basis for Tribunal Decision (U)
 (2) Classified Summary of Basis for Tribunal Decision (U)
 (3) Copies of Documentary Evidence Presented (U)

This Tribunal was convened by references (a) and (b) to make a determination as to whether the detainee meets the criteria to be designated as an enemy combatant as defined in reference (c).

The Tribunal has determined that he (is) (is not) designated as an enemy combatant as defined in reference (c).

[If yes] In particular the Tribunal finds that this detainee is a member of, or affiliated with, _____ (al Qaida, Taliban, other), as more fully discussed below and in the enclosures.

Enclosure (1) provides an unclassified account of the basis for the Tribunal's decision, as summarized below. A detailed account of the evidence considered by the Tribunal and its findings of fact are contained in enclosure (2).

(Rank, Name) President

Enclosure (9)

IMPLEMENTATION OF
THE DETAINEE TREATMENT ACT OF 2005

A. Consideration of new evidence relating to enemy combatant status.

If, pursuant to the procedures set forth in the Implementation Order of the Administrative Review Boards (reference (d)), the Deputy Secretary of Defense directs that a Combatant Status Review Tribunal be convened for the purpose of re-evaluating a detainee's status in light of new information, the tribunal shall conduct its proceeding in accordance with reference (a).

B. Consideration of whether any statement derived from or relating to a detainee was obtained as a result of coercion.

- | In making a determination regarding the status of any detainee, the CSRT shall assess, to the extent practicable, whether any statement derived from or relating to such detainee was obtained as a result of coercion and the probative value, if any, of any such statement.

Enclosure (10)

Appendix B. Model Charge

1. _____ is an unlawful alien enemy combatant under the personal jurisdiction of this tribunal pursuant to ____ finding dated _____. He is not a citizen of the United States.
2. On or about _____, at or near _____, _____ committed the crime of terrorism and/or a violation of the law of war, as part of a joint criminal enterprise through an association-in-fact. He is a co-perpetrator who knowingly and willfully participated in this joint criminal enterprise, sharing the criminal intent and mental state required to commit terrorism. In the alternative, he is a co-perpetrator who knowingly and willfully participated in this joint criminal enterprise, and was aware that terrorism and/or a violation of the law of war, was a natural and foreseeable consequence of their concerted actions as executed.
3. This duration of this joint criminal enterprise spanned from _____ to _____.
4. The purpose of this joint criminal enterprise was to commit violence upon persons and/or institutions protected by the Military Commissions Act of 2006. Said violence violates crimes enumerated under the Military Commissions Act, or otherwise violates the law of war within the Military Commission Act's jurisdiction.
 - (a) Said enterprise intentionally killed or inflicted great bodily harm on one or more protected persons or engaged in an act that evinced wanton disregard for human life; to wit, _____.
 - (b) Said enterprise did so in a manner calculated to influence or affect the conduct of government or civilian population by intimidation or corps and, or to retaliate against government conduct; to wit, _____.
 - (c) Said killing, harm or wanton disregard for human life took place in the context of and was associated with armed conflict, to wit, _____.

5. The known associates of the joint criminal enterprise number at least four persons. These associates are _____, a.k.a. _____.

6. In order for this joint criminal enterprise to succeed in its objective, _____, worked in concert with or through several individuals, each with his own role(s) that significantly contributed to the overall objective of the enterprise. The role(s) of these participants or co-perpetrators include, but are not limited to:

(planned) (prepared) (instigated) (ordered) (committed) (provided) (financed) (supplied)

(manufactured) (distributed) (formed) (directed) (controlled) (relayed) (translated)

(transported) (safeguarded) (secured) (protected) (advised) (influenced) (purchased) (paid)

(leased) (disbursed) (transacted) (reconnoitered) (reported) (taught) (trained) (equipped)

7. _____'s role(s) in this joint criminal enterprise to commit terrorism, include, but are not

limited to: (planned) (prepared) (instigated) (ordered) (committed) (provided) (financed)

(supplied) (manufactured) (distributed) (formed) (directed) (controlled) (relayed) (translated)

(transported) (safeguarded) (secured) (protected) (advised) (influenced) (purchased) (paid)

(leased) (disbursed) (transacted) (reconnoitered) (reported) (taught) (trained) (equipped)

Appendix C. Model Instruction

The Military Commissions Act as codified in Title 10, United States Code, Section 950v, makes unlawful the crime of terrorism and violations of the law of war. Any person who intentionally kills or inflicts great bodily harm on one or more protected persons, or intentionally engages in an act that evinces a wanton disregard for human life, 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, commits the crime of terrorism. Violence cognizable as terrorism may also give rise to violations of the law of war. As a matter of law, it is illegal for anyone to commit terrorism through participation in a joint criminal enterprise. A joint criminal enterprise may arise from an association-in-fact.

The defendant, _____, is accused in Charge ____ with committing this crime from on or about _____, to on or about _____, in that he is alleged to have partaken in a joint criminal enterprise effecting terrorism and/or a violation of the law of war, by

_____.

For you to find the defendant guilty of terrorism through participation in a joint criminal enterprise, you must be convinced that the Government has proved each of the following beyond a reasonable doubt:

First: That the violence charged violates the Military Commissions Act.

If more than one such violation is alleged as an act of terrorism or law of war violation, each violation must be connected together as a series of related or ongoing activities, as distinguished from isolated and disconnected acts of violence. You must unanimously agree on which of these underlying violations was proven, before you consider the defendant's complicity.

Second: That prior to the violence charged, a group of four or more non-state actors issued a collective creed, declaration, condemnation, charter, or manifesto against the sovereignty or policy of the United States.

This group of non-state actors need not have acted at the same time or in concert with each other. You need not unanimously agree on the identity of any other actors acting in concert with the defendant, so long as each of you finds that there were four or more such non-state actors under a collective creed. This group of non-state actors must operate as an enterprise. Such an enterprise need share only a common design or purpose, not a rank hierarchy or corporate structure. An enterprise includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact, although not a legal entity. The term enterprise includes both legal and illegal associations. The enterprise must be separate and apart from the particular terrorist activity which the defendant allegedly supported. The enterprise must be an ongoing organization or network, formal or informal, which functions as a continuing collective.

Third: That prior to the violence charged, the defendant knew of the enterprise's collective creed (tenets), declaration, condemnation, charter, or manifesto.

Fourth: That defendant's act or actionable omission, as charged, was a systemic step in furtherance of the enterprise's collective creed.

In considering whether the defendant's conduct was a systemic step within the enterprise, you need not find that the defendant was an organizer or supervisor. It is possible for an intermediary, subordinate, associate, or sympathizer to carry out a systemic step within an enterprise's collective creed (tenets). A step is systemic when it is taken in functional furtherance of an enterprise's collective creed, declaration, condemnation, charter, or

manifesto against the sovereignty or policy of the United States. A systemic step requires no particular skill set to achieve functional furtherance of an enterprise's collective creed.

Fifth: That the defendant's systemic step within the enterprise was taken with wanton disregard of the collective creed's unlawful effects; in this case, terrorism and/or a violation of the law of war.

Terrorist activities are intentional acts perpetrated to kill or inflict substantial bodily harm upon one or more protected actors, or intentional acts evincing a wanton disregard for human life, in a manner calculated to influence or affect the conduct of government or the civilian population, by intimidation or coercion, or to otherwise retaliate against government conduct.

Appendix D. Encyclopedia of Afghan Jihad

	<u>SUBJECT</u>	<u>TASKS</u>
Book 1 Explosives	Eight chapters with diagrams and formulas to handle, manufactured and detonate explosives.	How to disarm explosives; scientific theories; industrial terror; the use of liquid explosives.
Book 2 First aid	Methods of first aid including the handling of psychological shock, the treatment of burns and electrical shocks.	Describes the handling of several medical needs including delivering a child.
Book 3 Pistols, revolvers	Illustrated guide to the care and use of pistols, revolvers and specialized hand-guns.	Where to keep guns in the house and how to use silencers.
Book 4 Bombs, mines	Illustrated manual on grenades, bombs, mines, mine fields and mine war.	Recipes for mines made of raw materials; How to traverse a mine field.
Book 5 Security intelligence	How to spy; kinds of security; military Intelligence; sabotage; communications; security within Jihad; secret observation; assassination; brainwashing; protection of leaders; laws of sabotage; arms use.	Punishment of spies, Muslim and non-Muslim; interrogation; analyzing information; psychological war; poison use; opening locks; U.S. military training; assassination by riding a motorcycle.
Book 6 Tactics	Principals of war including battle organization, reconnaissance, infiltration, ambush; incursion.	Urged Muslims to follow Jihad established in Afghanistan against un-Islamic states and stated where true Islam is not practiced.
Book 7 Weapons	The book consists mostly of diagrams of machinery for the manufacture of arms. making	On the manufacture of bullets and silencers; metal casting; the use of steel files.
Book 8 Tanks	The anatomy and history of tanks, their effectiveness and different types.	Tank maintenance costs; how to drive a tank.
Book 9 Close fighting	Physical fitness; aikido and other forms of self defense; how to overcome a rival.	How to attack with knives, chairs; methods of releasing oneself from a grip.
Book 10 Topography area survey	Natural directions; using a compass; topography; following directions on maps; military area survey; area survey apparatus.	The estimation and measurement of distance, height, and speed for military use.
Book 11 Armament	Small arms – artillery, antiaircraft, antitank, machine guns, and rifles.	Reviews mostly Russian weapons; offers practical details on weapons assembly, cleaning, and use.

Source: Associated Press (Oct. 2, 2001), available at <http://www.unl.edu/eskridge/encyclopedia.html>

Appendix E. *Fatwa*

In the Name of Allah the Most Compassionate the Most Merciful.

This is a message from the servant of Allah Usama bin Laden, to the peoples of the countries who have entered into a coalition with the tyrant American administration.

Peace be upon those who follow guidance. The road to safety begins with the removal of aggression, and justice stipulates exacting the same treatment. What happened since the attacks on New York and Washington and up until today, such as the killing of the Germans in Tunisia, the French in Karachi, and the bombing of the French oil tanker in Yemen, and the killing of the marines in Failaka, and the killing of the British and the Australians in the explosions of Bali and the recent operation in Moscow, as well as some other operations here and there, is but a reaction and retaliation (an eye for an eye), undertaken by the children of the Muslims who are devoted to defending their religion and to the teachings of their Messenger.

What Bush, the Pharaoh of this day and age, is doing now, in terms of killing our children and Iraq, and what Israel, the ally of America, is doing in terms of destroying homes and the people inside them, destroying the homes with elderly, children and women inside, with the American planes in Palestine, should be ample indication to the wise from among your rulers to forsake of this gang of criminals. Our brethren in Palestine have been subjected to the killings and the worst forms of torture for more than a century. So if we defend our people in Palestine, the world reacts by ganging up against the Muslims under the banner of fighting terrorism, falsely and unjustly.

So what are your governments doing by siding with the gang of criminals at the White House against the Muslims? Do your governments not know that the gang of the White House are the biggest butchers in history? Here's Rumsfeld, the butcher of Vietnam, who killed more than 2 million people, in addition to the injured; and here are Cheney and Powell perpetrating in Baghdad, in terms of killing and destruction, more than Tartars led by Hulagu Khan.

So why are your governments entering into one alliance after another alliance with America by attacking us in Afghanistan? And I specifically mention Britain, France, Italy, Canada, Germany and Australia.

We have warned Australia before against taking part in the war in Afghanistan, in addition to her despicable attempt at separating East Timor; she disregarded the warnings until she awoke to the sounds of explosions in Bali. Then she falsely claimed that her people are not targeted.

If you have been aggrieved and appalled by the sight of your dead and the dead among your allies, men and women alike, and Tunisia, Karachi, Failaka, Bali and Amman, remember our dead children in Palestine and Iraq who perish every day. Remember our dead

in Khost and remember our dead who were killed deliberately during the wedding ceremonies and other celebrations in Afghanistan.

If you were appalled by the sight of your dead in Moscow, remember our dead in Chechnya. So how long should the killing, destruction, expulsion and the orphaning and widowing continue to be an exclusive occurrence upon us while peace, security and happiness remains your exclusive monopoly?

This is an unfair predicament. It is high time we were equal in terms of the commodities. So you kill, you shall be killed, and as you bomb, you shall be bombed, and wait for what brings calamity.

Here is the Islamic nation, who with the grace of Allah has started to throw at you her dearest children, who have promised Allah to pursue the jihad, with the pen and the sword, in order to establish the truth and banish falsehood, for as long as they have an eye that can see and as long as blood continues to run through their veins.

And finally, I ask Allah to grant us His help in order to defend His religion and in order to pursue the jihad for His sake and to meet Him what He is pleased with us. He is the possessor and capable of this with certainty and our last supplication is: Praise be to Allah, the Lord of the Universe.

Source: Translated Al-Jazeera television broadcast, November 12, 2002.

Appendix F. Federal Civilian Prosecution Options

CRIME	CONDUCT	LAW
ID Fraud	Fraud - identification documents	18 U.S.C. § 1028
	Passport forgery or false use	18 U.S.C. § 1543
	Passport misuse	18 U.S.C. § 1544
	Fraud and misuse of visas, permits, and other documents	18 U.S.C. § 1546
	Fraud - Social Security	42 U.S.C. § 408
Financial Fraud	Bribery of public officials and witnesses	18 U.S.C. § 201
	Counterfeited or forged securities of states or private entities	18 U.S.C. § 513
	Making false statement on the credit application	18 U.S.C. § 1014
	Bank fraud	18 U.S.C. § 1344
	Money laundering	18 U.S.C. § 1956
	Operating unlicensed money transmitting business	18 U.S.C. § 1960
	Racketeering	18 U.S.C. § 1962
Structuring transactions to evade reporting requirements	31 U.S.C. § 5324	
Mail & Wire Fraud	Fraud – mail	18 U.S.C. § 1341
	Fraud – wire, radio, or television	18 U.S.C. § 1343
Credit Card Fraud	Fraud in connection with access devices	18 U.S.C. § 1029
Tax Fraud	Filing materially false income tax returns	26 U.S.C. § 7206
	Corrupt endeavor to impede administration of IRS laws	26 U.S.C. § 7212
	Alien – deportable	8 U.S.C. § 1227
Immigration Fraud	Alien – failure to report address change	8 U.S.C. § 1305
	Alien – smuggling	8 U.S.C. § 1324
	Evading immigration laws	8 U.S.C. § 1325
	Falsely representing oneself as a U.S. citizen	18 U.S.C. § 911
	Illegal alien in the U.S.	18 U.S.C. § 922
	False statement -naturalization, citizenship, or alien registry	18 U.S.C. § 1015
	Unlawful procurement - citizenship or naturalization	18 U.S.C. § 1425
	Aiding and abetting	18 U.S.C. § 2
Ancillary / Support	Conspiracy to commit offense or defraud U.S.	18 U.S.C. § 371
	Making a materially false statement	18 U.S.C. § 1001
	Perjury	18 U.S.C. § 1621
	Providing material support to terrorists	18 U.S.C. § 2339
	Conspiracy - give or receive funds, goods, or services for a designated terrorist	50 U.S.C. § 595

Source: U.S. Department of Justice study, available at <http://www.ncjrs.gov/pdffiles1/nij/grants/209520.pdf>.

Appendix G. Al-Qaeda's Worldwide Affiliates

- Armed Islamic Group
- Salafist Group for Call and Combat and the Armed Islamic Group
- Egyptian Islamic *Jihad* (*Egypt*)
- Al-Gama'a al-Islamiyya
- Jamaat Islamiyya
- The Libyan Islamic Fighting Group
- Bayt al-Imam (*Jordan*)
- Lashkar-e-Taiba and Jaish-e-Muhammad (*Kashmir*)
- Asbat al Ansar
- Hezbollah (*Lebanon*)
- Al-Badar
- Harakat ul Ansar/Mujahadeen
- Al-Hadith
- Harakat ul *Jihad*
- Jaish Mohammed – JEM
- Jamiat Ulema-e-Islam
- Jamiat-ul-Ulema-e-Pakistan
- Laskar e-Toiba - LET
- Moro Islamic Liberation Front (*Philippines*)
- Abu Sayyaf Group (*Malaysia, Philippines*)
- Al-Ittihad Al Islamiya - AIAI (*Somalia*)
- Islamic Movement of Uzbekistan
- Islamic Army of Aden (*Yemen*)

Source: U.S. Department of State, Global Patterns of Terrorism Annual Report, Office of the Coordinator for Counterterrorism, (2005), available at <http://www.state.gov/s/ct/rls/> (last visited Apr. 6, 2007).