2015

# Analyze the practical differences and issues, if any, in prosecuting the crimes of aiding the enemy under article 104 of the UCMJ, treason, and material support for terrorism. Has the offense of "material support for terrorism," as defined in the military commissions act of 2009 (10 U.S.C. § 950 t (27)), been tried by U.S. military commissions or foreign military tribunals enforcing the law of war? Please consider whether the UCMJ/MCA crime of “aiding the enemy” 1) is comparable to any international offenses; 2) analyze the practical differences and issues , if any, in prosecuting the crimes of aiding the enemy (under article 104 of the UCMJ) and treason; 3) is a duty of allegiance necessary to prosecute someone for the UCMJ crime (article 104) of aiding the enemy; 4) based on the language of the offense contained in the UCMJ and manual for courts-martial (governed by executive order), can “any person” regardless of military status actually be prosecuted in a court martial for aiding the enemy under UCMJ article 104; and 5) analyze the feasibility of a prosecutor in a military commission charging an alien with article 104 of the UCMJ, taking into account consideration of whether or not there is a duty of allegiance.

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MEMORANDUM FOR MILITARY COMMISSIONS

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ISSUE: ANALYZE THE PRACTICAL DIFFERENCES AND ISSUES, IF ANY, IN PROSECUTING THE CRIMES OF AIDING THE ENEMY UNDER ARTICLE 104 OF THE UCMJ, TREASON, AND MATERIAL SUPPORT FOR TERRORISM. HAS THE OFFENSE OF "MATERIAL SUPPORT FOR TERRORISM," AS DEFINED IN THE MILITARY COMMISSIONS ACT OF 2009 (10 U.S.C. § 950 T (27)), BEEN TRIED BY U.S. MILITARY COMMISSIONS OR FOREIGN MILITARY TRIBUNALS ENFORCING THE LAW OF WAR? PLEASE CONSIDER WHETHER THE UCMJ/MCA CRIME OF "AIDING THE ENEMY" 1) IS COMPARABLE TO ANY INTERNATIONAL OFFENSES; 2) ANALYZE THE PRACTICAL DIFFERENCES AND ISSUES , IF ANY, IN PROSECUTING THE CRIMES OF AIDING THE ENEMY (UNDER ARTICLE 104 OF THE UCMJ) AND TREASON; 3) IS A DUTY OF ALLEGIANCE NECESSARY TO PROSECUTE SOMEONE FOR THE UCMJ CRIME (ARTICLE 104) OF AIDING THE ENEMY; 4) BASED ON THE LANGUAGE OF THE OFFENSE CONTAINED IN THE UCMJ AND MANUAL FOR COURTS-MARTIAL (GOVERNED BY EXECUTIVE ORDER), CAN "ANY PERSON" REGARDLESS OF MILITARY STATUS ACTUALLY BE PROSECUTED IN A COURT MARTIAL FOR AIDING THE ENEMY UNDER UCMJ ARTICLE 104; AND 5) ANALYZE THE FEASIBILITY OF A PROSECUTOR IN A MILITARY COMMISSION CHARGING AN ALIEN WITH ARTICLE 104 OF THE UCMJ, TAKING INTO ACCOUNT CONSIDERATION OF WHETHER OR NOT THERE IS A DUTY OF ALLEGIANCE.

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## I. INTRODUCTION

## A. Scope

This paper seeks to analyze the practical differences and issues, if any, in prosecuting the crimes of Aiding the Enemy under Article 104 of the UCMJ, Treason and Material Support for Terrorism. The paper will consider whether the offense of "material support for terrorism," as defined in the Military Commissions Act of 2009 has been tried by U.S. military commissions or foreign military tribunals enforcing the law of war. It will consider whether the crime of “Aiding the Enemy” is comparable to any international offenses and analyze the practical differences and issues, if any, in prosecuting the crimes of Aiding the Enemy and Treason. It will also review whether a duty of allegiance is necessary to prosecute someone for the UCMJ crime of Aiding the Enemy. In addition, this paper will discuss whether “any person” regardless of military status can be prosecuted in a court martial for Aiding the Enemy under UCMJ Article 104 based on the language of the offense contained in the UCMJ and Manual for Courts-Martial. It will indirectly analyze the feasibility of a prosecutor in a military commission charging an alien with Article 104 of the UCMJ, taking into account whether or not there is a duty of allegiance.

## B. Summary of Conclusions

1. **Difficulties in statutory interpretation have long been problematic for those charged with prosecuting the crime of Treason. The courts have struggled to define what constitutes Treason by levying war and what constitutes Treason by adhering to enemies specifically giving them aid and comfort. Treason may successfully be prosecuted under either the levying war or aid and comfort parts of the statute.**

2. **The UCMJ Section 104 crime of Aiding the Enemy is a distinct, albeit related crime, from the crime of Treason. Aiding the Enemy, unlike Treason, has no built in duty of allegiance requirement**

**required to prosecute. The newer Congressionally created crime "Wrongfully Aiding the Enemy" explicitly mandates an allegiance of duty requirement missing in the Aiding the Enemy crime, defining that allegiance as citizenship, resident alien status, or a contractual relationship in or with the United States supporting the aforementioned conclusion through this distinction.**

3. **The Military commissions only have jurisdiction for war crimes or crimes under the Law of War. Material Support for Terrorism under the Military Commission Acts of 2006 and 2009 is not a war crime and therefore prosecutors should not be able to prosecute by military tribunals.**

## II. FACTUAL BACKGROUND

### A. A Brief history of the crime of Treason

Treason was prosecuted in early England mainly under the offense of compassing the King's death, while other cases focused on the problem of Treason by levying war[1]. The United States also has a long history of prosecuting the crime of Treason. In 1794, the "Whiskey Rebellion" occurred in Pennsylvania in resistance to a tax on spirits. A number of the participants were charged with Treason.[2]

### B. History of Aiding the Enemy and Divergence from Treason

1. Prosecuting the crime of Aiding the Enemy within the U.S. context dates back to 1775. In *Hicks*, the defense noted that the crimes of Aiding the Enemy was enacted by

[1] Jabez W. Loane, IV, Treason and Aiding the Enemy, 30 Mil. L. Rev. 43 (1965) [Reproduced in accompanying notebook at Tab 32].

[2] The Whiskey Rebellion, or Whiskey Insurrection, was a tax protest in the United States beginning in 1791, during the presidency of George Washington. The so-called "whiskey tax" was the first tax imposed on a domestic product by the newly formed federal government. It became law in 1791 and was intended to generate revenue to help reduce the national debt. *Id* at 55[Reproduced in accompanying notebook at Tab 32].

the first U.S. Congress in 1760. The Act was often referred to as relating to the crime of Treason.[3]

2. However, Congress, as shown later, specifically intended to separate Treason from Aiding the Enemy. This Congressional intent culminated when Congress included Article 104 within the original United Code of Military Justice (UCMJ) in 1950. Thus, Aiding the Enemy under Article 104 is a separate offense, with distinct elements, from Treason.

### C. Background on the crime of Wrongfully Aiding the Enemy

Congress also gave prosecutors a newer charge under the MMC called "Wrongfully Aiding the Enemy. While this version follows the same general statutory guidelines as its UCMJ counterpart, the MMC requires an additional element absent from UCMJ Article 104. The MMC requires prosecutors a breach of an allegiance or duty to the United States, defining that allegiance as "citizenship, resident alien status, or a contractual relationship in or with the United States[4]."

### D. Origin and Evolution of Material Support for Terrorism

1. *Non-Military Prosecution of Material Support for Terrorism*. The term material support first appeared in federal legislation in the 1990 Immigration and Nationality Act (INA). While domestic law already excluded aliens from the United States who "engage in terrorist activity," INA expanded this scope. Under the INA, it was now permissible to

[3] U.S v Hicks, 2004 WL 3088462 (2004) [Reproduced in accompanying notebook at Tab 24].
[4] Manual for Military Commissions, 10 U.S.C § 47 A, April 27, 2010 [Reproduced in accompanying notebook at Tab 9].

exclude an alien from the United States if that individual had committed an act of providing material support to a terrorist organization.[5]

2. *Military Prosecution of Material Support for Terrorism*. In 2006, the United States categorized Material Support for Terrorism as a war crime with Congress's passage of the Military Commissions Act (MCA), codified in Title 10 of the United States Code[6].

## III. LEGAL DISCUSSION

### A. Treason

#### 1. Definition of Treason

Treason is defined under the US Code as whoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason and shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States.[7]

#### 2. Prosecuting early Treason under the levying war requirement.

##### a. Early England Treason and the Whiskey Rebellion

[5] Immigration and Nationality Act, 104 Stat. 4978, November 29, 1990 [Reproduced in accompanying notebook at Tab 6].
[6] Military Commissions Act, 10 U.S.C. § 948a, 2006[Reproduced in accompanying notebook at Tab 10].
[7] Crime of Treason, 18 U.S. Code § 2381 [Reproduced in accompanying notebook at Tab 4].

While the vast majority of the early English Treason trials were concerned with the offense of compassing the King's death[8], some addressed the problem of Treason by levying war. Where the former was relatively straightforward, the latter forced the development of at least rudimentary legal concepts which could be applied with some level of consistency. The construction of compassing the King's demise still played a part in prosecution, but an increasingly minor role. The United States faced a similar situation in its history and treatment of Treason. In 1794, the “Whiskey Rebellion” started up in Pennsylvania in resistance to a tax on spirits. Federal officers were threatened and assaulted. In July 1794, a mob attacked the home of the chief excise officer which was defended by a number of men. Subsequently, the mob, in a show of force, marched through Pittsburgh. A number of the participants were apprehended and charged with Treason. Only two persons, however, were actually brought to trial.[9]

b. **Mitchell and Frees: role in the history of the crime of Treason**

In *Mitchell,* the defense contended that the attack on the officer's home was an attack on him as an individual and not in his role as an officer of the United States and that there was not an attempt to resist the law on a nationwide scale[10]. The argument was that this was merely a riot, not Treason. The honorable Justice Paterson reasoned that if the object of the insurrection was to suppress the officers and to prevent the execution of an act of congress by force and intimidation the offense is high Treason by levying of war.[11] The court ruled if the Whiskey Rebels showed a determined effort to

[8] Jabez W. Loane, IV, Treason and Aiding the Enemy, 30 Mil. L. Rev. 43 (1965) [Reproduced in accompanying notebook at Tab 32].
[9] *Id* at 57.
[10] U.S v Mitchell, 2 U.S. 348 (1795) [Reproduced in accompanying notebook at Tab 26].
[11] *Loane, supra* note 1, *at 56 [Reproduced in accompanying notebook at Tab 32].*

oppose an act of Congress, those of the North Hampton Insurgents did not.[12] In 1799, John Fries led over 100 men to free a group of farmers being held by United States marshals for conspiracy to violate the Land Tax Act.[13] The mob arrived at a tavern where the prisoners were being held, threatened the marshals, and secured the farmers' release. However, John Fries was subsequently tried for Treason. The court found him guilty under the same reasoning as Mitchell. Although revolution was still a real fear, it is difficult to understand why Fries could have been convicted of levying war. Measured against the facts, Fries' conduct appears fragmentary and insignificant. If this had been Treason, then almost any riot or disorder involving opposition to a law of the United States can be construed as Treason. However, Fries was eventually pardoned.

### c. **Hanivay**

The effect of *Mitchell* persisted until the 1851 decision in *United States* v*. Hanivay*[14]. Hanivay had aided one of several armed bands advocating resistance to the fugitive slave law. In the immediate violence out of which the case arose, a slave owner was killed, his son wounded, and police officers were attacked. Justice Grier, professing that he saw a change in the legal definition of "levying war" believed that the term levying war, should be confined to insurrection and rebellions for the purpose of overthrowing the government by force and arms. The court reasoned that this was not an insurrection meant to overthrow the government and found Hanivay not guilty. Many

[12] *Id at 57 [Reproduced in accompanying notebook at Tab 32].*
[13] *Id [Reproduced in accompanying notebook at Tab 32].*
[14] Us v Hanivay [Reproduced in accompanying notebook at Tab 32].

of the cases of Treason mentioned would perhaps now be treated merely as aggravated felonies after this case.

### 3. Prosecuting Treason under the Adhering to the Enemy prong of the statute

#### a. Explanation of adhering to the enemy

Unlike the offense of Treason by levying war which passed from the scene almost a hundred years ago, the offense of Treason by adhering to the enemy has achieved a longer and more useful existence. Adhering to the enemy encompasses both aiding and giving comfort to the enemy. With these elements, the problem of intent is intertwined. A citizen may intellectually, emotionally and spiritually sympathize with the enemy, but as long as he fails to engage in conduct designed to give the enemy aid and comfort, the crime of Treason does not occur.[15] The mere fact that it is offered or rendered with the requisite intent will make the crime complete.

#### b. Difficulties in interpreting the aid and comfort requirement of Treason

##### i. Haupt and Chandler

The World War II propagandist cases mention levying war only in passing basing their decisions on the adhering prong. However, the courts have had great difficulty explaining what aid and comfort to a propagandist provides, by way of either benefit to the enemy or detriment to the United States. In earlier decisions applying the phrase "aid and comfort," courts faced clearer cases in which the defendants provided concrete

[15] Kristen Eichensehra, Treasons Return, 116 Yale L.J. Pocket Part 229 (2007) [Reproduced in accompanying notebook at Tab 29].

aid and comfort to the enemy. For example, in *Haupt v. United States*, the Supreme Court upheld the Treason conviction of the father of one of the Quirin[16] saboteurs who, with full knowledge and endorsement of his son's mission of sabotage, supplied him with housing, food, transportation, and employment in the United States[17]. In *Chandler*, the question considered was what aid and comfort do words with no actions provide. The court answered based on the facts that the appearance of an American citizen on an enemy radio program would demoralize U.S. troops in the field, thereby giving aid to the United States' enemies finding the American citizen guilty under the adhering prong. But the courts have held that the criminality of a U.S. citizen's production of enemy propaganda does not depend on the effects of that propaganda. As the court reasoned in *Chandler v. United States*, "it makes no difference how many persons in the United States heard or heeded Chandler's broadcasts."[18]

### c. Interpreting Gadahn and the propaganda requirement in the adhering prong

In October 2006, the Department of Justice indicted Adam Gadahn on charges of Treason and giving Material Support to a designated foreign terrorist organization.[19] The indictment alleged that Gadahn, an American citizen, "knowingly adhered to an enemy of the United States, al-Qaeda, and gave al-Qaeda aid and comfort with the intent to betray the United States." Gadahn allegedly betrayed the United States by appearing in al Qaeda videos in which he spoke against the United States, praised the

[16] Ex-parte Quirin, 317 U.S. 1 (1942) [Reproduced in accompanying notebook at Tab 27].
[17] Haupt v. U.S, 330 U.S. 631 (1947) [Reproduced in accompanying notebook at Tab 23].
[18] U.S v. Chandler, 171 F.2d 921 (1948) [Reproduced in accompanying notebook at Tab 20].
[19] U.S v. Gadahn, C.D. Cal. Oct. 11 (2006) [Reproduced in accompanying notebook at Tab 21].

September 11 attacks, and touted al Qaeda's ability to attack again. Because Gadahn's alleged crimes consisted solely of participating in propaganda videos, his case is similar to the last wave of treason prosecutions of American civilians, many of which targeted citizens who served as propagandists for Germany and Japan during World War II. The indictment against Gadahn follows the World War II Treason cases in asserting that propaganda amounts to Treason under the aid and comfort prong and makes no mention of "levying war" against the United States.

Attorney General Paul J. McNulty emphasized the potential harmful effects of propaganda: "The significance of the propaganda part should not be underestimated. This is a very significant piece of the way an enemy does business, to demoralize the troops, to encourage the spread of fear."[20] His response shows the effects-based theory of aid and comfort as it asserts that the standard for determining whether a defendant provided aid and comfort to America's enemies depends on the propaganda's effect on the United States. The problem with the Gadahn indictment is that the courts are unsure as to what constitutes "aid and comfort" in the propaganda context. The lack of clarity about what constitutes "aid and comfort" leaves the government great leeway in bringing treason prosecutions against political dissenters, whose statements might provide aid to the United States' enemies in only an indirect manner. Under the World War II precedents, there is no logical limit preventing an "aid and comfort" Treason charge against someone in the United States who speaks the same words as Gadahn. Without a clear definition of aid and comfort that encompasses those who work for an enemy to produce propaganda but excludes those who engage in political dissent by

[20] Eichensehra, *supra* note 15 at 232 [Reproduced in accompanying notebook at Tab 29].

independently agreeing with, but not working with, the enemy, Treason may be expanded indefinitely[21].

## 4. Treason prosecuted overseas: the duty of allegiance and citizenship requirement

The prosecution of a native or naturalized American citizen for Treason committed within the borders of the United States does not raise a jurisdictional problem. But Treason committed overseas is a different matter. The law punishes as traitors those who adhere to the enemies of the United States within the country or elsewhere. The "elsewhere" is a source of great confusion.

### a. "Axis Sally" and "Tokyo Rose"

In December 1941, simultaneously with the declaration of war, Mildred Gillars or "Axis Sally" executed a paper which contained the words "I swear my allegiance to Germany."[22] On the basis of this paper, which was never produced, she urged the jury to be instructed that if they found this to be a sufficient renunciation of citizenship, they should acquit. The court refused to give the instruction, and the conviction was affirmed. The court reasoned that there was no evidence that the paper had been sworn to before anyone, or that there was any connection between it and any procedure having to do with obtaining citizenship. Nor did it find any substance to Axis Sally's argument that her citizenship had ceased when her United States passport, submitted for renewal in 1941,

[21] Gadahn, *supra* note 20 at 233 [Reproduced in accompanying notebook at Tab 21].

[22] Mildred Elizabeth Gillars (November 29, 1900 – June 25, 1988), nicknamed "Axis Sally" along with Rita Zucca, was an American broadcaster employed by the Third Reich in Nazi Germany to proliferate propaganda during World War II. She was convicted of treason by the United States in 1949 following her capture in post-war Berlin.

had been retained by the consular agent. A passport is some evidence of citizenship but concluded the court, its absence does not deprive an American of his citizenship.

A second argument advanced in favor of successful expatriation under the Nationality Act of 1940 was advanced by Iva D'Aquino, the "Tokyo Rose" of the Pacific theater.[23] She noted that under the expatriation provisions of the Act, a person was permitted to shed his allegiance to the United States and by doing so, could engage in adherence, aid and comfort to the enemy with impunity. She argued that to try her for Treason for acts which the law permitted others to do was unreasonable and arbitrary and was a denial of due process under the Fifth Amendment. But the court found no basis for this contention and concluded it was no more than a mere play on words.[24]

It can be concluded that an American may avoid his natural loyalty to his country through an act of voluntary expatriation. But the mere fact that such person purports to verbally or informally renounce his citizenship or purports to pledge his allegiance to any enemy state, without complying with its formal requirements, will not excuse the crime of Treason. Before allowing a citizen to adhere to our enemies the courts will force a compliance with the statutes dealing with expatriation even for a person with a dual nationality status.[25]

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[23] Iva Toguri, better known as "Tokyo Rose," was born in Los Angeles on July 4, 1916. After college, she visited Japan and was stranded there after the attack on Pearl Harbor. Forced to renounce her U.S. citizenship, Toguri found work in radio and was asked to host "Zero Hour," a propaganda and entertainment program aimed at U.S. soldiers. After the war, she was returned to the U.S. and convicted of treason, serving 6 years in prison [Reproduced in accompanying notebook at Tab 32].

[24] Loane, *supra* note 8 at 66 [Reproduced in accompanying notebook at Tab 32].

[25] *Id [Reproduced in accompanying notebook at Tab 32].*

## B. **Aiding the Enemy**

### 1. **Definition of Aiding the Enemy**

Under Section 104 of the UCMJ, Aiding the Enemy is defined as any person who (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or (2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly; shall suffer death or such other punishment as a court martial or military commission may direct. This section does not apply to a military commission established under chapter 47A of this title.[26]

### 2. **Relationship between Treason and Aiding the Enemy**

The history of the Aiding the Enemy crime within the U.S. context dates back to 1775. The crimes of Aiding the Enemy and Treason were enacted by the first U.S. Congress in 1760.[27] That act, often referred to as relating to "the crime of Treason," stated that "if any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort with the United States or elsewhere ... such person or persons shall be adjudged guilty of treason." However, Congress later specifically intended to separate Treason from Aiding the Enemy. This Congressional intent culminated when Congress included Article 104 within the original UCMJ in 1950. Thus, Aiding the Enemy under Article 104 is a separate offense from Treason. This Congressional action provides

[26]United Code of Military Justice, 10 U.S. Code § 904, May 5, 1950 [Reproduced in accompanying notebook at Tab 16].

[27] Michael J. Lebowitz, A Question of Allegiance: Choosing Between Dueling Versions of "Aiding the Enemy" During War Crimes Prosecution, 67 A.F. L. Rev. 131 (2013) [Reproduced in accompanying notebook at Tab 31].

evidence that Treason is essentially one option for the government to use in levying charges against those who both assist the enemy against the United States and hold an allegiance or duty to the United States such as citizenship.[28]

### 3. Aiding the Enemy Under Section 104 of the United Code of Military Justice (UCMJ)

Article 104 has criminalized Aiding the Enemy since the UCMJ's inception in 1950. This charge is unique within the confines of traditional military law because the statutory language specifically authorizes trial via court-martial or military commission. Based on the language of case law, it is easy to conclude that Congress specifically intended the charge of Aiding the Enemy to be available to military prosecutors when conducting military commission proceedings. Article 104's recent history only bolsters this conclusion. The UCMJ version of Aiding the Enemy has only been amended once, in 2006, when Congress stated the section does not apply to a military commission established under chapter 47A. Thus, the Aiding the Enemy charge as laid out in the new MCA 2006 became the only legally sanctioned method for prosecuting Guantanamo Bay detainees available at the time. That bright-line exclusion of Article 104 seemed to be the end of the situation until a few years later with the approval of MCA 2009 that ultimately served to repeal MCA 2006.[29] The MCA 2009 failed to maintain the exclusion of UCMJ Article 104, and thus Congress effectively restored

[28] Leibowitz, *supra* note 27 at 136 [Reproduced in accompanying notebook at Tab 31].
[29] *Id [Reproduced in accompanying notebook at Tab 31].*

Article 104's scope back to its historic statutory language. As a result, the current UCMJ authorizes an Aiding the Enemy charge via any type of military commission.

### 4. Choosing how to prosecute under UCMJ 104: the prosecutor's dilemma

Theoretically, when prosecuting war criminals, military trial attorneys could bypass a military commission altogether and instead take the accused to a court-martial as Article 104 does assert jurisdiction over "any person."[30] A court-martial could better avoid the inherent politics and delay surrounding the military commission process. However, the negative view is the same logic that led to the creation of military commissions in the first place in terms of evidentiary issues and better protecting classified assets. Once a potential court martial gets to the referral stage relating to a violation of Article 104, a convening authority is required. The Office of Military Commissions (OMC) has its own appointed convening authority tasked with approving all referrals of charges. But the OMC convening authority is limited to military commissions and would not have jurisdiction to authorize a court martial. Therefore, the authority for a Guantanamo Bay detainee would likely be the admiral overseeing Joint Task Force Guantanamo. If the Guantanamo Bay authority approves charges against a detainee under Article 104, military trial counsel may seek a judicial opinion. The rationale is that the UCMJ has not been used in such a straight battlefield manner involving an enemy force. The judicial opinion would need to grant additional leeway in regard to the rules of evidence because of the in-depth intelligence inherent in a military

[30] Leibowitz at 143 [Reproduced in accompanying notebook at Tab 31].

commission but typically alien to the vast majority of courts-martial. But overall, bypassing a military commission for courts-martial may be tactically sound but would likely remain impractical due to the nature and scope of the evidence involved in such cases.[31]

### 5. **Duty of allegiance confusion under the UCMJ section 104 for the crime of Aiding the Enemy**

Although Article 104 appears to afford military commission prosecutors an additional choice of law regarding an Aiding the Enemy charge, the duty of allegiance seems to have worked its way back into the crime. During post 9/11 litigation involving the military commission process, the subject of Aiding the Enemy has arisen involving Guantanamo Bay detainees.[32] Moreover, the government charged Guantanamo Bay detainees Omar Khadr and David Hicks with Aiding the Enemy before the MCA 2006.[33] Between the federal civil litigation and the Khadr and Hicks charges, the duty of allegiance was introduced as being an element to UCMJ Article 104.This notion has its roots in confusion over the similarly situated historic Treason statute, despite either the lack of case law applying UCMJ Article 104 to alien combatants or its post-World War II predecessor with judicial overlay or additional common law elements. Adding to the confusion, Aiding the Enemy cases prosecuted during the Civil War, Philippine Insurrection, and Seminole War were not consistent in addressing the issue of loyalty, allegiance or Treason.[34] In 2004, in *United States v. Hicks*, the defense sought to

[31] Leibowitz at 145 [Reproduced in accompanying notebook at Tab 31].
[32] *Id* at 136 [Reproduced in accompanying notebook at Tab 31].
[33] Hicks *supra* 3, U.S v. Khadr, 529 F.3d 1112 (2008) [Reproduced in accompanying notebook at Tab 24 and Tab 25].
[34] *Id. [Reproduced in accompanying notebook at Tab 34].*

dismiss the Aiding the Enemy charge by tying it to the allegiance requirements contained in the Treason and Aiding the Enemy language of the Articles of War of 1775.[35] However, the issue was not tried since the government withdrew all charges against Hicks. The Aiding the Enemy charge against Khadr suffered a similar fate, and once the government was allowed to refile charges in that case, prosecutors decided not to use the Aiding the Enemy charge.

### 6. **The creation of a related crime of Wrongfully Aiding the Enemy under Military Manual for Commissions supports the conclusion UCMJ 104 has no duty of allegiance**

Congress authorized prosecutors to use a MMC alternative, a charge called "Wrongfully Aiding the Enemy."[36] While this crime follows the same statutory guidelines as its UCMJ counterpart, the MMC crime requires one significant additional element absent from UCMJ Article 104. This crime explicitly required that the accused detainee must be "in breach of an allegiance or duty to the United States," defining that "allegiance" or "duty" as "citizenship, resident alien status, or a contractual relationship in or with the United States." Therefore, based solely on the statutory language, military commission prosecutors seeking to charge an accused terrorist operative with Aiding the Enemy have the option of avoiding the MMC's strict allegiance requirement by simply reverting back to the UCMJ.[37] In fact, the UCMJ appears to provide jurisdiction to apply Article 104 to a detainee otherwise chargeable under the overall MCA 2009,

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[35] *Id* at 135[Reproduced in accompanying notebook at Tab 32] [Reproduced in accompanying notebook at Tab 34].
[36] Manual for Military Commissions, 10 U.S.C § 47 A, April 27, 2010 [Reproduced in accompanying notebook at Tab 9].
[37] Leibowitz at 143[Reproduced in accompanying notebook at Tab 31].

stating, “This article denounces offenses by all persons whether or not otherwise subject to military law.” Offenders may be tried by court-martial or by military commission. The forward to the MMC acknowledges that the military commission’s rules are “adapted from the Manual for Courts-Martial.”[38] The foreword adds support that the MMC applies the procedures and rules from courts-martial unless otherwise noted .This statement bolsters the conclusion that the MMC version of Wrongfully Aiding the Enemy was meant be treated as a distinct crime from UCMJ 104 Aiding the Enemy.

### 7. Prosecutor’s choice between the MMC crimes of Wrongfully Aiding the Enemy and UCMJ Aiding the Enemy is aided by a three part test

In determining whether to prosecute under the MMC Wrongfully Aiding the Enemy crime or the UCMJ Article 104 Aiding the Enemy crime a three-part test is an effective tool.[39] The first step is to assess the detainee's immigration status. If the detainee is a lawful permanent resident or holds himself out as a resident alien based on the stated belief that his “green card” is still valid, then the government can prosecute under the MMC version of Aiding the Enemy. The second step looks at where the detainee was seized. If the detainee were seized within the United States, then he has adopted a duty to the United States based on the immigration paperwork used to gain country access. For an accused captured overseas, the third step requires reviewing any substantial connections to the United States that the detainee had during his alleged assistance to the enemy. The “substantial connections” element of this test

[38]Manual for Courts Martial, 160 Mil. L. Rev. 96, June 1999 [Reproduced in accompanying notebook at Tab 8].
[39] Leibowitz, *supra* note 37 at 136 [Reproduced in accompanying notebook at Tab 31].

is valuable because in other contexts courts have found that overseas aliens held a sufficient nexus to the United States to merit certain Fifth Amendment trial rights.[40] For example, *al-Aqeel v. Paulson* involved a Saudi citizen deemed to have a "sufficient nexus with the United States" based on factors including frequent travel to the United States, acquiring property in Missouri and his being president of an Oregon corporation. In this case, al-Aqeel was allowed to enjoy some additional trial rights based on his substantial U.S. contacts, although the court denied his attempts to gain Fourth Amendment benefits.[41] Because the MMC defines the allegiance or duty requirement as having some duty to the United States, applying the substantial connections test may well be appropriate for an MMC wrongfully aiding the enemy charge.

### C. **Material Support for Terrorism**

#### 1. **Definition of Material Support for Terrorism**

Under 18 U.S. Code § 2339A, Material Support for Terrorism is defined as whoever provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, a violation of various sections section[42] or in preparation for, or in carrying out, the concealment of an escape from the commission of any such violation, or attempts or conspires to do such an act,

[40] Al-Aqeel v. Paulson, 568 F.Supp.2d 64 (2008) [Reproduced in accompanying notebook at Tab 19].
[41] *Id [Reproduced in accompanying notebook at Tab 19].*
[42] The sections the Material Support for Terrorism statute includes are as follows section 32, 37, 81, 175, 229, 351, 831, 842 (m) or (n), 844 (f) or (i), 930 (c), 956, 1091, 1114, 1116, 1203, 1361, 1362, 1363, 1366, 1751, 1992, 2155, 2156, 2280, 2281, 2332, 2332a, 2332b, 2332f, 2340A, or 2442 of this title, section 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2284), section 46502 or 60123 (b) of title 49, or any offense listed in section 2332b (g)(5)(B) (except for sections 2339A and 2339B [Reproduced in accompanying notebook at Tab 3].

shall be fined under this title, imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.[43]

### 2. Differences between the crimes of Aiding the Enemy and Material Support for Terrorism.

Accepting that Congress intended to provide military commissions prosecutors with a choice when it comes to an Aiding the Enemy charge does not end the inquiry. To truly understand the landscape requires examining the difference between an Aiding-the-Enemy charge and a charge of providing Material Support for Terrorism. Both UCMJ Article 104 and the material support charge contain similar elements relating to the aid and support of an enemy, but they differ.[44]

The primary difference is imbedded directly into the titles of these respective articles. The material support charge is limited to "terrorism," while in the charges of Aiding the Enemy, terrorism is inconsequential because the assistance only needs to be on behalf of "the enemy." More specifically, the MMC when describing the elements of the crimes requires either assisting in a planned "act of terrorism" or intentionally providing support or resources to "an international terrorist organization engaged in hostilities against the United States.[45] In contrast, the charges of Aiding the Enemy have a much wider scope. For a prosecutor, however, the utility is a scope expanded to

[43] Crime of Material Support for Terrorism, 18 U.S. Code § 2339A, 2001 [Reproduced in accompanying notebook at Tab 3].
[44] Dana M. Hollywood, Redemption Deferred: Military Commissions in the War on Terror and the Charge of Providing Military Support for Terrorism,36 Hastings Int'l & Comp. L. Rev. 1 (2013) [Reproduced in accompanying notebook at Tab 29].
[45] *Id* at 90 [Reproduced in accompanying notebook at Tab 32] [Reproduced in accompanying notebook at Tab 29].

include virtually anybody operating in hostile opposition to the United States. The government could then charge an accused terrorist with both offenses.

### 3. **Domestic background and prosecution of Material Support for Terrorism**

The term "material support" first appeared in federal legislation in the 1990 Immigration and Nationality Act.[46] Sponsored by Senator Edward M. Kennedy, the INA was a reform of U.S. immigration laws.[47] While domestic law already excluded aliens from the United States who "engage in terrorist activity," the INA expanded this scope. Under the INA, it was now permissible to exclude an alien from the United States if that individual had committed an act of providing material support to a terrorist organization. While significant, this milestone in the development of the material support provisions merely precluded aliens from gaining admission to the United States rather than criminalizing the support activities of American citizens. That later development would be brought on by the attack against the United States by al Qaeda.[48] The United States first passed laws criminalizing the provision of material support for foreign terrorist organizations in 1993. In 2001, after the 9/11 attacks, Congress passed the USA PATRIOT Act, which broadened the definition of "material support" as well as "terrorism" to include domestic acts.[49]

[46] Immigration and Nationality Act, 66 Stat. 163, June 27, 1952[Reproduced in accompanying notebook at Tab 6].
[47] Hollywood, *supra* note 44 at 77 [Reproduced in accompanying notebook at Tab 29].
[48] Id [Reproduced in accompanying notebook at Tab 29].
[49] USA PATRIOT Act, 115 Stat. 272, October 26, 2001 [Reproduced in accompanying notebook at Tab 17].

### 4. **Military Commissions may only prosecute crimes classified as violations of the Laws of War.**

To prosecute an accused in a military commission, the commission must have subject matter jurisdiction over the charges.[50] Military commissions derive their authority pursuant to Congress's enumerated power to define and punish offenses against the law of nations. Consequently, commissions' jurisdiction is limited to those offenses which are violations of the Laws of War. If a military commission were to try a crime other than a law of war violation, it would overreach its jurisdiction. This fact is recognized by the Judicial, Legislative and Executive branches.

#### Defining Law of War

The Law of War is the "customary and treaty law applicable to conduct of warfare on land and to relationships between belligerent and neutral states.[51] Violations of the Law of War are deemed war crimes. War crimes came to prominence after World War II and were created to hold Nazi party members responsible for violations of the international laws and customs of wars. Specifically, Article 6 of the Charter of the Nuremburg International Military Tribunal gave jurisdiction over those who had committed war crimes.[52] American jurisprudence has required a consistently established precedent in determining what constitutes a war crime. In 2004, for example, the Supreme Court held that actionable violations of international law must be

[50] Jack Morse, War Criminal or Just Plain Felon? Whether providing Material Support for Terrorism Violates the Laws of War and is Thus Punishable by Military Commission, 26 Ga. St. U. L. Rev. 1061 (2010) [Reproduced in accompanying notebook at Tab 33].
[51] *Id* at 1074 [Reproduced in accompanying notebook at Tab 33].
[52] Charter of the Nuremburg International Military Tribunal, August 8, 1945, 59 Stat. 1544 [Reproduced in accompanying notebook at Tab 2].

of a norm that is specific, universal, and obligatory. Two years later, grappling with whether conspiracy was a violation of the law of war, the Hamdan plurality held that such precedent must be by "universal agreement and practice."[53] Additionally, the Court held that the Government must make a substantial showing that the crime for which it seeks to try a defendant by military commission is acknowledged to be an offense against the Law of War. Analysis of this issue begins by determining what body of law is encompassed by the term "Law of War".[54] The Supreme Court's precedents tell us: The "law of war" referenced in 10 U.S.C. § 821 is the international law of war.[55]

### 5. Material Support for Terrorism as a war crime under the Military Commissions Acts

Military commissions continue to charge suspected terrorists with the offense of providing Material Support to Terrorism. In order understand that offense it is helpful to view it in the larger context of the nation's response to 9/11 attacks. The Authorization for Use of Military Force (AUMF), passed just days after the 9/11 attacks, provided the basis for what would become the Bush Doctrine, that those who support terrorism at any level are as guilty as those carrying out the attacks.[56] President Bush's Order in November 2001 authorizing military commissions, provided the venue for which the charge of material support could bring the Bush Doctrine to completion. After the

[53]Hamdan v Rumsfeld, 548 U.S at 603 (2006) [Reproduced in accompanying notebook at Tab 22].
[54] Laws of War, 10 U.S. Code § 821[Reproduced in accompanying notebook at Tab 7].
[55] Morse at 1074 [Reproduced in accompanying notebook at Tab 33].
[56] Authorization for Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224 Sept. 18, 2001[Reproduced in accompanying notebook at Tab 1].

Supreme Court held that the initial military commission system contravened the Uniform Code of Military Justice (UCMJ), Congress responded by enacting the 2006 Military Commissions Act, concluding that terrorism as a method of armed conflict was a modern day war crime and a practice contrary to the law of nations. Congress later passed a revised MCA in 2009.[57]

### The Military Commission Acts of 2006 and 2009 and Material Support for Terrorism

Both the 2006 and 2009 MCAs addressed the crime of material supporting terrorism, which the previous statutory treatment of international war crimes did not address. In particular, section 950v(b)(25) of the 2006 MCA made punishable the offense of providing material support or resources to those who have engaged in hostilities or who have purposefully and materially supported hostilities against the United States. It applies to those who have provided "material support or resources to an international terrorist organization or engaged in hostilities against the United States. The 2006 MCA thus "clarified the scope of the Executive's authority to try war crimes," adding crimes that include conspiracy and material support for terrorism to the international law of war.[58]

According to the MCA, military tribunals may exercise jurisdiction over any alien unlawful combatant, defined as either "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents," or a person who has been determined to be an unlawful enemy combatant

[57] Morse at 1079 [Reproduced in accompanying notebook at Tab 33].
[58] *Id* [Reproduced in accompanying notebook at Tab 33].

for other reasons.[59] The MCA also grants military commission jurisdiction over any offense made punishable by the MCA or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001. Such offenses, according to the MCA, include murder of protected persons, attacking civilians, pillaging, taking hostages, employing poison or similar weapons, torture, improperly using a flag of truce, rape, and providing material support for terrorism. Accordingly, the MCA indicates that a military commission has personal jurisdiction over a defendant who has "materially supported hostilities against the United States even though such an act does not by many accounts violate international law. [60]

### 6. **Material Support for Terrorism is not a War Crime under the Laws of War**

The MCA attempts to take measures that would allow military commissions to exercise jurisdiction over defendants for acts other than those crimes internationally recognized as war crimes. Specifically, the MCA grants military commissions authority to try unlawful enemy combatants for the crime of Material Support for Terrorism. Provisions that expand the jurisdiction of commissions beyond war crimes are unconstitutional and overstep international law norms as well as United States precedent that limit military commissions to trying only violations of the Laws of War. Thus, the question arises in light of the Military Commissions Act and the military tribunal convicting Hamdan for providing material support for terrorism, is providing material support for terrorism legitimately categorized as a war crime, for which the

[59] Military Commissions Act, 10 U.S.C. § 948a, 2006 [Reproduced in accompanying notebook at Tab 10].
[60] *Id.* [Reproduced in accompanying notebook at Tab 10].

United States may try a defendant by military tribunal, or should it exclusively be considered a crime under domestic law.[61] Notwithstanding a pair of decisions by the Court of Military Commission Review, the charge of material support for terrorism cannot be said to constitute a violation of the laws of war. Consequently, military commissions have no jurisdiction over that charge. Yet Congressional restrictions in the 2011 and 2012 National Defense Authorization Acts make military commissions the only vehicle for trying many suspected terrorists.

Under *Hamdan*, when Hamdan committed the relevant conduct from 1996 to 2001, Section 821 of Title 10 provided that military commissions may try violations of the "law of war."[62] The Law of War cross-referenced in that statute is the international law of war.[63] When Hamdan committed the conduct in question, the international law of war proscribed a variety of war crimes, including forms of terrorism. At that time, however, the international law of war did not proscribe material support for terrorism as a war crime. Therefore, the relevant statute at the time of Hamdan's conduct—10 U.S.C. § 821—did not proscribe material support for terrorism as a war crime.[64] After his release, Hamdan nonetheless continued to appeal his U.S. military commission conviction. On appeal to the en banc Court of Military Commission Review, Hamdan argued that Congress lacked authority under Article I of the Constitution to make Material Support for Terrorism a war crime triable by military commission; and that the statute in effect at the time of his alleged conduct—10 U.S.C. § 821, which limited

[61] Morse at 1079 [Reproduced in accompanying notebook at Tab 33].
[62] Hamdan v Rumsfeld, 548 U.S at 603 (2006) [Reproduced in accompanying notebook at Tab 22].
[63] Ex-parte Quirin, 317 U.S. 1 (1942) [Reproduced in accompanying notebook at Tab 27].
[64] *Id* [Reproduced in accompanying notebook at Tab 27].

military commissions to violations of the "law of war"—did not authorize prosecution of Material Support for Terrorism as a war crime. In 2011, the Court of Military Commission Review affirmed the conviction.[65]

However, there is much additional support for the conclusion that Material Support for Terrorism is not a war crime. First, there are no relevant international treaties that make material support for terrorism a recognized international law war crime. Neither the Hague Convention nor the Geneva Conventions acknowledge Material Support for Terrorism as a war crime.[66] Nor does customary international law otherwise make material support for terrorism a war crime. Customary international law is a kind of common law; it is the body of international legal principles said to reflect the consistent and settled practice of nations.[67] Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.[68] Although customary law is often difficult to interpret, here, the content of customary international law is quite evident.

In addition, the 1998 Rome Statute of the International Criminal Court, which catalogues an extensive list of international war crimes, makes no mention of material support for terrorism.[69] Nor do the Statute of the International Tribunal for the Former Yugoslavia, the Statute of the International Tribunal for Rwanda, or the Statute of the

[65] Hamdan, *supra* n*ote 58* [Reproduced in accompanying notebook at Tab 22].
[66] Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, 1958 ATS No 21, August 12, 1949 [Reproduced in accompanying notebook at Tab 5].
[67] Restatement (Third) of Foreign Relations Law of the United States, § 102(2), 1987 [Reproduced in accompanying notebook at Tab 11].
[68] Sosa v. Alvarez–Machain, 542 U.S. 692, (2004) [Reproduced in accompanying notebook at Tab 28].
[69] Rome Statute of the International Criminal Court, adopted by the Security Council on 17 July 1998, U.N Doc A/CONF. 183/9 (1998) [Reproduced in accompanying notebook at Tab 12].

Special Court for Sierra Leone.[70] In addition, no international tribunals exercising common law power have determined that Material Support for Terrorism is an international law war crime. Also, the offense of material support for terrorism is not listed in the JAG handbook on the law of war. So, neither the major conventions on the law of war, nor prominent modern international tribunals, nor leading international law experts have identified Material Support for Terrorism as a war crime. Finally and importantly, before this case, no person has ever been tried by an international law war crimes tribunal for material support for terrorism.

Other sources indicative of customary law also fail to allude to the provision of material support as a war crime. The Nuremberg Charter specifically addresses violations of the customs of war but does not list material support.[71] A United Nations Special Rapporteur went so far as to conclude that providing material support for terrorism goes "beyond offences under the law of war, and even a congressional research service report has found that defining material support of terrorism as a war crime "does not appear to be supported by historical precedent." Additionally, the United States War Crimes Act does not list material support as a war crime nor is its definition of "war crime" broad enough to include material support.[72]

[70] Statute of the Int'l Criminal Tribunal for the Former Yugoslavia, U.N.S.C. Res. 827, U.N. SCOR 48th Sess., 3217 mtg., U.N. Doc. S/RES/827 (1993).; Statute of the International Tribunal for Rwanda, adopted by Security Council on 8 November 1994, U.N. Doc. S/ RES/955 (1994).; Statute of the Special Court for Sierra Leone, 2178 U.N.T.S. 138 (2002) [Reproduced in accompanying notebook at Tab 13].
[71] Charter of the Nuremburg International Military Tribunal, August 8, 1945, 59 Stat. 1544 [Reproduced in accompanying notebook at Tab 2].
[72] War Crimes Act, 18 U.S. Code § 2441, 2006 [Reproduced in accompanying notebook at Tab 18].

However, either a court martial or an Article III federal court, both of which provide the procedural protections needed when trying a defendant who is not accused of committing a war crime, have the appropriate jurisdiction needed to try Material Support for Terrorism. Additionally, 18 U.S.C. § 2339B, which makes Material Support for Terrorism a violation of domestic law, specifically grants extraterritorial jurisdiction in situations where the defendant is brought into or found in the United States.

## IV. **Conclusion**

In conclusion, this paper analyzes the practical differences and issues in prosecuting the crimes of Aiding the Enemy under article 104 of the UCMJ, the Wrongfully Aiding of the Enemy crime under the MMC, Treason, and Material Support for Terrorism. Although, navigating the different crimes can be confusing this paper attempts to analyze how these different but related crimes are to be prosecuted in order to aid the military prosecution. The crimes viewed together can be seen as different tools in a prosecutor's tool box.