

YEARBOOK OF INTERNATIONAL HUMANITARIAN LAW — VOLUME 19, 2016
CORRESPONDENTS' REPORTS

UNITED STATES¹

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Cases – Enforcement of the Law of War – Conspiracy as a Basis for War Crimes Liability

- Bahlul v United States, 840 F.3rd 757 (DC Cir, 2016),
<<https://www.cadc.uscourts.gov/internet/opinions.nsf/OpinionsByRDate?OpenView&count=100&SKey=201610>>

Bahlul is Yemeni national who traveled to Afghanistan in the 1990s to join al Qaeda. Al Qaeda leader Osama bin Laden later appointed Bahlul his personal assistant and secretary for public relations. In this capacity, Bahlul was actively involved in preparations for the attacks on the United States on September 11, 2001, and provided bin Laden with an after-action assessment of the economic effects of the attacks. Later that year he fled to Pakistan, where he was turned over to the US military and taken to the Guantanamo Bay Naval Station. In 2008, he was tried by Military Commission and convicted of ‘conspiracy to commit war crimes’ under the *Military Commissions Act* of 2006.²

After the conviction was upheld by the Court of Military Commissions Review, Bahlul appealed to the US Court of Appeals for the District of Columbia Circuit, the civilian court with exclusive jurisdiction to review military commission cases. Sitting as it does in the nation’s capital, this court frequently deals with federal statutory and constitutional issues, and its decisions are widely regarded as authoritative. In the Court of Appeals, Bahlul argued that the US Constitution only allowed military commissions to punish offenses that are violations of the international law of war. Bahlul argued that inchoate conspiracy, ie, two or more persons agreeing to commit a crime in the future, punishable as a separate offense even if the planned crime never occurred, was unique to national legal systems based on the English Common Law. Because conspiracy was not a crime under international law (a point the government conceded), Bahlul contended that the military commission at Guantanamo did not have jurisdiction to convict him of conspiracy to commit war crimes.³

Sitting *en banc*, the nine judges of the court upheld the conspiracy conviction by a vote of six to three. The three dissenting judges accepted the defense argument that military commissions could only act on violations of the international law of war. Four members of the majority rejected that theory. Examining the history of military commissions in United States practice, these judges noted that military courts had often tried offenses, including espionage and conspiracy, which were not violations of international humanitarian law. Particular reliance was placed on the two of the most significant military commission trials in US history, the 1865 trial of the conspirators involved in the assassination of President

¹ Burrus M Carnahan, Professorial Lecturer in Law, George Washington University, Washington, DC, USA.

² Public Law No. 109-366, 120 Stat. 2600, 2630. Offenses triable by Military Commission are codified in Title 10 USC § 950t. The 2009 amendments to the *Military Commissions Act* were not material to this case.

³ The appellant’s domestic constitutional arguments were very technical and not material to the IHL aspects of the decision and opinions.

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Abraham Lincoln⁴ and the 1942 Supreme Court decision upholding convictions for espionage and conspiracy of German secret agents sent to sabotage US war industries in the Second World War.⁵

Two judges in the majority distinguished between conspiracy as an inchoate offense standing alone, and conspiracy as a basis for liability for war crimes. They found it unnecessary to decide whether military commissions could only try international law offenses because in this case Bahlul had participated in actual war crimes, including the murder of civilians and destruction of civilian property, in the September 11, 2001, hijackings and attacks in the United States. Here the conspiracy charge served merely as a basis for imposing liability similar to the internationally accepted concept of a 'joint criminal enterprise'.

Military Manuals – Protected Persons – Journalists

- ☛ Department of Defense Law of War Manual (updated May 2016)
<http://www.defense.gov/Portals/1/Documents/DoD_Law_of_War_Manual-June_2015_Updated_May_2016.pdf>
- ☛ Press Release No: NR-276-16, "DoD Announces Update to the DoD Law of War Manual," July 22, 2016, <<http://www.defense.gov/News/News-Releases/News-Release-View/Article/852738/dod-announces-update-to-the-dod-law-of-war-manual>>

As noted in last year's report, in June 2015 the US Department of Defense finally issued a comprehensive manual on the law of war to be used by all US armed forces. The initial version of the Manual included a discussion of the status of journalists in armed conflict, including the following language:

4.24 JOURNALISTS In general, journalists are civilians. However, journalists may be members of the armed forces, persons authorized to accompany the armed forces, or unprivileged belligerents.

....

4.24.2 **Other Journalists.** In general, independent journalists and other media representatives are regarded as civilians; i.e., journalism does not constitute taking a direct part in hostilities such that such a person would be deprived of protection from being made the object of attack.

....

4.24.4 **Journalists and Spying.** Reporting on military operations can be very similar to collecting intelligence or even spying. A journalist who acts as a spy may be subject to security measures and punished if captured. To avoid being mistaken for spies, journalists should act openly and with the permission of relevant authorities. Presenting identification documents, such as the identification card issued to authorized war correspondents or other appropriate identification, may help journalists avoid being mistaken as spies.

4.24.5 **Security Precautions and Journalists.** States may need to censor journalists' work or take other security measures so that journalists do not reveal sensitive information to the enemy. Under the law of war, there is no special right for journalists to

⁴ The transcript of this trial, including the Attorney General opinion upholding its constitutionality and legality under the law of war, were reprinted in E Steers (ed), *The Trial: The Assassination of President Lincoln and the Trial of the Conspirators* (University Press of Kentucky, 2003).

⁵ *Ex Parte Quirin*, 317 US 1 (1942).

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enter a State's territory without its consent or to access areas of military operations without the consent of the State conducting those operations.

After receiving critical comments from news organizations, in 2016 the Department substantially revised these provisions to express a more positive view of the role of the news media in armed conflict. Paragraph 4.24 now reads as follows:

In general, journalists are civilians and are protected as such under the law of war. Journalists play a vital role in free societies and the rule of law and in providing information about armed conflict. Moreover, the proactive release of accurate information to domestic and international audiences has been viewed as consistent with the objectives of U.S. military operations. DoD [the Department of Defense] operates under the policy that open and independent reporting is the principal means of coverage of U.S. military operations. In addition to responding to press inquiries and providing briefings to members of the press on U.S. military operations, DoD practice has also been to embed journalists with units during military operations. Embedded journalists are assigned to a unit, and they eat, sleep, and move with the unit.

The express reference to journalists as possible spies, which was probably very offensive to media personnel, has been omitted in paragraph 4.24.5. However, a new paragraph 4.24.1.2 has been added as follows:

Combatants Performing Journalistic Work. Although generally journalists are civilians, journalists are not precluded from being considered combatants, whether privileged or unprivileged, if they otherwise acquire such status. For example, members of the armed forces sometimes serve as journalists or in some other public affairs capacity, and these persons have the same status as other privileged combatants. Non-State armed groups sometimes use their members for propaganda or other media activities, and such personnel are not precluded from being considered unprivileged belligerents. In addition, although engaging in journalism would not be a basis to consider a person an unprivileged belligerent, an unprivileged belligerent would not be precluded from being considered as such because he or she works as a journalist.

New language in paragraph 4.24.2 also states that:

In addition, civilian journalists and journalists authorized to accompany the armed forces should not take any action adversely affecting their status as civilians if they wish to retain protection as a civilian. For example, relaying target coordinates with the specific purpose of directing an artillery strike against opposing forces would constitute taking a direct part in hostilities that would forfeit protection from being made the object of attack.

In the main, these changes appear more cosmetic than substantive. While the direct reference to journalists as possible spies has been omitted, it remains clear that journalists can become unlawful combatants or otherwise lose their protected status as civilians. In the proper circumstances, they could also be guilty of espionage, as implied by the example of passing targeting information for artillery strikes as forfeiting protected status.

National Policy – Precautions in the Attack – Collateral Injury to Civilians

- Executive Order 13732, 'U.S. Policy on Pre & Post-Strike Measures to Address Civilian Casualties in the US Operations Involving the Use of Force,' 1 July 2016, 81 Fed Reg 44485 (July 7, 2016), <<https://www.gpo.gov/fdsys/pkg/FR-2016-07-07/pdf/2016-16295.pdf>>.
- FACT SHEET: 'Executive Order on the U.S. Policy on Pre & Post-Strike Measures to Address Civilian Casualties in the U.S. Operations Involving the Use of Force,' 1 July

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2016, <<https://www.whitehouse.gov/the-press-office/2016/07/01/fact-sheet-executive-order-us-policy-pre-post-strike-measures-address>>.

This presidential Executive Order codifies current US policies to avoid or minimize collateral civilian casualties during military operations, and to investigate suspected incidents of collateral injury. The principal new element is a requirement that the Director of National Intelligence submit an annual report on collateral injury to civilians ‘on strikes outside the area of active hostilities’ (ie strikes outside the Iraq and Afghanistan theaters of war). One Obama administration policy that was *not* included in Executive Order 13732 was the decision that for drone strikes outside an ‘area of active hostilities’ there must be a ‘near-certainty that no civilians will be killed or injured – the highest standard we can set.’⁶

While most of the document merely reflects existing policies of the Defense Department, reissuing these policies in an executive order is legally significant. In US administrative law, an executive order remains in force even after the president who issued it leaves office. During his final year in office, President Obama thus decided to place some his policies on collateral civilian injuries on a more permanent foundation.

Crimes against Humanity – Genocide – Religious Minorities

- Remarks of John Kerry, Secretary of State, Press Briefing Room, Washington, DC, 17 March 2016, <<http://www.state.gov/secretary/remarks/2016/03/254782.htm>>

In March, Secretary of State Kerry announced that the US government had determined that the persecution of religious minorities by the Islamic State in Iraq and Syria (ISIS) was so serious that its actions should be considered genocide. ‘Ultimately,’ Kerry stated, ‘the full facts must be brought to light by an independent investigation and through formal legal determination made by a competent court or tribunal.’ He declared United States support for efforts to collect, document, preserve, and analyze evidence of atrocities by ISIS, and to see that perpetrators are held accountable.

BURRUS M CARNAHAN

⁶ See Remarks by the President at the National Defense University, 23 May 2013, Fort McNair, Washington, DC, <<http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>>.