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Peter Margulies
Roger Williams University School of Law, pmargulies@rwu.edu

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CIVIL LIBERTIES AND CONSTITUTIONAL RIGHTS

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In recent posts both on *Lawfare* and at *Opinio Juris*, Steve and Kevin Jon Heller (here and here) sharply critiqued the brief that Jim Schoettler and I filed on Thursday for Former Government Officials, Former Military Lawyers and Scholars of National Security Law asking the *en banc* D.C. Circuit to uphold the military commission conviction of Ali Hamza al Bahlul, a former aide to Osama bin Laden. Both Kevin and Steve care deeply about the fairness of military commissions, as do *amici* – many of whom as Judge Advocates served as defense counsel demanding fairness for their own clients. As his post demonstrates, Kevin has an encyclopedic knowledge of the development of international criminal law (ICL) from Nuremberg to the present. Unfortunately, Kevin doesn'tfully acknowledge the consistency of *amici*'s position with the jurisprudence of the international criminal tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY). Much of Kevin's disagreement with *amici*'s position is, at root, disagreement with these tribunals' precedents. In the same vein, much of Steve's comment signals disagreement with harmless error jurisprudence. Neither Kevin nor Steve dispute the first point in the brief, that al Bahlul's role in the preparation for the 9/11 attacks constituted participation in a Joint Criminal Enterprise (JCE) to murder civilians. (*See* my analysis at pp. 84-87 and Jens David Ohlin's fine article.) As the ICTY Appeals Chamber said in *Prosecutor v. Brdanin* (2007) and the ICTR Appeals Chamber said in *Prosecutor v. Rwamakuba* (Oct. 2004), JCE entails intentional participation in a common plan to commit a subsequently completed war crime. Both the ICTY and the ICTR have characterized JCE as a form of responsibility under customary international law that precisely tracks the elements of conspiracy as a mode of liability for a completed war crime. JCE is broad: participation in even "*one aspect*" of the plan is sufficient. That breadth is necessary because tribunals from Nuremberg to the present have understood that concerted conduct yields vast opportunities for plausible deniability. Putting an "end to impunity," as the Preamble to the Rome Statute of the International Criminal Court put it, therefore requires greater accountability for an individual who "aids, abets, or *otherwise assists*" in the commission of a war crime. Kevin is nervous about JCE's breadth, and about the tribunals' view that JCE is customary international law (CIL). However, viewing JCE as CIL serves the same function as JCE's breadth: it limits impunity. As Beth van Schaack noted in an insightful paper, both transnational tribunals and the U.S. Supreme Court (in cases like *Quirin* and *Yamashita* reviewing military commission decisions) have regarded entrenched custom as providing ample guidance for individuals who wish to conform their conduct to legal requirements. CIL therefore also provides robust support in transnational and military tribunals for holding accountable those who *violate* legal norms. How did al Bahlul assist in the JCE that led to 9/11? In a letter to senior Al Qaeda figure Ramzi bin al Shibh, al Bahlul described his own role in the 9/11 preparations as "simple." In executing a plan to commit mass murder of civilians, the simple contribution can make a difference. Bahlul's contribution started, as his letter to bin al Shibh admitted, by ensuring that Mohammed Atta and Ziad al Jarrah swore a *bayat* or loyalty oath to Osama bin Laden. The *bayat* to Atta, the 9/11 plot's ringleader in the United States, and al Jarrah, the pilot on Flight 93 (which crashed in Pennsylvania), set the 9/11 machinery in motion. The *bayat* bound Atta and al Jarrah to "obey [bin Laden] at all times" and "die for the sake of Jihad… against the American[s] and the Jews."

Al Bahlul didn't merely admit this in his letter to bin al Shibh – he also acknowledged it in interviews with the FBI conducted by former agent Ali Soufan, who practiced interrogation the old-fashioned way, through guile and building rapport. Al Bahlul told Soufan that *all* Americans, including women and children, served in some fashion as supporters of the U.S. government and were therefore appropriate targets. Moreover, Soufan testified at trial that Bahlul had acted as Atta and al Jarrah's minder in bin Laden's compound, grooming them for a mission of particular "sensitivity." It is irrelevant that al Bahlul may not have had advance knowledge of the specifics of the 9/11 attacks. The ICTY has repeatedly said that a defendant need not have advance knowledge of a *particular* war crime, if the defendant intentionally participates in a common plan to commit a war crime such as the murder of civilians and that war crime occurs. The evidence for JCE in al Bahlul's case is actually well *above* the ICTY's threshold. Kevin and Steve save much of their ire for *amici*'s argument that errors in the charges and instructions were harmless. Here, too, Kevin's beef is not with *amici*'s arguments, but with the ICTY. In *Prosecutor v. Kvočka* (Appeals Chamber 2005), the ICTY held that charges need not be models of precision, as long as defendants have notice of the "factual basis of the charges against them." Similarly, in *Prosecutor v. Mucić* (Appeals Chamber 2001), defendants convicted of aiding and abetting abuses in a detention camp they had run asserted on appeal that the charges against them did not specifically mention aiding and abetting. In paragraph 350 of its decision, the ICTY acknowledged that the charges "could (and should) have been expressed with greater precision." Despite this acknowledgment, the tribunal found that a statement of the prosecution's theory of the defendants' command responsibility for the camp plus a "general reference" to the tribunal's governing statute was an "adequate basis" for the conviction. Al Bahlul had more notice than these ICTY defendants. His charging documents listed his giving the *bayat* to Atta and al Jarrah as an overt act furthering both conspiracy and material support. The charging documents also listed his "preparing" the martyr wills of Atta and al Jarrah "in preparation for the acts of terrorism" committed on 9/11. Al Bahlul, who had sought to represent himself at trial (rarely a good idea, as I'm sure Kevin would admit), made statements to the court that revealed a clear understanding of the ramifications of those overt acts for his own defense. (The excellent David Frakt, an Air Force JAG officer and legal academic who has written about Guantanamo here, was assigned to serve as defense counsel in the case and was present when al Bahlul spoke. However, al Bahlul's lengthy comments on the record, *see, e.g.*, page 167 of the trial transcript (noting to court that, "What I did and I will do… is to kill Americans"), suggest that the court in practice gave al Bahlul a great deal of leeway in articulating his own arguments without assistance of counsel). In his statements to the court at pages 193-94 of the transcript, al Bahlul echoed what he had said in his letter to Ramzi bin al Shibh and his FBI interview: that he gave the *bayat* to Atta and al Jarrah. He also touted the analysis he provided at bin Laden's request on 9/11's effects on the United States. Al Bahlul might have been well-advised to take a different tack at trial, just as he might have been better off not sending his letter to bin al Shibh or talking so freely with the FBI. Kevin seems shocked that a defendant could act against his own interests, and attributes al Bahlul's approach to lack of adequate notice of the charges against him. However,

not all defendants follow their own best interests. Some, like al Bahlul, whose specialty prior to his capture was "media relations" for Al Qaeda, view trials as vehicles for propaganda. Al Bahlul's tactics were driven by that agenda. Although Kevin and Steve argue that the members of the military commission in al Bahlul's case never found that his conduct related to the September 11 attacks, the members' specific findings prove otherwise. Those specific findings rebut Steve's reliance on *Apprendi*, which involved a judge making findings that properly were the province of the jury. In al Bahlul's case, the members of the commission specifically found that the defendant had given the *bayat* to Atta and al Jarrah. This finding also serves as a finding that the defendant had participated in a JCE, even though the instruction erroneously stated that conviction did not require a completed war crime. The members could have made their finding regarding the *bayat only* if they credited the evidence supplied by the defendant's letter to Ramzi bin al Shibh. In that letter, the defendant described himself as playing a "simple… indirect role" in the 9/11 attacks. As Steve and Kevin agree, that description fulfills the requirements for JCE. To find that the defendant did not participate in a JCE, the commission members would have had to disagree with the defendant's *description of his own conduct*, which they had already credited regarding his giving the *bayat* to Atta and al Jarrah. The commission members would also have had to disregard Ali Soufan's testimony about the *bayat*'s significance and al Bahlul's role as Atta and Jarrah's minder. In theory, a factfinder could so find – but in practice the link between the commission members' findings and the evidence in the record supported the defendant's guilt on a JCE theory beyond a reasonable doubt. In analogous cases, such as *Neder v. United States* (1999), the Supreme Court has viewed instructions that misstated elements of offenses as harmless error. The same conclusion should apply here. In contrast, the Supreme Court's decision in *McCormick v. United States* (1991), which Steve cites, isn't really a criminal procedure case at all. It addresses a *substantive* question of statutory interpretation, holding that a legislator does not violate a federal anti-corruption statute, the Hobbs Act, by receipt of campaign contributions from constituents and subsequent acts that benefit those constituents, without a more specific *quid pro quo*. In writing for the majority, Justice White observed that the judge's instruction permitting the jury to find a violation without a *quid pro quo* exceeded Congress's intent, because "[s]erving constituents and supporting legislation that will benefit the district… is the everyday business of a legislator." Moreover, the court below had affirmed the conviction without even *considering* whether the trial court's instructions were erroneous. *McCormick* continues to trigger controversy as a statutory interpretation case, but it has little or nothing to say about harmless error. Kevin's analysis of Justice Stevens' footnote 32 in *Hamdan I* similarly misses the mark. Stevens' core concern in this footnote and throughout his plurality opinion on conspiracy (not joined by Justice Kennedy, incidentally) was that Hamdan's conduct as Osama bin Laden's driver was simply not a war crime. Stevens asserted that the charge against Hamdan of conspiracy as an inchoate offense involving mere agreement wasn't recognized under international law (and *amici* agree). As Kevin recounts, Stevens then criticized Justice Thomas's argument that Hamdan could have been (but wasn't) charged with *other* offenses. However, Kevin fails to note that, according to Justice Stevens, those other offenses alsowere insufficient predicates for commission jurisdiction in Hamdan's case. For example, Stevens observed that Hamdan could *not* have been charged with "aiding the enemy," since as a Yemeni national with no ties to the U.S., Hamdan did not "owe allegiance to the party whose enemy he is alleged to have aided." Justice Stevens and others who joined his plurality opinion could well have distinguished al Bahlul's case from Hamdan's, given the evidence that al Bahlul participated in a JCE. Based on the record, the *en banc* D.C. Circuit can make this distinction. In sum, Kevin and Steve's disagreement is not with *amici*, but with developments in ICL and U.S. criminal procedure law that Kevin and Steve find unfair to defendants. That is a legitimate view. However, Congress is constrained by the Constitution, not by Kevin's opinions on how ICL *should* develop or Steve's views about the harmless error rule. Here, international precedent recognizes that JCE tracks the elements of conspiracy as a mode of liability for a completed war crime. Both international and U.S. precedents have articulated harmless error rules that focus on the notice actually provided to the defendant. Notice to al Bahlul complied with this standard. Al Bahlul's conviction therefore passes muster under the Constitution, even if it doesn't comport with Kevin and Steve's stricter test.

Topics: Civil Liberties and Constitutional Rights, Extraterritoriality, Guantanamo, Guantanamo: Litigation, Guantanamo: Litigation: D.C. Circuit, International Law, Terrorism Trials & Investigations, Terrorism Trials: Military Commissions, Military Justice

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Peter Margulies is a professor at Roger Williams University School of Law, where he teaches Immigration Law, National Security Law and Professional Responsibility. He is the author of Law's Detour: Justice Displaced in the Bush Administration (New York: NYU Press, 2010).