

UNCLASSIFIED//FOR PUBLIC RELEASE
MILITARY COMMISSIONS TRIAL JUDICIARY
GUANTANAMO BAY, CUBA

UNITED STATES OF AMERICA v. KHALID SHAIKH MOHAMMAD, WALID MUHAMMAD SALIH MUBARAK BIN ATTASH, RAMZI BINALSHIBH, ALI ABDUL AZIZ ALI, MUSTAFA AHMED ADAM AL HAWSAWI	AE 120B Government Supplemental Filing To AE 120 – Government Motion To Make Minor Conforming Changes To The Charge Sheet 18 October 2013
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1. Timeliness

This supplemental filing is timely filed pursuant to Military Commissions Trial Judiciary Rule of Court 3.5.e.

2. Relief Sought

As stated in AE 120, the government does not oppose the defense motion to dismiss Charge I, Conspiracy as a *stand-alone offense*, if the Commission accepts the minor conforming changes to the charge sheet outlined in AE 120, Attachment B. At trial, the government intends to prove an agreement between the five Accused and others, as well as overt acts committed by each Accused, that will establish each of their criminal liability as principals for aiding, abetting, counseling, commanding, or conspiring to commit the substantive law of war offenses that were committed during the September 11, 2001 attacks that killed 2,976 people.¹ Therefore, the language in Charge I alleging an agreement, and the overt acts in furtherance thereof that establish how each Accused is alleged to have aided, abetted, counseled, commanded, or conspired to commit the attacks, should remain on the charge sheet under the heading of “Common Allegations” to keep the accused on notice of all theories liability and to reduce confusion for the panel members. Alternatively, the Commission could choose to keep the

¹ For the legal definition of Principal the prosecution is relying upon *see* 10 U.S.C. §950q(1); *see also United States v. Jefferson*, 22 M.J. 315, 323-24 (C.M.A. 1986) , previously cited in AE 120.

conspiracy charge and heading on the charge sheet and simply instruct the panel on findings that no Accused can be found guilty of conspiracy.

3. Affirmative Statement

The purpose of this supplemental filing is to submit for the Commission's review and consideration a new international criminal tribunal appellate decision issued on 26 September 2013 in the prosecution case against Charles Taylor. *Prosecution v. Taylor*, Case No. SCSL-03-01-A, Appellate Judgment (Sept. 26, 2013), *available at* <http://www.sc-sl.org/LinkClick.aspx?fileticket=t14fjFP4jJ8%3d&tabid=53> ("*Taylor* Appellate Judgment"). The Appellate Chamber of the Special Court for Sierra Leone in *Taylor* discusses in great detail aiding and abetting liability, a form of vicarious liability, by assessing historical international humanitarian law cases and customary international law. *Taylor* Appellate Judgment, at ¶¶ 353-486. As such, the *Taylor* decision is "newly decided case law," reflecting customary international law on aiding and abetting liability. Pursuant to the D.C. Circuit's decision in *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012), international law plays a direct role in defining the substantive offenses triable by military commission. Accordingly, this Commission should consider the *Taylor* decision in deciding whether to grant the government's request to make minor conforming changes to the charge sheet.

Further, the government argues in AE 120 that the requested minor changes should be accepted because the acts listed directly support a different form of vicarious liability—common plan or Joint Criminal Enterprise ("JCE") liability. AE 120 at 6-13. While common plan is distinct from aiding and abetting, the government does not and need not as a matter of law rely upon a single theory of liability. *See, e.g.*, AE 120 at 2, 4; AE 120B at 9-10; Unofficial/Unauthenticated Transcript at 5236-37 (Aug. 12, 2013). The *Taylor* decision affirms that the charge sheet with minor proposed amendments would appropriately keep the accused on notice of the aiding and abetting form of vicarious liability—and the other forms—while making clear that that accused cannot be convicted or punished for standalone conspiracy.

4. Law and Argument

I. **The *Taylor* Appellate Decision Sets Forth Aiding and Abetting Liability Using a Customary International Law Framework**

Charles Taylor was prosecuted for, and ultimately convicted of, a wide range of law of war violations, including acts of terrorism, murder, and violence to life, health, and physical or mental well-being of persons, pursuant to a theory of aiding and abetting liability. *Taylor* Appellate Judgment, at ¶¶ 5, 9, 13, 526, 540. In reaching its conclusion, the Appeals Chamber discussed at length the historical origins and modern evolution of aiding and abetting liability under customary international law. *Id.* at ¶¶ 362-385, 413-451, 471-480.

The Appeals Chamber found the following with respect to the *actus reus* of aiding and abetting liability:

The Accused provided practical assistance, encouragement, or moral support to the perpetration of a crime or underlying offense, and

Such practical assistance, encouragement, or moral support, had a substantial effect upon the commission of a crime or underlying offense.

Id. at ¶¶ 353, 362. Concerning the second element, the Appeals Chamber held that the assistance need not be directly provided to the actual criminal perpetrator, nor must it be used in the commission of a specific crime. *Id.* at ¶¶ 368, 371. The accused's assistance could take a variety of forms, such as transporting the perpetrators to the crime scene, providing financial support or personnel, or even attending meetings, which could also technically be lawful activities standing alone, such as the purchase and use of satellite phones. *Id.* at ¶¶ 369, 377-380, 395 (relying upon case law from the International Military Tribunal for the Major War Criminals, Control Council Law No. 10 military tribunals, the International Criminal Tribunal for the former Yugoslavia ("ICTY"), and the International Criminal Tribunal for Rwanda ("ICTR")). Though the total effect on the commission of a crime is a factual determination, a "but for" causation standard is not required, nor must the assistance be specifically directed towards a crime. *Id.* at ¶¶ 353, 390-392, 476-480.

In defining *mens rea*, the Appeals Chamber found the following two elements:

The Accused performed an act with the knowledge that such act would assist the commission of a crime or underlying offense, or that he was aware of the substantial likelihood that his acts would assist the commission of an underlying offense, and

The Accused is aware of the essential elements of the crime committed by the principal offender, including the state of mind of the principal offender.

Id. at ¶¶ 403, 436-437. The knowledge required is simply a knowing participation that the acts would assist the commission of a crime. *Id.* at ¶¶ 436-437. A conscious desire or willingness to achieve the criminal result is not required. *Id.* Further, the prosecution was not required to prove that *Taylor* knew that the acts themselves would have a substantial effect on the crime, but rather that the acts would only assist in the commission of the offense. *Id.* at ¶ 439. Whether *Taylor*'s assistance had, in fact, a substantial effect was a determination for the trier of fact. *Id.* Finally, the accused's awareness of the crime must be more than a general or abstract awareness that any type of crime could be committed in the ensuing armed conflict. *Id.* at ¶ 445 (stating that law of war violations are nearly inevitable in any armed conflict).

II. Retaining the “Common Allegations” on the Charge Sheet is Consistent With the Aiding and Abetting Liability Standard Articulated in *Taylor*

Each of the Accused in the present case knowingly provided assistance to the 19 hijackers who carried out the attacks on 11 September 2001. The overt acts that would be set forth under the “Common Allegations” section delineate the wide range of assistance allegedly provided, including, but not limited to: devising the plot, recruiting and selecting the hijackers, assisting in flight school research, attending planning meetings, training the hijackers, providing intelligence and materials, communicating between top al Qaeda leadership and the hijackers, purchasing clothing, food, lodging, rental cars, and traveler's checks, and making travel arrangements for the perpetrators to the crime scene, for the sole purpose of facilitating the successful completion of a criminal operation. AE 001 (Charge Sheet), at ¶¶ 2-167. While the accused's contributions need not be necessary for the commission of a specific crime, the Accused in this case are alleged to have provided necessary and substantial assistance to the hijackers who committed the underlying offenses. Further, the Accused allegedly provided the

assistance knowing their acts would positively affect the underlying crimes. Finally, as alleged in the overt acts, it is clear that the Accused were not operating in an informational vacuum, but knew the type of crime the perpetrators sought to commit—a criminal operation to attack American soldiers and civilians wherever they could be found.

In contrast, Charles Taylor provided far less assistance to the criminal offenders in Sierra Leone, yet was still held criminally responsible as an aider or abettor. In fact, Taylor did not directly provide any material or financial aid or support to any of the physical perpetrators. *Taylor* Appellate Judgment, at ¶¶ 510-517. He instead relied almost exclusively upon a series of intermediaries to transfer weapons, ammunition, and funding, and to communicate with and provide advice to the armed military groups. *Id.* at ¶¶ 510-521. The Appeals Chamber found that Taylor’s extensive and sustained assistance was “critical to [the armed group’s] functioning and its capacity to implement its Operational Strategy.” *Id.* at ¶ 520. Similarly, each of the Accused in the present case allegedly provided critical resources and support throughout the duration of the criminal operation, from developing the initial plans to closing out the last of the bank accounts linking the accused to the September 11th hijackers after the attacks. Accordingly, and as recognized by *Taylor*, the commission members could reasonably find that the Accused are guilty as principals for the charged offenses under a theory of aiding and abetting.

III. The “Common Allegations” Are Therefore Relevant Because They Set Forth Matters that Are Necessary to Prove and Are Not Surplusage Subject to Being Stricken

As discussed above, to convict the accused as principals the Prosecution must establish that each Accused aided, abetting, counseled, commanded, or conspired to commit the substantive law of war offenses that were committed during the September 11, 2001 attacks that killed 2,976 people.² Because the “Common Allegations” allege facts that the government will

² For the legal definition and contours of “Principal Liability” the Prosecution is relying upon, see 10 U.S.C. §950q(1); see also *United States v. Jefferson*, 22 M.J. 315, 323-24 (C.M.A. 1986) (previously cited in the Prosecution’s Motion (AE 120)).

have to prove to establish the five Accused as principals in the attacks, the acts listed are legally relevant. *See* M.R.E. 401 (“‘Relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”). Additionally, retaining the “Common Allegations” on the charge sheet will continue to place the Accused on notice of what the government intends to prove, while ensuring that the members are able to understand and contextualize the evidence offered to prove the necessary elements to establish all forms of principal liability for the remaining substantive offenses. *See* AE 120 at 5. This is important to upholding the principle of individual criminal responsibility and to identifying what each individual accused did in relation to the group conduct at issue in the case.

Because the “Common Allegations” are legally relevant to elements that the government must prove beyond a reasonable doubt, and because they are not unfairly inflammatory or unduly prejudicial, they are not surplusage subject to being stricken. The federal courts have “strictly construed” the rule “against striking surplusage,” *United States v. Rezaq*, 134 F.3d 1121, 1134 (D.C. Cir. 1998), and this Commission should do the same. *See also* Unofficial/Unauthenticated Transcript at 5228 (Aug. 12, 2013).

5. Conclusion

For the foregoing reasons, the government respectfully moves this Commission to make minor conforming changes to the charge sheet outlined in AE 120, Attachment B.

6. Oral Argument

Should completion of the oral argument on this motion occur after timelines for response and reply briefs, the government proposes that Prosecution and Defense be heard on this supplemental filing in conjunction with remaining oral argument on AE 120.

7. Witnesses and Evidence

The government has no witnesses or evidence to present on this supplemental filing.

8. Certificate of Conference

The government conferred with the defense, and defense counsel for Messrs Hawsawi, Ali, Mohammad and Binalshibh do not object to this motion. Defense counsel for Mr. bin Attash does not object to this supplement provided Mr. bin Attash has 14 days to respond per Rule 3.7.c(1) of Military Commission Rules of Court.

9. Additional Information

The government has no additional information.

10. Attachments

Certificate of Service, dated 18 October 2013.

Respectfully submitted,

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Mark Martins
Chief Prosecutor
Military Commissions

ATTACHMENT A

CERTIFICATE OF SERVICE

I certify that on the 18th day of October 2013, I filed AE120B, **Government Supplemental Filing** To AE 120 – Government Motion To Make Minor Conforming Changes To The Charge Sheet with the Office of Military Commissions Trial Judiciary and I served a copy on counsel of record.

//s//
Mark Martins
Chief Prosecutor
Military Commissions