

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

United States Of America

v.

Val Fillenwarth

)
)
)
)
)
)
)

No: 4:06-po-00038-GMF

**MOTION AND MEMO FOR RULING ON ADMISSIBILITY OF EXPERT
TESTIMONY**

Motion

For the reasons set out in the accompanying memorandum, undersigned counsel requests that this Court admit the testimony of experts concerning, e.g., international law, as part of the defense in this matter.

January 13, 2007

s/ William P. Quigley, Pro Hac Vice
Loyola University New Orleans College of
Law
Box 902
7214 St. Charles Avenue
New Orleans, LA 70118
504.861.5591 (office)
504.710.3074(cell)
quigley@loyno.edu

Memorandum in Support of Motion re Admissibility of Expert Testimony

United States courts may ascertain contemporary norms of customary international law by "'consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" *Filartiga*, 630 F.2d at 880 (quoting *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 160-61, 5 L.Ed. 57 (1820)). *Mehinovic v Vuckovic*, 198 F. Supp 2d 1322 (N.D. Ga. 2002).

In connection with presentation of evidence concerning international law, defendants ask to call Francis Anthony Boyle, a Professor at the University of Illinois College of Law, as an expert in international law. Professor Boyle is a 1971 graduate of the University of Chicago and a 1976 magna cum laude graduate of Harvard Law School. He also received a Masters Degree in 1978 and a Ph.D. in political science in 1983, both from Harvard. He teaches Public International Law, International Human Rights Law, Jurisprudence, and a seminar on Constitutional Law of U.S. Foreign Affairs.

Defendants also seek to call Jennifer Harbury as an expert witness in this matter. Jennifer K. Harbury is an activist, author, and attorney who has spent much of the past twenty years working to monitor and promote human rights in Guatemala. Harbury graduated from Harvard Law School in 1978 and has published two books about her experiences in Guatemala: *Bridge of Courage* (Common Courage Press, 1994) and *Searching for Everardo* (Warner Books, 1997). She has been a teaching fellow at Radcliffe Institute.

Ms. Harbury's husband, Efrain Bamaca Velasquez, was a Mayan resistance leader who was "disappeared" by the Guatemalan military in 1992; subjected to long-term, severe torture; then extrajudicially executed. Harbury's efforts to save his life, which included three dangerous hunger strikes, resulted in startling disclosures about the close working relationship between the CIA and the Central American death squads. Since learning of her husband's death, she has devoted much of her time to pressing for human rights reforms for both the United States and Guatemalan governments.

Professor Boyle is the author of several books including: *World Politics and International Law* (Duke University Press 1985); *Defending Civil Resistance Under International Law* (Transnational Publishers 1987), *The Future of International Law and American Foreign Policy* (Transnational Publishers 1989); *Foundations of World Order: The Legalist Approach to International Relations 1898-1921* (Duke University Press 1999); and *The Criminality of Nuclear Deterrence* (Clarity Press 2002).

Professor Boyle has authored several articles including: *Restoration of the Independent Nation State of Hawaii under International Law*, 7 St. Thomas Law Review 723 (1995); *International Crisis and Neutrality: U.S. Foreign Policy Toward the Iran-Iraq War*, 43 Mercer Law Review 523 (1992); *International Law and Solutions to the Arab-Israeli Conflict*, 83 American Society of International Law Proceedings (1989)(co-author); *Citizen Initiatives Under International Law*, 82 American Society of International Law Proceedings 555 (1988)(co-author); *Determining U.S. Responsibility for Contra Operations Under International Law*, 81 American Journal of International Law 86 (1987); *The Relevance of International Law to the 'Paradox' of Nuclear Deterrence*, 80 Northwestern University Law Review 1407 (1986); *International Lawlessness in Grenada*, 78 American Journal of International Law 172 (1984)(co-author); *The 75th Anniversary of the Second Hague Peace Conference: New Rule and Institutions for the Peaceful Settlement of International Disputes*, 76 American Society of International Law Proceedings 130.

Professor Boyle has served as a member of the Board of Directors and consultant to Amnesty International USA. He has also served as a consultant or legal advisor to: the American Friends Service Committee; Palestinian Delegation, Middle East Peace Negotiations; Mothers of Srebrenica Association of Bosnia and Herzegovina.

As detailed in other pleadings, the individuals charged in this matter ask for the opportunity to raise defenses including international law and necessity to the charges lodged against them.

As a part of those defenses, undersigned counsel advises the prosecutor and the Court that the defense intends to call these experts to testify.

The following are the areas that Professor Boyle and Ms. Harbury will testify about:

- Professor Boyle will testify that United States law includes international law, including the United Nations Charter, the Charter of the Organization of American States and the principles of international law derived from the decisions of the Nuremberg war crimes tribunals, they are therefore applicable to this defense.
- Professor Boyle will testify that the Supreme Court has held that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains and that international law holds that an otherwise lawful regulation cannot interfere with an individual's attempt to prevent crimes against humanity.
- Professor Boyle will testify that, according an accepted interpretation of the precedent at Nuremberg, individuals have an international right to try to prevent crimes against humanity, crimes of aggression, and war crimes.
- Professor Boyle will testify that the Charters of the Nuremberg and Tokyo war crimes tribunals made complicity with war crimes a crime. These precedents provide individual responsibility to the world community to enforce international law regardless of domestic law.
- Professor Boyle will testify that, according to the *Nuremberg* Principles, complicity in the commission of a crime against peace, a war crime, or a crime against humanity is a crime under international law.
- Professor Boyle will testify that the Nuremberg precedent criminalizing conspiracy to commit war crimes not only applied to military leaders, it also established private citizen rights to uphold international law.
- Professor Boyle and Ms. Harbury will testify about how the School of Americas/WHISC aids, abets, promotes, incites, and facilitates the commission of war crimes, violations of international human rights, crimes against humanity, and genocide.

- Professor Boyle and Ms. Harbury will testify as to the complicity of the School of Americas/WHISC in these international crimes as a crime in its own right.
- Professor Boyle will testify that the right to prevent crime is one of the recognized in General Principles of Law Recognized by Civilized Nations.
- Professor Boyle will testify that U.S. Supreme Court Justice Robert Jackson, who served not only as the chief American prosecutor at the Nuremberg Trial, but was also appointed to help formulate the international legal principles for the trial stated:

“The very essence of the Nuremberg Charter is that individuals have international duties which transcend national obligations of obedience imposed by the individual state.”

- Professor Boyle and Ms. Harbury will further testify that the protestors had the right to take necessary and reasonable and non-violent steps to prevent the ongoing criminal activity at the School of Americas/WHISC hence they did not possess the requisite criminal intent for the crimes charged.
- Ms. Harbury will testify about U.S. policies and practices at SOA/WHINSEC and their impact on the people of Latin America.

Since the government must prove criminal intent beyond a reasonable doubt, the experts’ testimony will directly address the issue of reasonable doubt.

Careful reading of the crime which each defendant is charged with violating, 13 USC 1382, makes it clear that each defendant’s action must be taken *for any purpose prohibited by law or lawful regulation*; legal intent of the defendants is at issue in this matter.

While the government could conceivably make an argument that the statute can be read in such a way that it does not require the Court to address the issue of intent for those defendants who were already subject to valid ban and bar letters, the statute on its face requires that the trespass be *for any purpose prohibited by law or lawful regulation*.

Undersigned counsel suggests to this Court that the statute be read in its entirety to require that the issue of intent be a part of the deliberation for all defendants.

However, at least for those defendants who were not subject to valid ban and bar letters, the issue of their lawful intent is unequivocally and squarely before this Court. Thus, they are entitled to put on evidence on this point.

Further, the charging document for each defendant specifically alleges that each entered Ft. Benning, “*unlawfully, knowingly, and willfully*”.

Under the explicit words of the statute at issue and the charging documents, the government must prove that the acts were done with criminal intent.

The defendants have the right to present the expert testimony of Professor Boyle on international criminal law and crimes against humanity so that the Court may evaluate each defendant’s intent in light of their legal obligations and the international legal obligations of the School of Americas/WHINSEC.

Further, the experts will be able to offer this Court expert opinion as to the legality of the actions taken by the School of Americas/WHINSEC under international law and the legality, under international law, of the actions taken by those whose non-violent protest resulted in these charges.

If the actions of defendants are indeed authorized under principles of international law, then they cannot be found to have violated this statute. Since testimony from these experts could directly address this critical point, it must be admitted.

Defendants may also ask that other experts be allowed to testify on the issues before this Court.

Conclusion

For these reasons, the defendants request that they be allowed to introduce the testimony of experts concerning, e.g., international law, as part of the defense in this matter.

January 13, 2007

s/ William P. Quigley, Pro Hac Vice
Loyola University New Orleans College of
Law
Box 902
7214 St. Charles Avenue
New Orleans, LA 70118
504.861.5591 (office)
504.710.3074(cell)
quigley@loyno.edu

CERTIFICATE OF SERVICE

I hereby certify that on January 13, 2007, I electronically filed this MOTION AND MEMO FOR RULING ON ADMISSIBILITY OF EXPERT TESTIMONY with the Clerk of the Court using the CM/ECF system, which shall cause service to be electronically made upon the following attorneys of record:

Melvin E. Hyde

Stuart D. Alcorn

January 10, 2007

s/ William P. Quigley, Pro Hac Vice
Loyola University New Orleans College of
Law
Box 902
7214 St. Charles Avenue
New Orleans, LA 70118
504.861.5591 (office)
504.710.3074(cell)
quigley@loyno.edu