

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 EVIDENCE RE
INTERNATIONAL LAW**

Motion

For the reasons set out in the accompanying memorandum, undersigned counsel requests that this Court authorize the presentation of evidence in support of the defense of 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 Evidence Re International Law

“The arc of history is long, but it bends towards justice.”

Martin Luther King, Jr.

Defendants in this matter are charged with violating federal criminal law against unlawful trespass on a military installation. This memorandum is submitted to explain why the defendants had a legal right to take the action they did and to allow evidence about the reasons why they took their actions to come before the Court. International law allows conduct that is otherwise criminal to be justified and legal if it is taken to prevent a larger crime. If a woman breaks into a house, she might be charged with breaking and entering. However, a woman who breaks into a house on fire to rescue a child is not guilty of breaking and entering because she acted for the purpose of fulfilling the higher justice responsibility of trying to help another live. The people before this Court are charged with the technical violation of trespassing onto federal property – but their actions are much more like those of the woman who broke into a house on fire to save a child. The people before this Court ask that this Court allow them to put on evidence to back up their claims that their actions were taken in order to prevent a much greater harm, and are therefore just.

There is wide and historical precedent for this request. 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.”

The individuals charged in these matters did not engage in criminal action but rather actions of justice. Their acts of conscience undertaken to protest the continuation of SOA/WHINSEC are protected under the international law. Undersigned counsel submits this memorandum in support of the request for a ruling on the presentation of evidence for the defense of international law.

Section 2: Scope of This Motion

In this motion, defendants specifically move to be allowed to put on evidence relevant to the defense of international law. This evidence may include expert testimony, expert lay testimony, documentary evidence, books, videos and other information about the actions of the School of

Americas/WHINSEC consistent with the Federal Rules of Evidence, some of the specifics of which are outlined below. This Court is not now being asked to make an advance ruling on each of the specific items of evidence which may be offered, but to rule that evidence relevant to the defense of international law be allowed to be offered, subject to normal evidentiary rulings.

Further, though defendants are filing an accompanying motion requesting a jury trial, undersigned counsel wants to make clear that defendants seek to put on evidence on these issues whether or not there is a jury in this matter. The basic constitutional right to put on a full defense obviously applies with equal force whether the trial is before a judge or a jury. *Armstrong v Manzo*, 380 US 545, 552 (1965). Arguably, there would even be a lower threshold standard for the introduction of this evidence if the trial is to the Court alone because the potential for the evidence to be prejudicial to the Court would be less than to a jury.

Section 3: International Law Applies

International law is explicitly a part of US law by reason of two provisions of the US Constitution.

Article VI, Section 2 says:

This constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding.

Article III also explicitly confers on federal courts jurisdiction over cases involving treaties:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.

In June of 2004, the US Supreme Court again affirmed that US domestic law recognizes international law. In *Sosa v Alvarez-Machain*, 124 S. Ct. 2739, the Court ruled:

“For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations. See, e.g., Banco Nacional de Cuba v Sabbatino, 376 U.S., at 423, 84 S.Ct. 923 (1964) (“[I]t is, of course, true that United States courts apply international law as a part of our own in appropriate circumstances”); The Paquete Habana, 175 U.S., at 700, 20 S.Ct. 290 (“International law is part of our law, and must be ascertained and administered by the Courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination”); The Nereide, 9 Cranch 388, 423, 3 L.Ed. 769 (1815) (Marshall, C.J.) (“[T]he Court is bound by the law of nations which is a part of the law of the land”); see also Texas Industries, Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981) (recognizing that “international disputes implicating ... our relations with foreign nations” are one of the “narrow areas” in which “federal common

law" continues to exist). It would take some explaining to say now that federal courts must avert their gaze entirely from any international norm intended to protect individuals."

In the 1900 decision referenced by the United States Supreme Court in 2004, an earlier court declared that:

"International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is."

The Paquete Habana, 175 US 677, 700, 20 SCt 290, 299 (1900).

Later the Court reinforced the power of treaties and the ability and the power to enforce the provisions of those treaties.

"We do not deem it necessary to consider the constitutional limits of treaty-making powers. A treaty, within those limits, by the express words of the Constitution, is the supreme law of the land, binding alike national and state courts, and is capable of enforcement, and must be enforced."

Maiorano v. Baltimore & Ohio R.R. Co., 213 U.S. 268, 273 (1909).

International law is an evolving area of the law as recent decisions make clear. For example,

"[I]t is clear that courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today."

Filartiga v Pena-Irala, 630 F2d 876, 881 (Cir 2 1980).

This Court has so far refused to allow evidence of international law in previous SOA-WHINSEC civil disobedience trials. This Court has cited a passage from *US v Montgomery*, 772 F2d 733 (11th Cir. 1985) that reviewed a portion of the *Nuremberg* principles and concluded that "here defendants held no duty to act in any manner that could have been considered criminal under international law. Therefore, an international law defense in this case is not warranted."

Defendants argue that part of the *Montgomery* court decision actually supports this defense request to put on evidence of international law because it recognizes the importance of international

law. But the conclusion of the Montgomery court mis-characterized part of the issue of international law before it and thus this Court should not rely on it nor the cases it cites for a decision denying defendants an opportunity to put on evidence of international law defenses.

It is very noteworthy for the matter before this Court that the Montgomery case cites *The Flick Case*, where German industrialists were charged with using slave labor and war prisoners in armament production. *The Flick Case*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1192 (1952). As the Montgomery court stated, quoting the *Nuremberg Military Tribunals* decision in *The Flick Case*:

International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment falls on the offender in propria persona. The application of international law to individuals is no novelty.

Montgomery, *supra*, at 737.

The Montgomery court decision thus agrees with defendants that it is well settled that international law is part of the body of law applicable in the United States but the Court disagrees with defendants about *how* it should apply. That disagreement is precisely *why* defendants should be allowed to put on evidence of international law.

It is also noteworthy that international law has become much more pervasive and accepted since Montgomery.

In recent years, American jurists have moved further in that direction and signaled an increased willingness to turn to international law for guidance when addressing key Constitutional questions. See e.g., *Thompson v. Oklahoma*, 487 U.S. 815, 851 (1988) (O'Connor, J., concurring) (invoking United States' ratification of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, 6 U.S.T. 3516, 3560, T.I.A.S. No. 3365 (entered into force for United States on Feb. 2, 1956), and its signature of two other international agreements that had not been ratified, as relevant expressions of international practice to consider when evaluating application of the death penalty to a 15-year-old defendant).

Justice Ginsburg in 2003 advocated for courts to look beyond our borders at international law treaties and the experiences of other nations. Ruth Bader Ginsburg, "Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication," 40 Idaho L Rev 1 (2003). Justice Ginsburg acknowledged that "...since the United Nations' 1948 adoption of the Universal Declaration of Human Rights, the U.S. Supreme Court has mentioned that basic international Declaration a spare six times - and only twice in a majority decision." See *Knight v. Florida*, 528 U.S.

990, 996 (1999) (Breyer, J., dissenting from denial of certiorari); *Dandridge v. Williams*, 397 U.S. 471, 521 n.14 (1970) (Marshall, J., dissenting); *Zemel v. Rusk*, 381 U.S. 1, 4, 15 n.13 (1965) (majority opinion); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 161 n.16 (1963) (majority opinion); *Int'l Ass'n of Machinists v. Street*, 367 U.S. 740, 776 (1961) (Douglas, J., concurring); *Am. Fed'n of Labor v. Am. Sash & Door Co.*, 335 U.S. 538, 550 n.5 (1949) (Frankfurter, J., concurring).

In 2005, Justice Kennedy in the case outlawing the juvenile death penalty observed "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty." *Roper v Simmons*, 125 SCt 1183, 1198 (2005). The majority opinion goes on at some length to review international human rights treaties and the practices of other countries at pp 1198-1200.

In 2003, Justice Kennedy in *Lawrence v Texas*, the Court made it a point to cite a 1981 decision of the European Court of Human Rights, authoritative in 45 countries now, as a part of its decision protecting consensual sex between people of the same gender. *Lawrence v Texas*, 558, 573 (2003) citing *Dugeon v United Kingdom*, 45 Eur. Ct. H. R. (1981).

In the 2003 case upholding academic affirmative action, Justice Ginsburg in a concurrence joined by Justice Breyer, pointed out the importance of the *International Convention on the Elimination of All Forms of Racial Discrimination*, ratified by the US in 1994 and the 1979 *Convention on the Elimination of All Forms of Discrimination Against Women*, which the US has not ratified. *Grutter v Bollinger*, 539 US 306 (2003).

Justice Stevens in the 2002 decision invalidating the death penalty for mentally disabled offenders noted in his majority opinion "within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. *Atkins v Virginia*, 536 US 304,316 fn 21 (2002). Atkins also noted the earlier decision of *Thompson v Oklahoma*, 487 US 815, 830 (1988) where the Court agreed that it was worthwhile to consider the views of "respected professional organizations, by other nations that share our Anglo-American heritage and by leading members of the Western European community."

These changes have translated into recent decisions like *Mehinovic v Vuckovic*, 198 F. Supp 2d 1322 (N.D. Ga. 2002) which found torture by Bosnian Serb police officer actionable under US law. In doing so, the Court recognized the critical role of international law in interpreting and applying US law, in this case the Alien Tort Claims Act:

United States courts presented with the issue have unanimously recognized that official torture violates obligatory norms of customary international law and is thus actionable under the Alien Tort Claims Act. The prohibition of torture under customary international law is evidenced by, among other things, specific prohibitions on its use in numerous international

human rights treaties; including the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention").

At 1344-1345.

See other recent examples like *Cabello Barrueto v Fernandez Larios*, 205 F. Supp 2d 1325 (S.D. Fla. 2002) - complicity with torture is a violation of international law; *John Doe I v Unocal Corp*, 2002 WL 31063976 (9th Cir 2002) - noting the importance of international law to interpret the Alien Tort Claims Act. *Boim v Quranic Literary Institute and Holy Land Foundation*, 291 F.3d 1000 (7th Cir. 2002) - violations of statute criminalizing the provision of material support to terrorists constitute "acts of international terrorism."

The world and international law have changed mightily since the Montgomery decision. The United States justified its bombing of Afghanistan and the invasion of Iraq violating those country's laws by invoking an international privilege to violate a nation's domestic law in order to uphold international law.

Defendants should at least have the right to present evidence of the same international law to justify their efforts to try to stop training at an institute that has graduated numerous documented human rights violators.

In 2001, the United Nations Security Council passed resolution 1373 against terrorism:

...every State has the duty to refrain from organizing, instigating, assisting or participating in terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts...

...all States shall: (a) refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts...

If this motion is granted, defendants will be able to offer this Court evidence 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 were indeed authorized under principles of international law, then they cannot be found to have violated this statute.

The testimony sought to be admitted will establish elements of a defense under international law, or it will be sufficient to negate the criminal intent of the offense charged, and must accordingly be allowed.

Section 4 : Responsibility of School of Americas/WHINSEC Under International Law

The principles of international legal responsibility for the School of Americas/WHINSEC are relevant to defendants' defense.

As noted above, 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.

Therefore, courts are bound by international law, which included treaties, executive orders, and customary international law.

The Supremacy Clause of the Constitution specifies that Treaties are the Law of the Land. The Constitution of the United States, Article 6(2).

"By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation."

Whitney v. Robertson, 124 U.S. 190 (1888).

Both the United Nations Charter and the Charter of the Organization of American States are treaties. As such, domestic courts must give them effect. See *Oyama v. California*, 68 S.Ct. 269, (1948). (Overturning state law conflicting with obligations under the UN Charter to respect human rights and fundamental freedoms).

In addition to treaties, the Supreme Court held that executive agreements are also often binding federal law, or the Supreme Law of the Land. *United States v. Pink*, 62 S.Ct. 552 (1942). While holding that an executive agreement was enforceable as a Treaty within in Article 6(2) of the Constitution, the Supreme Court quoted the Federalist papers,

"[a]ll constitutional acts of power, whether in the executive or in the judicial department, have as much legal validity and obligation as if they proceeded from the legislature..."

Id at 565.

To determine whether the President's executive order is a "constitutional act of power" that should be enforced as a treaty, courts consider the order's relationship to the President's foreign affairs powers under the Constitution and the extent of Congress's acquiescence or support for the policy. *Dames & Moore v. Regan*, 101 S.Ct. 2972 (1981).

By binding executive orders, the United States established international legal principles for the war crimes trials at Nuremberg and Tokyo. Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise* 63 SCALR 833 (1990).

The United States, France, the United Kingdom, and the Union of Soviet Socialist Republics signed the Charter of the International Military Tribunal at Nuremberg to lay the groundwork to prosecute Nazi war criminals on August 8, 1945. The Nuremberg Tribunal established international crimes: crimes against humanity, crimes against peace, and war crimes.

By executive order, President Truman assigned Supreme Court Justice Robert Jackson to prosecute Nazi war criminals. Kenny, *Moral Aspects of Nuremberg*, p. 23, 1949. Under another executive order, the Instrument of Surrender of Japan, General MacArthur was given the authority to establish the Tokyo War Crimes Tribunal. *Id* at 35.

The Charter of the Tokyo Tribunal, developed to prosecute war crimes in Tokyo, was based principles of international criminal law which had been implemented at the *Nuremberg* trials, such as the individual criminal responsibility for complicity with crimes against humanity, crimes of war, crimes against peace.

The decisions and principles these war crimes tribunals were executive agreements, with the benefit of the supremacy clause, as they were established pursuant to the President's Constitutional authority in the realm of foreign affairs and Congress has acquiesced to and supported them. See *Dames and Moore*. Like the binding agreement in *Dames and Moore*, "Congress has not enacted legislation, or even passed a resolution, indicating its displeasure with the Agreement." *Dames and Moore* at 687.

The United States continues to support the prosecution of war criminals according to the principles of law derived from Nuremberg and Tokyo trials.

Furthermore, the United States government incorporated the principles of *Nuremberg* into the United States Army Field Manual. It specifies that civilians or armed forces members who commit crimes against peace, humanity, or war crimes are criminally liable. (Article 498)

Therefore, similar to the executive agreements in *Pink* and *Dames and Moore*, the *Nuremberg Charter and Principles*, and the principles from the *Tokyo Charter* and war crimes trial are the Supreme Law of the Land, pursuant to the President's power to enter into an executive agreement and that binds the nation under his foreign affairs status as the leader of the sovereign in order to establish and maintain amicable relations with other countries.

Another source of law, customary international law, as evidenced by commentators' understanding of it and nations' recognition of it, is also enforceable federal law. *The Paquete Habana*, 175 U.S. 677, 700.

International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *Id.*

The principles of law from the decisions at the Nuremberg and Tokyo war crimes trials constitute customary international law because of they are recognized by civilized nations as such, they have been applied as international law, and they are recognized by jurists and commentators as international law.

“[T]he Nuremberg Principles have universally been considered to constitute an authoritative statement of the rules of international law dictating individual criminal responsibility for crimes against peace, crimes against humanity and war crimes.”

F. Boyle, “The Relevance of International law to the So-Called Paradox of Nuclear Deterrence,” 1984, p. 12.

The United Nations Security Council also recognized the continued validity of international criminal law based on the precedents of Tokyo and Nuremberg when it unanimously voted to create a tribunal to try human rights violations in ex-Yugoslavia based on the principles of international humanitarian law and drafted Statutes based on those decisions. Aryeh Neier, *War Crimes: Brutality, Genocide, Terror and the Struggle for Justice* 21, 111 (1998).

The establishment of the tribunal for the former Yugoslavia, as well as the Rwandan war crimes tribunal were both led by the United States, demonstrating its acceptance of international criminal law. The principles of international criminal law applied at war crimes tribunals are customary international law, and therefore are federal law.

One of the purposes for creating international definitions of crimes against humanity and genocide through the Nuremberg Charter was to prevent other nations, including those establishing the tribunal, from committing similar crimes.

“A major political concern was to set a positive standard for future conduct of the remaining major world powers who were implementing the trial. By maintaining that international law forbade the Nazi crimes, the major world powers would be legally constrained from repeating similar crimes in the future.”

Steven Fogelson, *The Nuremberg Legacy: An Unfulfilled Promise* 63 SCALR 833, (1990)

This Court, therefore, has a duty to pass judgments consistent with international treaties, executive orders, and customary international law, including the Charter of the Organization of American States, the United Nations Charter, the principles of laws established by international war crimes tribunals, and to view jurists and commentators' works on international law as "trustworthy evidence of what the law really is."

Section 5: International Law Creates A Right to Prevent Crime

It is the defense position that international law creates a right to prevent crime and that the School of Americas/WHINSEC is a source of international human crime. Thus, the evidence sought to be admitted can establish a defense to the crime charged.

International law derived from the war crimes tribunal, which criminalizes complicity with international crimes, creates a right to prevent crime.

The School of Americas/WHINSEC violates the UN Charter, the Charter of the OAS, and incites crimes against humanity, genocide, and war crimes. Defendants are entitled to an opportunity to put on evidence to support this position.

How does the School of Americas/WHINSEC violate the *Nuremberg* Principles, the Charter of the Organization of American States, and the United Nations Charter? This memo will now briefly address those issues so that defendants can address those issues in more depth with evidence at the trial.

The UN Charter and the Charter of the OAS Charter are evidence of binding principles of international law. The Constitution of the United States, Article 6(2). *US v Toscanino*, 500 F 2d 267, 276-279 (2nd Cir. 1974). Consequently, domestic courts have passed judgments based on both Charters. See for example *Filartiga v. Pena-Irala*, 630 F.2d 876, at (FN 9) (2nd Cir. 1980).

Defendants can submit evidence to demonstrate that the School of Americas/WHINSEC is responsible for inciting and condoning crimes against humanity according to the international criminal law recognized by the judgments of the war crimes trials at Nuremberg and Tokyo.

The School of Americas/WHINSEC is responsible for many of its graduates' acts according the principles in the Nuremberg Charter. Again, these are not speculative issues, but violations that have been well documented by Amnesty International USA in their 2002 report “*Unmatched Power, Unmet Principles: The Human Rights Dimensions of US Training of Foreign Military and Police Forces.*” Full report is available online at www.amnestyusa.org/stoptorture/msp.pdf

A good explanation of the international criminal liability for accomplices is available in William Schabas, “Enforcing International Humanitarian Law: Catching the Accomplices” published 42 *International Review of the Red Cross* 439 (June 30, 2001). The entire article is available on the web site for the International Red Cross. www.icrc.org On page 441 of the article, Schabas, a Professor of Human Rights at the National University of Ireland, Galway and Director of the Irish Centre for Human Rights, cites to the case of *United States of America v Alstotter et al*, (“Justice trial”), 1948, 6 L.R.T.W.C., p 62 for the following passage which sums up the Nuremberg Tribunal principle for the law of complicity in international criminal law:

“[t]his is but an application of general concepts of criminal law. The person who persuades another to commit murder, the person who furnishes the lethal weapon for the purpose of its commission, and the person who pulls the trigger are all principals or accessories to the crime.”

Under these principles applied at Nuremberg, the School of Americas/WHINSEC is liable for its role in a conspiracy to commit crimes against humanity.

Because the School of Americas/WHINSEC violates international law, defendants have a right to put on evidence that there is a right to prevent international crimes.

According an accepted interpretation of the precedent at Nuremberg, individuals have right based on international law to try to prevent crimes against humanity, crimes of aggression, and war crimes. Francis Anthony Boyle, *Defending Civil Resistance Under International Law* (Transnational Publishers, 1988) p. 139 Further, international law holds private citizens criminally responsible for their direct role in and complicity with these crimes. See *The Flick Case*, 6 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10*, at 1192 (1952).

Section 6: The School of Americas/WHINSEC Violates International Law

There is substantial evidence that can be offered to the Court that the School of Americas/WHINSEC violates international law. See Quigley, “The Case for Closing the School of the Americas-WHINSEC,” 20 *BYU Journal of Public Law* 1 (2005).

The militaries in Latin America, which the School of Americas/WHINSEC have trained, have carried out systematic repression and crimes against humanity. The School of Americas/WHINSEC has assisted these crimes.¹ For example, there is significant evidence that civilians were targeted for systematic persecution by graduates of the School of Americas/WHINSEC:

- Two of the three officers cited in the assassination of Archbishop Romero are School of Americas/WHINSEC graduates;
- Three of the five officers cited in the rape and murder of Maura Clarke, Jean Donovan, Ita Ford, and Dorothy Kazel are School of Americas/WHINSEC graduates;
- Ten of twelve officers cited as responsible for the massacre of more than 900 civilians in El Mozote, El Salvador, are School of Americas/WHINSEC graduates;
- Nineteen of twenty-six officers cited in the November 1989 murder of six Jesuit priests, their housekeep and her daughter are School of Americas/WHINSEC graduates;²

In 2000, the official School of Americas/WHINSEC website celebrated the success of this persecution and terrorization, proclaiming, “many of the [SOA’s] critics supported Marxism – Liberation Theology – in Latin America – *which was defeated with the assistance of the United States Army.*” (Emphasis supplied).³

The School of Americas/WHINSEC and those responsible for its operations have taken affirmative actions to further persecution. For example, by training 10,000 soldiers for the Columbian military, which has extensive links to paramilitaries that kill and terrorize labor organizers and other civilians, the School of Americas/WHINSEC has “furnished the lethal weapon” for crimes against humanity.⁴

The School of Americas/WHINSEC has trained soldiers in "psychological operations" and counterinsurgency that supported numerous repressive regimes and militaries that committed human rights atrocities, while encouraging torture, murder, the systematic repression of the poor and the

¹ See details set out by Amnesty International USA in their 2002 report “Unmatched Power, Unmet Principles: The Human Rights Dimensions of US Training of Foreign Military and Police Forces.” Full report is available online at www.amnestyusa.org/stoptorture/msp.

² Jack Nelson-Pallmeyer. *SCHOOL OF ASSASSINS* (Orbis Books, 1997); Jack Nelson-Pallmeyer. *SCHOOL OF ASSASSINS: Guns, Greed, and Globalization* (Orbis Books, 2001); Nelson-Pallmeyer, at 32.

³ Nelson-Pallmeyer, at p. 34.

⁴ . See <http://www.hrw.org/reports/2000/colombia/> Human Rights Watch “Columbia The Ties That Bind: Colombia and Military-Paramilitary Links.”

annihilation of “liberation theologians.” Because the training was part of a larger conspiracy to persecute based on political and religious grounds, specifically targeting “liberation theologians” and sympathizers with the poor, under decisions of Nuremberg, the School of Americas/WHINSEC is criminally responsible for much of the devastation in Central America.

The School of Americas/WHINSEC is also legally complicit in the war crimes of the people it trained and assisted, which include “murder, ill-treatment...killing of hostages...” These actions are war crimes whether they committed during a declared or de facto war. The School of Americas/WHINSEC is responsible for war crimes according to international law and the precedents of Nuremberg.

The School of Americas/WHINSEC also violates the United State’s treaty obligation to “abstain from intervening in the affairs of another state.” *Charter of the Organization of American States*. Article 3e. Regarding the scope of this duty, the Charter specifies that no member country has “the right to intervene directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.” *Id.* Article 19. The School of Americas intervenes in the affairs of other states through its training of over sixty thousand Latin American soldiers, many of which have subsequently committed gross human rights violations, assisted in the overthrow of democratic governments, and impeded national and international peace processes.

Many School of Americas/WHINSEC graduates are soldiers and generals in militaries, responsible for widespread oppression and murder. This is just a sampling:

- Guatemala Dictator General Romero Lucas Garcia, a School of Americas/WHINSEC graduate, and other SOA/WHINSEC graduates were responsible for widespread terror in Guatemala where over 150,000 people were killed following a coup overthrowing a reformist democratic government. Under Garcia’s rule, death squads killed civilians in front of their families. The tactics used against social organizers included torturing their children. Nelson-Pallmeyer, p 35-43.
- Guatemalan Bishop Juan Gerardi participated in the investigation and reporting of human rights abuses in his country. That report found that the military and paramilitaries were responsible for over 87% of the torture committed. In April 1998, two days after releasing that study to the public, Bishop Gerardi was murdered. A School of Americas/WHINSEC graduate was one of the four men convicted of his murder. Nelson-Pallmeyer, p 43.
- In Honduras, a secret army unit, Battalion 316, acted as a death squad. They conducted interrogations using shocks and suffocation and ultimately murder. Nineteen of the

ranking Honduran officers linked to the death squads of Battalion 316 are graduates of the School of Americas/WHINSEC. Nelson-Pallmeyer 46.

- In Chile, the military overthrew the democratically elected government. General Pinochet was indicted for international human rights violations by a Spanish judge in 1998. The court was also asked to indict thirty other high ranking members of the military dictatorship. Ten of those are graduates of the School of Americas/WHINSEC. Nelson-Pallmeyer at 48-50.
- In Colombia, more than 100 of the 246 Colombian officers cited for war crimes by an international human rights tribunal in 1993 were graduates of the School of Americas/WHINSEC. Nelson-Pallmeyer, at 54.

These and other actions are evidence that the School of Americas/WHINSEC also violates the United State's duty to "refrain from practicing policies and adopting actions or measures that have serious adverse effects on the development of other Member States." *Id.* Article 35.

In addition, the SOA/WHINSEC violates the UN Charter's guarantee to "human rights and fundamental freedoms." UN Charter Article 1(3). The SOA's training deprives many of their guaranteed human rights and fundamental freedoms. Defendants have the right to present evidence to establish that the SOA/WHINSEC is in violation of international law.

The *Nuremberg* precedent criminalizing conspiracy to commit war crimes not only applied to military leaders, it also established private citizen' responsibilities to uphold international law. See *The Flick Case*, 6 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 1192 (1952).

In the *Justice Case* and others, industrialists and judges who cooperated with the Nazi reign of terror were tried and punished. *Id.* Individuals were found to have a duty to disobey domestic orders that cause crimes against humanity. The Justice Case, 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951).

Moreover, the right to prevent crime is one of the recognized General Principles of Law Recognized by Civilized Nations. Boyle, *Defending Resistance*, 139. The Statute of the International Court of Justice recognizes these principles as a valid source of international law. Article 38.

As noted above, Courts must also look to jurists' interpretations of international law as "trustworthy evidence of what the law really is." *The Paquete Habana* 175 U.S. 677, 700. One such jurist and scholar, Supreme Court Justice Robert Jackson, 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. He 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.”

This articulation of the principles of international law developing from the post-war trials was echoed by Tokyo War Crimes Tribunal Judge Röling, who said,

“The most important principle of Nuremberg was that individuals have international duties which transcend national obligations of obedience imposed by the nation state... This means that in some cases individuals are required to substitute their own interpretation [of international obligations] for the interpretation given by the state.”

Röling and Cassese, *Tokyo Trial and Beyond* 107 (1995).

As Judge Röling said, the world “has to rely on individuals to oppose the criminal commands of the government” at 108.

This Nuremberg Privilege would have provided a defense to individuals who blocked trains transporting internees to a German concentration camp or who smuggled Jewish children out of Germany. Matthew Lippman, *Civil Resistance: Revitalizing International Law in the Nuclear Age*, 13 Whittier L. Rev. 17 Whittier Law Review (1992).

Those who protest against the actions of the School of Americas/WHINSEC embody the spirit of individual responsibility to humanity that the jurists involved in the prosecution deemed to be the essence of the principles of war crimes trials.

In conclusion, since the defendants were charged with violating a “lawful regulation,” they are entitled to put on evidence there is an international legal right and privilege to prevent violations of international human rights laws and crimes. It would be paradoxical if international law failed to offer protection to those non-violently protesting a state's violation of the law of nations. This would undercut the principle that individuals have international rights and obligations which transcend those imposed by the nation-state. The Montgomery decision reflects this exact paradox by, on the one hand, recognizing the importance of international law but then, on the other hand, restrictively applying it only as a defense when domestic law requires action violating human rights as opposed to allowing citizens to invoke it to prevent violations of human rights.

Therefore, defendants are entitled to introduce evidence of the defense of international law.

Section 7: The Crime Charged Involves Intent

The crime which each defendant is charged with committing, 13 USC 1382 reads as follows:

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, *for any purpose prohibited by law or lawful regulation*; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof-

Shall be fined under this title or imprisoned not more than six months or both.

(Emphasis supplied).

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*. Thus the legal intent (*purpose*) of each defendant is at issue in this matter.

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, particularly those who were not subject to valid ban and bar letters. While some may argue that the issue of intent is not before the Court for those defendants who have valid ban and bar letters, at the minimum, 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, these defendants are entitled to put on evidence that goes to the lawfulness of their intent.

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.

As a part of the evidence of the lawfulness of their intent, defendants seek to put on a defense and evidence to support their defenses based on international law.

This Court ruled in the past that:

"...the requisite knowledge in a 18 USC 1382 case is whether a defendant knows that his entry is prohibited. US v Cottier, 759 F2d 760, 762 (9th Cir. 1986). This is not to be confused with defendant's motive for committing the crime. Military personnel announced and posted signs that entering the US Military Post was unlawful. Both the defendants with valid ban and bar letters, and those without could have readily observed the gates restricting entry as well as uniformed officers prohibiting free access to the premises. Thus criminal intent is not at issue in this case and as such, evidence supporting international law and/or necessity is not appropriate to negate the intent of defendants to commit 18 USC 1382."

Decision of June 24, 2002.

Reliance by this Court on the case of *US v Cottier*, 759 F2d 760 (9th Cir. 1986) for the proposition that evidence of intent is not at issue is misplaced. *Cottier* argued that the government had to prove that his entry onto a military base was with knowledge that his entry was unauthorized. Thus his challenge was to the *knowingly* part of the conduct proscribed by the statute, unlike the challenge of these defendants. The court found that given the circumstances of the case, fences and guards and warning signs, that the defendant must have known that his conduct was unauthorized. As the Court said “Under these circumstances, the magistrate could conclude beyond a reasonable doubt that *Cottier* knew his entry was unauthorized.” at page 762.

These defendants are not advising this Court that they did not have knowledge that they were not supposed to go onto the base. They are advising the Court that they went onto the base with the intent to follow the consciences, international law, and to take actions to accelerate the closing of the SOA-WHINSEC.

Thus, the intent issue before this Court is not just whether they knew their actions were prohibited by federal statute but whether their actions were, according to the statute at issue, *unlawful* and *willful* and taken *for any purpose prohibited by law or lawful regulation*. International law squarely addresses these points.

Defendants have the right to put on evidence that the School of Americas/WHINSEC have been involved in ongoing violations of international law. Under an accepted interpretation of international law, individuals have a legal right or privilege to prevent crimes against humanity, war crimes, and genocide. This right is derived from the international legal principles of the Nuremberg and Tokyo war crimes trials. As international law, these principles are binding on American courts. *The Paquete Habana*, 175 U.S. 677, 700 (1900).

Courts must read statutes consistently with international law. Restatement (Third) of Foreign Relations Law § 115(1)(a) (“Congress can be assumed, in the absence of a statement to the contrary, to be legislating in conformity with international law and to be cognizant of this country's global leadership position and the need for it to set an example with respect to human rights obligations.”) Furthermore, the rule of strict construction demands that criminal statutes must be strictly construed. *U.S. v. Lanier*, 117 S.Ct. 1219 (1997). *U. S. v. A & P Trucking Co.*, 79 S.Ct. 203 (1958). Therefore, the trespassing statute must be read narrowly and in a manner consistent with international law. As this memo will indicate there is evidence available that will show the base regulation can be invalid because it is not “lawful” when applied to prevent individuals from attempting to prevent international crime.

The Supreme Court has held that "[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *The Charming Betsy*, 6 U.S. 64 at 118 (1804). In *MacLeod v. United States*, the United States Supreme Court again held that statutes should be read consistently with international law. *MacLeod v. U.S.*, 33 S.Ct. 955, 229 U.S. 416, 434 (1913):

The statute should be construed in the light of the purpose of the Government to act within the limitation of the principles of international law, the observance of which is so essential to the peace and harmony of nations, and it should not be assumed that Congress proposed to violate the obligations of this country to other nations, which it was the manifest purpose of the President to scrupulously observe and which were founded upon the principles of international law. *MacLeod*, 229 U.S. at 434

The trespassing statute only criminalizes an entry that is not lawful or is "prohibited by a lawful regulation." For the regulation to be "lawful," it must be consistent with principles of international law. *Id.* Therefore, according to the *Nuremberg* principles, a lawful regulation cannot interfere with an attempt to prevent crimes against humanity, pursuant to "international law [that is]...so essential to the peace and harmony of nations."

The "canon of strict construction" of criminal statutes further supports the narrow interpretation of the word "lawful." This principle, also called the "rule of lenity," demands narrow constructions to "ensure fair warning by so resolving ambiguity in criminal statute as to apply it only to conduct clearly covered." *U.S. v. Lanier*, 117 S.Ct. 1219, 1225 (1997). Moreover, courts have mandated the rule of strict construction of penal statutes involving the defendants' important rights. *Smith v. U. S.*, 79 S.Ct. 991, 997 (1959). "Criminal statutes and rules must be given strict interpretation in favor of defendants where substantial rights are involved." *Id.* In this instance, the First Amendment generally guarantees the freedom of expression. Therefore, a narrow interpretation of "unlawful" that is consistent with international law is supported not only by rules of construction that mandate statutes be read with international law, but also by the "canon of strict construction," and the requirement of strict construction because substantial rights are involved.

The *Montgomery* decision specifically underscores the importance of international law. Its conclusion that international law defenses are only available for people who are required to commit domestically lawful acts that violate international principles of justice and law is incorrect and should not be relied upon by this Court.

Defendants were trying, by their non-violent symbolic acts, to bring attention to and halt the ongoing human rights violations occurring at the SOA-WHINSEC and to hasten its closing.

These are not speculative issues, but violations that have been well documented by Amnesty International USA in their 2002 report “*Unmatched Power, Unmet Principles: The Human Rights Dimensions of US Training of Foreign Military and Police Forces.*” The full report is available online at <http://www.amnestyusa.org/stoptorture/msp.pdf>

When reading the statute, as limited by international law, acts authorized or even mandated by international law are not barred by lawful regulation, because for a regulation to be “lawful” it must not be inconsistent with international law, it must not prevent a non-violent attempt to prevent crimes against humanity.

Section 5: Conclusion

For these reasons, the defendants request that they be allowed to put on evidence of the defense of international law.

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 EVIDENCE RE INTERNATIONAL LAW 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 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