IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S OPPOSITION TO STANDBY COUNSEL'S MOTION FOR DISCOVERY OF AGREEMENT BETWEEN GERMANY, FRANCE AND THE UNITED STATES AND EVIDENCE SUBJECT AND/OR RELEVANT TO THAT AGREEMENT

The United States respectfully opposes standby counsel's efforts to discover information related to any assurances that the United States may have given to Germany or France regarding the use of evidence in this case.

Without citing any legal authority providing for the production of such information, standby counsel seek discovery of: any agreement between the United States and Germany and France relating to the production of any evidence in this case from those countries; any letters rogatory seeking evidence from Germany or France; any correspondence relating to any such agreements or letters rogatory; all evidence produced by Germany or France in response to any such agreements, letters rogatory or correspondence; and any oral or written agreement or understanding that limits or seeks to limit the use of any such evidence. Because any such information is not discoverable, standby counsel's motion must fail.

Background

By means of a request under a Mutual Legal Assistance Treaty (MLAT) with France and Letters Rogatory with Germany, the United States sought the production of evidence from those

countries to be used during this prosecution. Due to questions from both countries regarding the death penalty, the Department of Justice supplemented both requests with certain written assurances. The United States fully intends to comply with the assurances given to both France and Germany; however, neither assurance confers any rights upon defendant.

The Government has received some evidence from both countries which we intend to introduce at trial and we expect to receive more. Discoverable evidence currently in the custody of the United States has been produced to the defense as will any other discoverable evidence obtained from either country in the future. Therefore, the only issue remaining before the Court is whether the defense is entitled as a matter of right to the production of the letters rogatory or treaty requests and related correspondence with Germany/France leading to the production of this evidence.

Argument

The defense has no right to the letters rogatory or treaty requests and related correspondence. As an initial matter, the Supreme Court has recognized the need for secrecy surrounding communications between countries. United States v. Curtiss-Wright Corporation, 299 U.S. 304, 320-21 (1936). Therefore, the courts have ruled that international communications should not be made public absent a demonstration of materiality by the defense. See United States v. Rezaq, 156 F.R.D. 514, 521-22 (D.D.C. 1994) (defendant not entitled to communications between United States and Malta regarding whether the United States would prosecute the defendant at the conclusion of proceedings in Malta).[1] If the matter is not relevant

[1]Cf. In re Letters Rogatory from Tokyo, 539 F.2d 1216, 1219 (9th Cir. 1976) ("Letters Rogatory are customarily received and appropriate action taken with respect thereto ex parte.");

or material or intended to be used in the government's case, it is not discoverable. See Fed. R. Crim. P. 16; Weatherford v. Bursey, 429 U.S. 545, 559 (1977) ("There is no general constitutional right to discovery in a criminal case . . ."); United States v. Derrick, 163 F.3d 799, 810-11 (4th Cir. 1998).

The materials at issue here – the diplomatic communications and assurances – do not qualify as discoverable material. We disagree with standby counsel's argument that the jury may consider, as a mitigating factor, the contention that "the governments of France and Germany not only do not want to have any part in the execution of Mr. Moussaoui, but also that they believe that such a punishment is inappropriate." Motion at 4. To the contrary, the views of France and Germany regarding the death penalty are not appropriate factors to be presented to the jury. Cf. Buell v. Mitchell, 274 F.3d 337, 371-76 (6th Cir. 2001) (rejecting role of international law in the application of death penalty), cert. denied, 123 S. Ct. 30 (2002); Reese v. Delo, 94 F.3d 1177, 1183 (8th Cir. 1996) (evidence that family members of the victim oppose capital punishment is not relevant evidence at death penalty phase); Glass v. Butler, 820 F.2d 112, 115-16 (5th Cir. 1987) (priest's testimony that mainline churches are opposed to capital punishment not relevant); United States v. Bin Laden, 126 F. Supp.2d 290, 294 (S.D.N.Y. 2001) (rejecting notion that international law bars death penalty despite fact that 75 countries do not permit capital punishment); Stewart v. Lane, 1993 WL 207807 at *14 (N.D. Ill. 1993) (defense witnesses' opposition to death penalty not admissible during penalty phase). [2]

Matos v. Reno, 1996 WL 467519 at *2 (S.D.N.Y. 1996) ("Generally, requests [from foreign countries for judicial assistance] are confidential . . . .").

[2] Standby counsel's reliance on United States v. Bin Laden, 156 F. Supp.2d 359 (S.D.N.Y. 2001), is misplaced. In that case, defendant Khalfan Khamis Mohamed was captured

But, even if it were appropriate to prove the German and French views, those views are well documented: those governments have publicly stated their disapproval of the death penalty in other contexts. The European Union, of which Germany and France are both member states, opposes the death penalty and has expressed its disagreement with the United States on this issue.[3] Indeed, were the Court to deem their positions relevant, the United States would stipulate that Germany and France object to the imposition of the death penalty. Since the public position of Germany and France can be established by other evidence, counsel do not need the particular items they seek by means of discovery to make that point.

Finally, we disagree that discovery is appropriate or necessary in order to guarantee that the United States abides by the assurances. As noted above, the United States fully intends to abide by them. But were it to fail to do so, the remedy would be diplomatic, not judicial. See United States v. Robinson, 843 F.2d 1, 4 (1st Cir. 1988) (J. Breyer) (only Panama could object to a prosecution after it gave the United States the right not only to board ships in its jurisdiction

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in South Africa and delivered to the United States without any agreement by the United States that it would not seek the death penalty. After Mohamed was delivered, the Constitutional Court of South Africa ruled that the delivery of Mohamed to the United States without securing an assurance that the death penalty would not be sought was a violation of the South African Constitution. Id. at 361. Judge Sand permitted the defendant to introduce this fact as a mitigating factor because it related to another mitigating factor that other defendants would not face the death penalty as a result of the location of their arrest and "if things had gone as the South African Constitutional Court says they should have, [Mohamed] too would not be eligible for the death penalty." Id. at 370. In making this decision, Judge Sand acknowledged that his decision was based upon the "particular facts of [the] case." Id.

No such circumstances exist in this case. Defendant was captured in this country after he entered the United States of his own volition to carry out his role in the September 11 attacks. Thus, Judge Sand's decision in Bin Laden has no relevance here.

[3] See, e.g., http://www.eurunion.org/legislat/DeathPenalty/eumemorandum.htm.

but also to prosecute persons on aboard for drug offenses). Under well-settled principles, therefore, defendant would not be entitled to demand judicial enforcement.

While the assurances are not "treaties" (in the case of France, they were done pursuant to the MLAT), they must be analyzed under treaty principles. See Kwan v. United States, 272 F.3d 1360, 1362 (Fed. Cir. 2001) ("treaty principles have been applied to interpreting executive agreements"). "[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts. There are, of course, exceptions to this rule, but an international agreement can be considered to create judicially-enforceable private rights only where such rights are contemplated in the agreement itself." Garza v. Lappin, 253 F.3d 918, 924 (7th Cir. 2001) (rejecting federal capital defendant's claim that the United States' ratification of the Charter of the Organization of American States prohibited imposition of the death penalty); see also United States v. Li, 206 F.3d 56, 60 (1st Cir. 2000) (*en banc*) ("Treaties do not generally create rights that are privately enforceable in the federal courts.").

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamation, so far as the injured parties choose to seek redress . . . . It is obvious that with all this the judicial courts have nothing to do and can give no redress.

Id. at 60-61 (quoting Head Money Cases, 112 U.S. 580, 598 (1884)); see also Hamdi v. Rumsfeld, 316 F.3d 450, 468-69 (4th Cir. 2003) (Geneva Convention does not confer upon a private person a right of an initial formal determination of status as an enemy belligerent by a competent tribunal); Kwan v. United States, 272 F.3d at 1362 ("When the foundation document is an agreement between governments, non-governmental entities can not ordinarily challenge

either their interpretation or their implementation, in the absence of express authorization for such private action."); Goldstar (Panama), S.A. v. United States, 967 F.2d 965, 968 (4th Cir. 1992) (finding that Hague Convention provided no private right of action).

The assurances sought by and given to France were made pursuant to an MLAT and, therefore, should be analyzed under the terms of that treaty and the treaty principles described above. The MLAT specifically provides that it is intended "solely for mutual legal assistance between the States." Art. 1(3). Furthermore, the two governments, in an explanatory note, made clear that the treaty was not designed to allow private judicial enforcement: "Both Parties understand that, for the United States, the provisions of the Treaty do not create a new right on the part of a private person to obtain assistance, to suppress or exclude any testimony or evidence, or to impede the execution of a request. However, such rights of private persons as otherwise exist under United States law in this regard continue in effect." Explanatory Note relating to Article 1(3), Treaty Between the Government of the United States of America and the Government of France on Mutual Legal Assistance in Criminal Matters, signed at Paris, on December 10, 1998, __ U.S.T. __, entered in force December 1, 2001. Thus, the MLAT creates no right to discovery. See, e.g., United States v. $734,578.82 in U.S. Currency, 286 F.3d 641, 659 (3d Cir. 2002) ("the treaty explicitly states that is not intended to provide a private remedy . . . . Therefore, even if it is assumed for argument's sake that the United States violated the MLAT, Claimants have no private right to enforce its terms."); United States v. Jimenez-Nava, 243 F.3d 192, 195-96 (5th Cir. 2001) (treaties are contracts between countries and "generally do not create rights that are enforceable in the courts"); United States v. Cordero, 668 F.2d 32, 37-38 (1st Cir. 1981) ("[E]xtradition treaties are made for the benefit of the governments concerned.

And, under international law, it is the contracting foreign government, not the defendant, that would have the right to complain about a violation.").

In the case of Germany, with which the United States has no MLAT, the same principles apply. The assurances given to Germany by the United States are a diplomatic communication from one government to another; they are neither a treaty, nor provided pursuant to a treaty. If treaties do not generally create privately enforceable rights, see supra, certainly such diplomatic assurances cannot do so. The only parties having any standing to complain about the handling of the evidence from France and Germany are those countries.

Conclusion

Because any understandings between the United States and France and Germany regarding the use of evidence are irrelevant, confidential, and in any event not subject to judicial review, standby counsel's request for discovery regarding the agreements must be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on the 25th day of March, 2003, a copy of the foregoing Government's Response was provided to defendant Zacarias Moussaoui through the U.S. Marshals Service and faxed and mailed to the following:

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