

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK
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3 UNITED STATES OF AMERICA

4 v. S(7)98CR1023

5 USAMA BIN LADEN, et al.,
6 Defendants.

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8
9 New York, N.Y.
10 May 21, 2001
11 11:15 a.m.

12 Before:

13 HON. LEONARD B. SAND,
14 District Judge

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1 APPEARANCES

2 MARY JO WHITE
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4 Southern District of New York
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16 FREDRICK H. COHN
17 DAVID P. BAUGH
18 LAURA GASIOROWSKI
19 Attorneys for defendant Mohamed Rashed Daoud Al-'Owhali

20 DAVID STERN
21 DAVID RUHNKE
22 Attorneys for defendant Khalfan Khamis Mohamed

23 (In open court; jury not present)

24 THE COURT: The note from the jury reads: Judge
25 Sand, question B2 of Count Eight (page 11) of the verdict form
26 pertains to KK Mohamed, but the question is in regard to
27 Nairobi instead of Dar es Salaam.

28 Can we please have this typographical error corrected
29 and a new page 11 sent to us for voting.

30 Thank you.

31 Juror No. 1.

32 MR. RUHNKE: Yes, I agree.

1 THE COURT: This juror is absolutely correct and,
2 indeed, the preceding matters all relate to Dar es Salaam.
3 It's a purely typographical error, and unless anyone objects
4 to it, we'll simply send in a new page 11.

5 MR. COHN: And a stapler.

6 THE COURT: And a statement?

7 MR. COHN: And a stapler.

8 MR. SCHMIDT: Your Honor, there is another issue that
9 I wish to raise with my client present concerning the MCC
10 visits and conditions of confinement.

11 THE COURT: Where are the defendants?

12 MR. COHN: I assume they're in back and nobody chose
13 to bring them. And I waive my client's presence for this
14 small technical matter.

15 MR. RUHNKE: We do as well.

16 MR. SCHMIDT: For this portion.

17 MR. HERMAN: We join.

18 THE COURT: The note was read to me on the telephone
19 and the correction is being made in my chambers, and the
20 corrected page 11 is in en route, and as soon as it arrives we
21 will send it into the jury, without any further comment,
22 except maybe, we apologize for the typographical error. Is
23 that agreeable?

24 Insofar as just let me know then when, is it
25 appropriate for other defendants to be present or is this a

1 matter that relates solely to Mr. El Hage?

2 MR. SCHMIDT: Well, it relates solely to Mr. El Hage.
3 It's not inappropriate that the other inmate defendants be
4 here if they wish to be brought out.

5 MR. COHN: Your Honor, I know what it's about. You
6 do not have to bring out Mr. Al-'Owhali.

7 MR. RUHNKE: You do not have to bring out Mr. Khalfan
8 Mohamed.

9 MR. HERMAN: Same here.

10 THE COURT: As soon as he and Mr. El Hage is out we
11 will address that matter.

12 (Pause)

13 THE COURT: All right. We have the substitute pages.
14 This says: This will correct the typographical error.
15 Substitute pages are attached.

16 (Recess)

17 (In open court; jury not present)

18 THE COURT: Mr. Cohn, the form that the jury has is
19 clipped, not stapled.

20 MR. COHN: I was sort of semi-joking, but I most
21 always am and it's hard to know when to take me seriously.

22 THE COURT: Mr. Schmidt.

23 MR. SCHMIDT: Thank you, your Honor.

24 Your Honor, as your Honor is aware we've been trying
25 to arrange visits for Mr. El Hage during the time that his

1 wife has been present in New York, and the difficulty because
2 Mrs. El Hage has been here two weeks, she saw her husband
3 approximately three hours two weeks ago, and was planning to
4 see him again on Saturday.

5 THE COURT: Yes.

6 MR. SCHMIDT: Meantime there was one issue that had
7 arisen that Mrs. El Hage was trying to deal with, and that was
8 her desire because of her faith not to remove her head scarf
9 for the visit unless in the presence of a Muslim female
10 officer. There are times during the week that there was
11 another female officer present. On the weekend apparently
12 there is not.

13 I spoke with the Warden's office. I spoke to the
14 executive director to see if we can work out a compromise, and
15 after speaking to him about a compromise that a female
16 officer, not Muslim, would be able to feel and search the
17 whole area, the head, the scarf, as a substitute of forcing
18 her to take off the scarf, I was told it was satisfactory as a
19 compromise because it would satisfy the security needs.

20 On Saturday when she arrived -- she also contacted
21 the Bureau of Prisons regional office a number of times to try
22 to arrange for the nonremoval of the head scarf. As a result
23 this compromise occurred.

24 When she arrived on Saturday she was told that she
25 could not see her husband unless she removed the head scarf.

1 Though this is against her beliefs and embarrassing, she did,
2 so she could see her husband.

3 THE COURT: So the visit in fact took place.

4 MR. SCHMIDT: It did not for another reason. But,
5 again, I understand the security needs. It seems that one
6 representative of the Bureau of Prisons says this satisfies
7 the security needs and then they do something else. It's
8 something that I feel needs to be dealt with because feeling a
9 head scarf which is a thin scarf on the hair, feeling the
10 hair, feeling the scarf itself should satisfy security needs
11 since visitors are not stripped searched, so the other
12 clothing are not removed. So I think we need to deal with
13 that issue as well.

14 So what happened on Saturday was that Mr. El Hage was
15 brought to a noncontact room to see his wife and his oldest
16 son was where there would be a wire barrier and a plastic
17 barrier between them, and the visitors was not only taken to
18 that room, but was told that these items were going to be kept
19 on him. He was handcuffed. He was not only handcuffed, he
20 had the black box which keeps the handcuffs still and cannot
21 be moved so your hands are in a locked position. They were
22 further attached by a metal chain to his waist and his feet
23 were shackled, placed in the room and expected to see his son,
24 his 14 year old son and his wife in those conditions in a
25 noncontact area.

1 He had previously had a problem with just handcuffs
2 and with counsel in a noncontact room, a room where there is
3 no access whatsoever to anyone he was required to have
4 handcuffs. One counsel, I'm not sure who it was, took care of
5 that problem and indicated that it would not be necessary to
6 be handcuffed in a noncontact room. There apparently was no
7 Bureau of Prisons or MCC rules saying that he should.
8 Previously, when counsel went to see Mr. El Hage the
9 lieutenant on the tenth floor said, no, this is the way we do
10 it, and he contacted the legal officer and notwithstanding
11 what the legal officer said to him he said, no. We left. We
12 spoke to legal counselor. Indeed, the counselor contacted
13 either the Warden or the Assistant Warden, and was told that
14 no, we do not have to have handcuffs talking to counsel. We
15 were led back up. We saw Mr. El Hage without him being
16 handcuffed. But we believed it was resolved in contact with
17 counsel at the MCC about that my understanding is when an
18 inmate is in a noncontact room where it --

19 THE COURT: I'm not clear. Did the visit in fact
20 take place?

21 MR. SCHMIDT: With me it took place after about an
22 hour and a half of trying to get that done. This occurred
23 about four, five weeks ago, and my understanding that issue
24 was resolved.

25 THE COURT: No. But this Saturday did the visit take

1 place?

2 MR. SCHMIDT: This Saturday the visit did not take
3 place because Mr. El Hage did not want his son to see him with
4 his hands handcuffed, held in front of him, and shackled
5 around his waist and his feet. It seems to me that --

6 THE COURT: The other thing that I am trying to find
7 out was whether this was a bureaucratic misinterpretation
8 caused by the fact that the staff on Saturday may not have
9 been fully apprised, or whether it was in fact an official
10 determination. Do you have any sense as to that?

11 MR. SCHMIDT: I have a sense. The visit two weeks
12 earlier, a week earlier, did not have any of the accoutrements
13 that I mentioned. It was a visit without being shackled,
14 without the chains.

15 THE COURT: A visit by you or by --

16 MR. SCHMIDT: By Mr. El Hage's wife. There is,
17 apparently, I heard there is no problem with such visits. So
18 this is now also a Saturday. Mr. El Hage informed me, and
19 Mrs. El Hage informed me that while they're waiting the
20 lieutenant on duty said let me check, and about twenty minutes
21 later he said to Mr. El Hage that he spoke to the Warden and
22 the Warden says, no, everything remains on. I do not know if
23 in fact he spoke to the Warden.

24 The problem is, your Honor, when it happened one time
25 and it's corrected the first time, you can understand that

1 there could be a bureaucratic misunderstanding. This has not
2 happened once. It's happened with other counsel seeing their
3 clients. This has happened repeatedly, and it's happening in
4 a manner that it appears to be especially on the weekends when
5 there is less oversight done in a way to humiliate Mr. El Hage
6 and punish him, Mr. El Hage.

7 THE COURT: Let me now make inquiry of the
8 appropriate personnel at the MCC because before I can deal
9 with it or issue any order or pass any judgment I have to know
10 what the answer to that is, and if the answer is that it was a
11 bureaucratic foul up, then I have to make sure that there is
12 no occurrence of that. If the answer is that it was
13 intentional and policy, then I have to address that. But it
14 seems to me I have to know the answer to that before we can
15 deal with it.

16 MR. SCHMIDT: Your Honor, I saw Ms. Raia first thing
17 this morning, and her reaction was that -- at that time I only
18 had known that it was handcuffs, I did not know that it was
19 also the black box and chain on the waist -- and her reaction
20 was that she thought she dealt with that problem twenty times
21 already in MCC, so to her it appeared to me that she did not
22 expect that to happen.

23 But as your Honor indicated, I think it's way past
24 the time to give this as a bureaucratic mishap because it
25 specifically happened too many times.

1 THE COURT: So steps have to be taken to assure that
2 what is in fact the appropriate policy for the MCC is
3 implemented. Let me make immediate inquiry, and we'll deal
4 with it, but it seems to me that there is no point in further
5 rhetoric, nor anything else until I know what the position of
6 Bureau of Prisons is on the matter.

7 MR. SCHMIDT: I understand.

8 THE COURT: I will do that immediately.

9 MR. SCHMIDT: I have one further request because
10 Mrs. El Hage has been here two weeks and seen her husband
11 once, that we schedule for this evening or tomorrow evening
12 after court an opportunity, notwithstanding the concern of MCC
13 as to overtime, extraordinary conditions of confinement
14 extraordinary situation. Thank you.

15 THE COURT: Very well. All right. We will recess
16 pending something further from the jury, and pending my
17 inquiry as to the causes for Saturday's occurrence.

18 I take it the government has no comment on this.

19 MR. FITZGERALD: No, Judge.

20 (Recess)

21 (In open court; jury not present; 2:15 p.m.)

22 The note from the jury reads: The jury would like to
23 request the photos taken of Al-'Owhali after his arrest -
24 particularly the ones that show his injuries.

25 Thank you.

1 PS. Please include exhibit Al-'Owhali I.

2 So there are two questions to respond to. One is the
3 photos, and the other that would include the photos taken of
4 him while he was in custody showing his wounds; photos taken
5 by Agent Gaudin, the information, identification parade, the
6 photo taken for the newspaper by the newspaper.

7 MR. COHN: Your Honor, I've gone through it and we
8 have all of them I believe and I'm going to identify them with
9 the government and read the numbers into the record in about
10 40 seconds.

11 THE COURT: Very well, okay.

12 (Pause)

13 While you're doing that, just because the other
14 matters were on the record, with respect to Mr. El Hage and
15 the question of the visit, my understanding was that the MCC
16 had two facilities in which visits are held.

17 One has a bare mesh barrier, and the other doesn't.
18 And one is in an area which requires walking through 9 South
19 and the other doesn't. And in the area which requires walking
20 through 9 South, there is no requirement of the inmate being
21 handcuffed. In the other facility there is a requirement of
22 handcuffing.

23 The explanation I was given, which was based on Ms.
24 Raia, based on conversations with the Warden, was that he
25 thought that walking to 9 South was inappropriate for a young

1 boy, but that it's a decision to be made by Mr. El Hage.

2 I spoke to Mr. Schmidt who expressed his view that
3 this was all after the fact rationalization for what had
4 occurred, but that Mr. El Hage's preference is for the visit
5 which does not require him to be handcuffed, and such a visit
6 is scheduled for 5:30 today in the area where handcuffs will
7 not be required, but which will require walking through 9
8 South.

9 Ms. Raia says there may be some delay. It will be
10 scheduled for 5:30. There may be some delay because the count
11 down takes place at that time, and the visit will follow the
12 completion of the count down.

13 Going back to the juror's request.

14 MR. COHN: Your Honor, the government and I have
15 agreed we have exhibit B and B1 through B8 which are pictures
16 of the injuries. We have exhibit C which is the newspaper
17 photo. We have exhibit D which is the parade photo, and we
18 have I, J and K which are pictures taken of Agent Gaudin, the
19 client, and in one situation one other person post-arrest.

20 MR. FITZGERALD: And the Government Exhibits in
21 addition are 551-A through I.

22 MR. COHN: Are they in, because they're the same
23 photographs as B1 through B8.

24 MR. FITZGERALD: But they are in evidence.

25 MR. COHN: Not a problem.

1 THE COURT: Very well. We'll send them in.

2 We reconfirm 11 o'clock Wednesday for the charging
3 conference with respect to the death penalty phase as to both
4 defendants.

5 MR. SCHMIDT: Your Honor, Mr. El Hage and I want to
6 thank your Honor for the effort. I would just like to make
7 one other thing clear. One of the problems seemed to be the
8 change of policy in MCC about visits.

9 Mr. El Hage did have a visit, did have other visits
10 not on 10 South, on other floors where he was not required to
11 have to be handcuffed and where he saw his children. The fact
12 that the institute now says that those other locations
13 requires handcuffs, they've actually changed from the visit
14 that occurred nine days ago, and I just want your Honor to be
15 aware this is one of the problems. We have certain
16 expectations based on what's happened before. We're not
17 informed. The policy has changed and then something happens
18 that is different than that has been the concern of Mr. El
19 Hage. We want your Honor to be aware that this is not
20 necessarily how they arranged these visits a week and a half
21 ago.

22 THE COURT: Very well.

23 MR. COHN: Your Honor, may I raise one thing which
24 may seem picayune, and I'm not exactly sure what it means, but
25 the juror's inquiry refers, after the arrest.

1 As I recollect the record he was not arrested until
2 he was on the airplane, and these photos all precede that and
3 we are assuming that means when Kenyan CID took him into
4 custody. If my recollection is right, it may mean that the
5 jurors should be told that, although I believe that's what
6 they are asking for, and they should get what they're asking
7 for. It's a question of how they construe the information.

8 MR. FITZGERALD: Your Honor, I think it's clear from
9 the text on the note, they're referring to his detention in
10 Kenya because they say, include exhibit I which are photos
11 taken before he's ever put on an airplane plain.

12 THE COURT: We have used the post-arrest, for
13 example, with respect to admissibility of statements, we've
14 used the phrase post-arrest.

15 MR. COHN: I believe there is no question as to what
16 they are asking for, and I am not objecting to it going in.
17 What I am inquiring about, and I truly say that I don't know
18 where I come out on this, is whether or not, and I'm asking in
19 a sense for the Court's advice, that no arrest really took
20 place until he was put on the airplane, and perhaps while the
21 jury gets this information they ought to be told that.

22 THE COURT: I don't know that that's accurate. No
23 arrest by what, American authorities?

24 MR. COHN: And there is no --

25 THE COURT: If you used the classic definition of

1 arrest, that is whether somebody was free to leave, he clearly
2 was not free to leave.

3 MR. COHN: Well, on the other hand, your Honor, he
4 was taken into custody because allegedly he had no
5 documentation as to his presence, and it was as I recall the
6 testimony both at the suppression hearing and at the trial, it
7 was an inquiry, and it is unclear as to when that changed.
8 While it is clear that were we're talking about in custody
9 under usual United States law and when Miranda became
10 available, we would be talking about the time he was no longer
11 free to leave which is about thirty seconds after CID came
12 into his room, but I don't know that what the jury is
13 referring to in terms of arrest, and I wonder whether or not
14 they --

15 THE COURT: You really don't know what they mean when
16 they say, particularly the ones which show his injuries and
17 identify --

18 MR. COHN: I know what photos they're talking about,
19 Judge, but they're using a technical term, and it troubles me.

20 THE COURT: They are using it, but they're using it
21 in a nontechnical sense. Tell me specifically what it is that
22 you think the Court should do.

23 MR. COHN: I think they ought to be told that they
24 are being sent the pictures after CID took him into custody
25 but he was not arrested until he got on the plane.

1 MR. FITZGERALD: Judge, I think they're just asking
2 for photographs. I don't think we need to confuse them,
3 particularly since Mr. Cohn made an argument in summation
4 about the conditions of confinement. I think they're simply
5 describing what they want in plain English.

6 THE COURT: I think that's fair, and I don't know
7 that Mr. Cohn disputes the fact that we know exactly what it
8 is that they are asking for, and I think I agree that it would
9 simply confuse matters to elaborate on arrest.

10 MR. RUHNKE: Your Honor, I had other scheduling
11 matters to talk to you about, pending matters. I hand
12 delivered a file to the chambers over lunch hour and I'm
13 wondering when you want to take up that matter.

14 THE COURT: Is the government prepared to deal with
15 that now or does the government want to respond to that?

16 MR. RUHNKE: I think the government just got my
17 papers, your Honor.

18 MR. FITZGERALD: I prefer to deal with it if I could
19 to look at it further. Obviously, it's a letter. We oppose
20 the application. We'd like to focus on the proposed charge.

21 THE COURT: We have --

22 MR. RUHNKE: Excuse me. I couldn't hear you for a
23 moment, please.

24 MR. COHN: I'm sorry, Judge.

25 THE COURT: Can we deal with that say at 10:30 on

1 Wednesday?

2 MR. RUHNKE: That's fine, your Honor.

3 THE COURT: All right. We'll await further from the
4 jury.

5 (Recess)

6 (In open court; jury not present; 2:50 p.m.)

7 THE COURT: The note from the jury reads:

8 Judge Sand. Thank you for your prompt response to
9 our previous questions. We have a few more questions for the
10 Court.

11 1. We request the reading of the testimony of
12 government witness number 24, Charles Mwaka Mula 2.

13 We also request that Special Agent Gaudin's testimony
14 be read in its entirety. A portion was previously read.

15 Finally, we would like a clarification of the second
16 paragraph on page 88 on the first element which reads: Quote
17 three dots, the defendant inflicted an injury or injuries upon
18 the victim from which the victim died or that the defendant
19 aided and abetted another person to do so.

20 Does this mean that the injuries/death were caused by
21 the weapon caused by the defendant or by his participation in
22 the bombing quote acting as a diversion.

23 Thank you for your help.

24 My only question with respect to 1 and 2 is whether
25 we should have that read to the jury or whether at least with

1 respect to Agent Gaudin it is so lengthy that we should send
2 in 12 copies of the transcript.

3 MR. COHN: Is your Honor finished or waiting for a
4 response?

5 THE COURT: Excuse me?

6 MR. COHN: Are you finished or waiting for a
7 response?

8 THE COURT: All right, I'm finished as to that.

9 MR. COHN: Your Honor, I believe it has to be read.

10 THE COURT: Does anybody disagree with that?
11 Everybody agrees.

12 Should we do that, and then we can discuss the
13 implications of the third question.

14 MR. COHN: Your Honor, but in terms of the readback
15 of the testimony the way it's been going on, and what's been
16 asked for I would ask that as it's read back exhibits which
17 were put up on the screens at the time and are referred to in
18 the testimony should be put up again. I believe they're
19 asking for a readback which in this case requires a readback
20 with the pictures as they were put up.

21 THE COURT: I'll ask them that. We'll bring them in,
22 we'll start to read, and the first time it comes up, we'll ask
23 them that.

24 MR. COHN: Very well, your Honor.

25 MR. FITZGERALD: Judge, there is only one logistical

1 issue. My understanding is that as to the transcripts errata
2 sheets were sent to the Court reporters to correct any
3 typographical errors. I believe that the corrected
4 transcripts came back, and then they were recently proofed
5 against the errata sheets and there may have been a couple of
6 typographical errors that are still outstanding.

7 We were getting the sheets that went over this
8 morning to compare that. I don't know if any of this is
9 significant or not, but I think we should just resolve any
10 disagreement with the transcript before we bring the jury in.

11 MR. COHN: I think that's fair, your Honor, and what
12 I would suggest what we do is because of the hour and when
13 they generally want to quit, I would read Mr. Mwaka Mula's
14 testimony first, which is the shorter of the two, and that
15 might run us out to close to 4:30, if that's when they want to
16 go home, and then we can resolve the other question.

17 MR. FITZGERALD: I still think we have the transcript
18 issue as to both witnesses.

19 MR. COHN: We'll deal with that one first is all I'm
20 suggesting, that we try and deal with it that way, the
21 government is absolutely correct, that we should read them as
22 accurate.

23 THE COURT: Why don't you see whether you can resolve
24 any transcript errors with respect to the Mwaka Mula testimony
25 and let me know as to that, and in the meantime I'll try to

1 address both questions, which I'll deal with you. The jury
2 wants to go home at 4:30. So we have an hour and a half.

3 MR. COHN: Thank you, your Honor.

4 (Recess)

5 (In open court; jury not present)

6 THE COURT: Let me run by you my proposed response to
7 the third question. Do you physically have a xerox of the
8 question before you?

9 MR. FITZGERALD: Yes, Judge.

10 THE COURT: I think that in the next to last
11 paragraph the second line there should mean were caused by the
12 weapon used by. Does everybody agree with that?

13 MR. FITZGERALD: Yes.

14 MR. COHN: Where is that?

15 THE COURT: Does this mean that the injury/deaths
16 were caused by the weapon, underlined, caused by the defendant
17 or by his participation in the bombing acting as a diversion.

18 MR. COHN: Your Honor, I believe that cause is
19 improper allocution and probably a mistake. What it means,
20 I'm not prepared to say and I would ask the jury.

21 THE COURT: And you would ask for what?

22 MR. COHN: I would ask the jury what they mean by
23 cause as opposed to --

24 THE COURT: For the time being I think we will assume
25 that means it was caused by the weapon used by the defendant.

1 It's the only thing that make sense. So I think they are hung
2 up. You see they've underlined weapon and participation. And
3 what I propose to say to them is the following:

4 With respect to the language on the second paragraph
5 on page 88 that quote government must prove that the defendant
6 inflicted an injury or injuries upon the victims from which
7 the victim died, you asked whether this means quote caused by
8 the weapon, underlined, and I put brackets, used, by the
9 defendant or by his participation, underlined, in the bombing
10 acting as a diversion.

11 And I go on: The answer is that you must look at all
12 of the conduct of the defendant with respect to the attack on
13 the embassy. This includes the nature of the weapon used -a
14 bomb- and the defendant's role in the bombing. After
15 considering all of the acts which you find that the defendant
16 to have done in connection with the bombing, the question is
17 whether the defendant's conduct caused the infliction of
18 injury or injuries by the victim or aided and abetted another
19 person to cause such injury.

20 MR. COHN: Your Honor, we will have until tomorrow
21 morning to consider that, and I would ask that you give me
22 that in writing and we talk about it in the morning.

23 THE COURT: Denied. I don't think that that is
24 necessary. We can't deal with that now in --

25 MR. COHN: Why not? Does it cost us any time to wait

1 until the morning, so that counsel can consider what is I
2 think not an uncomplicated question. I mean what does it cost
3 us to wait? We're going to have plenty to do to read
4 transcripts.

5 THE COURT: What it costs is leaving the doubt in the
6 jurors' minds until sometime tomorrow. Yes, we'll do it
7 tomorrow.

8 MR. COHN: Thank you.

9 THE COURT: We'll do it tomorrow. We'll do it
10 promptly tomorrow.

11 MR. COHN: That's fine. Could we have a copy of what
12 your Honor proposes to read?

13 THE COURT: The court reporter has taken it down,
14 right? Yes.

15 MR. FITZGERALD: To save time for tomorrow, might I
16 just suggest that if you read the last question I think it
17 could be answered simply by saying the answer is either. What
18 it's saying is, does that mean injuries caused by the weapon
19 by the defendant or caused by his participation in the
20 bombing. If a juror finds that a defendant's use of a weapon
21 or participation in the bombing caused the death that would
22 suffice.

23 THE COURT: I think it's pretty clear that we're on a
24 Count 9, right? They asked a question about 8 which we
25 answered, and I think it's clear now that they are on Count 9.

1 And I think that what they're looking to is with respect to
2 Al-'Owhali is whether it's he himself, or aided and abetted.
3 I think that's where the jury is, and so to say either doesn't
4 really tell them which box they check.

5 But we'll take it up tomorrow morning, 9:30 promptly.
6 Now, where are we with respect to the Mula's testimony?

7 MR. COHN: The government has given me a list of
8 corrections that were not corrected. I agree that the
9 government is correct and, therefore, we can read it with the
10 government's indentations.

11 THE COURT: Can we now bring in the jury?

12 MR. FITZGERALD: That covers both Gaudin and Mwaka
13 Mula. The only thing I was going through was flagging where
14 colloquy happened or there were objections so we don't have an
15 issue on that. I could have it finished in five minutes.

16 THE COURT: So we'll bring in the jury in another
17 five minutes.

18 Let Mr. Kenneally know when you're ready.

19 (Recess)

20 (In open court; jury not present)

21 THE COURT: Let me come back to the third question
22 and respond a little bit to Mr. Fitzgerald's comment and
23 realization of what it is that is troubling the jury, and I
24 think it is the language of the special verdict form that has
25 the alternative himself killed or aided and abetted. Let me

1 do it again from the top and I'll do it slowly, and I'll ask
2 that the court reporter make sure counsel have a copy of this
3 this evening.

4 With respect to the language in the second paragraph
5 on page 88 that the quote government must prove that the
6 defendant inflicted an injury or injuries upon the victim from
7 which the victim died unquote, you ask whether this means
8 quote caused by the weapon, underlined bracket, used, close
9 bracket, by the defendant or by his participation, underlined,
10 in the bombing ("acting as a diversion.")

11 The answer is that you must look at all of the
12 conduct of the defendant with respect to the attack on the
13 embassy. This includes the nature of the weapon used -a bomb-
14 and the defendant's role in the bombing.

15 MR. COHN: Your Honor, the door was open and the jury
16 was right outside.

17 THE COURT: After considering all of the acts which
18 you find the defendant to have done in connection with the
19 bombing, the question is whether the defendant's conduct
20 caused infliction of injury or injuries to the victim, or
21 aided and abetted another person to cause such injuries. If
22 you find that the defendant's conduct itself caused the injury
23 and all of the other elements of the crime have been proven
24 all beyond a reasonable doubt then you will have found that he
25 "himself killed" the victim.

1 If you find beyond a reasonable doubt that the
2 defendant's conduct did not itself cause the injuries, but
3 aided and abetted the causing of the injuries by another
4 person, and all of the other elements of the crime have been
5 proven, then you will have found him to be an aider and
6 abetter.

7 All right. We'll take that up at 9:30 tomorrow
8 morning. Let's bring in the jury.

9 MR. FITZGERALD: You want me to read into the record
10 what we should start and stop. I have a list of when we
11 started and stopped in the transcript. I don't know if you
12 wanted me to put that on the record.

13 THE COURT: Okay. Why don't you do that after. As
14 long as the jury is standing in the hall, let's do that.

15 MR. FITZGERALD: Okay. I just wanted to make sure
16 the court reporter knows --

17 (Jury present)

18 THE COURT: You asked for the reading of testimony
19 which we will read to you. And you asked a question with
20 respect to the charge, which we will answer. With respect to
21 the question you said, does this mean that the injuries/death
22 were caused by the weapon, underlined, and then there is
23 another word says, caused by the defendant. Do you mean used
24 by the defendant?

25 Used by the defendant. I thought that was the case.

1 Your first request is for the testimony of witness
2 24, Charles Mwaka Mula, and what is happening is that counsel
3 are indicating the pages on which that appears so that the
4 reporter will know what it is to read.

5 MR. COHN: Were you going to ask the question of the
6 jury about the exhibits that come up?

7 THE COURT: During the testimony there is reference
8 to exhibits, some of which you have and some of which you may
9 not have, and the question is whether you want to see the
10 exhibits while the testimony is being read. Why don't we
11 begin and you can let us know that tomorrow morning.

12 (Record read: Line 19, page 2125 through Line 10,
13 page 2159)

14 THE COURT: You've also asked for the testimony of
15 Agent Gaudin and you said in its entirety. And maybe what we
16 ought to do is this. Maybe we should call it a day. We will
17 not finish Agent Gaudin's testimony today even if we start,
18 and maybe you give some thought to whether you can specify
19 some portions of Agent Gaudin's testimony that you're
20 particularly interested in rather than perhaps have
21 considerable time spent reading testimony which is not of
22 particular interest to you.

23 So why don't you give some thought to that and
24 perhaps send us another note, and if you wish to hear it in
25 its entirety, no problem, and we will read it all in its

1 entirety and also give some thought to the question that I
2 posed with respect to exhibits utilized during the testimony,
3 and you may return to the jury room, and you may call it a day
4 at 4:30 if you wish.

5 (Jury not present)

6 THE COURT: Mr. Cohn.

7 MR. COHN: Your Honor, I object to your invitation to
8 the jury to revise their question.

9 THE COURT: Excuse me?

10 MR. COHN: I object to your invitation to the jury to
11 revise their request for a readback. I think it's
12 inappropriate the reason they asked for what it is, and you
13 suggest that it's unnecessary in my view respectfully
14 inappropriate. As for the morning, that if they have now
15 changed their view because of your question that you ignore it
16 and you read back the testimony of Agent Gaudin the entirety
17 which is what they asked for.

18 THE COURT: I don't know how closely you watched the
19 jury and watched what happened during the reading of the
20 testimony. I think it's clear that there is some portion of
21 that testimony that they're interested in, and there is
22 portions of the testimony they were not and one of the jurors
23 sent a note to the foreperson, and --

24 MR. COHN: They don't know that until --

25 THE COURT: -- made it very clear. I said at least

1 twice that if in fact they wish to hear it in its entirety,
2 there is no problem, and that we would do that. It is only
3 that if in fact their interest was focused on some particular
4 portion of the testimony they could send us another note.
5 Your objection is noted.

6 MR. COHN: Judge, the question said that they
7 actually recalled that a portion of that testimony had been
8 read back before. The notion that we should sit here and read
9 entrails and decide what we think they mean is frankly
10 inappropriate. They asked for it. And for you to suggest
11 from the presence of the bench that they may be want to
12 reconsider it I think is inappropriate. I've made my record
13 and you'll do what you do.

14 THE COURT: I have.

15 Anything further? We're adjourned. Very promptly at
16 9:30. You know the jury gets in a little after 9.

17 (Pause)

18 THE COURT: Judge Sand: The juror who has requested
19 to hear Agent Gaudin's testimony has changed her mind after
20 hearing witness 24's testimony read as she feels this has
21 answered her question. Thank you, and good night. Juror No.
22 1 Foreperson.

23 Well, there was in fact a juror who sent a note to
24 the Forelady and the Forelady sort of shrugged her shoulders
25 as if there isn't anything that I can do about it. All right.

1 We will follow the juror's request. I'm trying to recall just
2 at what point in the testimony that the juror thought that her
3 question was answered, but I didn't note that. So that at
4 9:30 tomorrow we will deal with the response to the third
5 question and we're adjourned until tomorrow.

6 (Adjourned to Tuesday, May 22, 2001 at 9:30 a.m.)

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