

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

4 v. S(7) 98 Cr. 1023

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

7 -----x

8  
9 New York, N.Y.  
10 May 17, 2001  
11 9:30 a.m.

12 Before:

13 HON. LEONARD B. SAND,  
14 District Judge  
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APPEARANCES

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1 (Deliberations resumed)

2 (Time noted, 9:45 a.m.; jury not present)

3 THE COURT: Are there any disagreements as to what  
4 should be read to the jury in response to the note?

5 MR. COHN: There are, your Honor.

6 MR. WILFORD: Your Honor, my client is not able to  
7 hear anything.

8 MR. COHN: The government agrees with those portions  
9 which I think are relevant but they have additional portions  
10 which I think are not. Therefore, let me give you the ones  
11 that we believe that we are in agreement on and then obviously  
12 you will want to hear from the government.

13 THE COURT: Yes.

14 MR. COHN: Page 2020, line 23 --

15 THE COURT: I tell you what. I am not so much  
16 interested in those that you are agreed upon. That is a  
17 matter of giving that list to the reporter. I think we should  
18 focus on those things where there is disagreement.

19 MR. COHN: Except, your Honor, that the disagreement  
20 is conceptual, I think, and I believe that the question  
21 addressed to the bombing, the motive for the bombing of the  
22 embassies --

23 THE COURT: The language of the note is what he said  
24 regarding why embassies are targeted. What is the date of the  
25 transcript?

1 MR. COHN: The date of it, your Honor, is March 7.

2 THE COURT: Is it all on that day?

3 MR. KARAS: Yes.

4 THE COURT: You are in agreement with page 2020 --

5 MR. COHN: Line 23, through 2021, line 11. Then we  
6 are in further agreement on page 2023, line 19, through 2024,  
7 line 6. The government then has further material.

8 THE COURT: The government wants what?

9 MR. KARAS: There are two additional questions, your  
10 Honor, that are responsive to the note that the jury has  
11 brought out. The first one is on page 2021, beginning on line  
12 12. It goes down to line 24.

13 THE COURT: That deals with when rather than why.

14 MR. KARAS: The only thing, in particular, line 21,  
15 on page 2021, what Al-'Owhali explained to Agent Gaudin was  
16 that the group wanted to attack American targets outside the  
17 United States, which we think is responsive to why embassies  
18 are targeted, so that it could weaken the United States.

19 THE COURT: Where is that?

20 MR. KARAS: Page 2021, line 21, the sentence that  
21 begins with first, and he says first, we must first, Saleh  
22 explains to Al-'Owhali that we have to have many attacks  
23 outside the United States, and this will weaken the US and  
24 make way for our ability to strike within the United States.

25 THE COURT: That does relate to why embassies are

1 targeted.

2 MR. COHN: You say does or doesn't?

3 THE COURT: It does.

4 MR. COHN: It talks about undifferentiated targets  
5 and could include all sorts of things, including military  
6 bases and all the things that are sort of off campus. I don't  
7 think it is specific enough. Your Honor said at the beginning  
8 of this process that we would give a close literal reading of  
9 the request. I don't think that is responsive. I think it is  
10 too broad.

11 MR. KARAS: Your Honor, all this has to be viewed in  
12 context. This is right after Al-'Owhali has explained why the  
13 embassy in Nairobi was to be targeted, and then right after he  
14 gives that answer, the next question and answer deals with the  
15 types of training they received, and at the top of page 2022,  
16 the answer given is that Al-'Owhali explained to me during his  
17 training they emphasize priorities of attacks, three of those  
18 to be US missions or diplomatic posts and kidnapping  
19 ambassadors.

20 So I don't think in context it can be read as a very  
21 vague abstract.

22 THE COURT: I agree. So that is 2020 -- I disagree  
23 with the government with respect to the line prior line 23 on  
24 page 2020.

25 MR. KARAS: Or line 21, at the end of the line there,

1 first we must?

2 THE COURT: Where would you begin?

3 MR. KARAS: Line 21, the sentence that begins with  
4 first.

5 MR. COHN: This is on page what?

6 MR. KARAS: 2021.

7 THE COURT: Page 2021, what line?

8 MR. KARAS: At the very beginning it would be, as  
9 your Honor noted, page 2020, line 23.

10 THE COURT: So you would begin on 21, first we  
11 must --

12 MR. KARAS: I may have misunderstood your question,  
13 your Honor. When you ask where would we begin, the bottom of  
14 page 2020, line 23.

15 THE COURT: That's clear, right? There is no  
16 disagreement as to that.

17 MR. COHN: No, and we are in agreement through line  
18 11 on the next page. The government wishes to continue.

19 MR. KARAS: I think, your Honor, in terms of context  
20 to make it clear, I think we go through to page 2022, line 5.

21 THE COURT: To line 5, I agree.

22 MR. COHN: Note my objection.

23 THE COURT: So it will be 2020, line 23, through  
24 2022, line 5.

25 MR. COHN: Just so the record is clear --

1 THE COURT: Yes.

2 MR. KARAS: The next one where we do agree is page  
3 2023, line 19, through to page 2024, line 6. That was where  
4 we agreed. And then the last area of disagreement is, turning  
5 to page 2037, beginning with line 8, through to 2038, line 2.  
6 And there Agent Gaudin asks Al-'Owhali what it is that it  
7 would take for this to stop, referring to the embassy  
8 bombings, and Al-'Owhali explains again the motives as to why  
9 American embassies are targeted, and he lists the three  
10 conditions in which those attacks would stop.

11 MR. COHN: Your Honor, he is asking questions about  
12 policy and it is not directed to the embassy.

13 THE COURT: You would read to where? What line?

14 MR. KARAS: We would seek to have read back page  
15 2037, line 8, to 2038, line 2.

16 THE COURT: No, I will sustain the objection to that.  
17 I think the question is why embassies, and this is more  
18 general.

19 So that's it?

20 MR. KARAS: That's it.

21 MR. COHN: That appears to be it.

22 THE COURT: We will bring the jury in. I will tell  
23 the jury that if there is anything else they want of the  
24 testimony of Agent Gaudin, they should send us another note.

25 MR. SCHMIDT: Your Honor, before we bring the jury

1 in, I also request your Honor that before you have this  
2 material read that you give the limiting instruction  
3 concerning the use of the statement made by Mr. Al-'Owhali as  
4 to the other defendants.

5 THE COURT: That is appropriate. I will do that.

6 MR. WILFORD: Your Honor, is it your intent to  
7 reiterate the last paragraph of your charge on admissions of  
8 defendants?

9 THE COURT: I intend to say I remind you that the  
10 testimony of the agent with respect to postarrest statements  
11 by Mr. Al-'Owhali were received only with respect to him.

12 If they want the totality of his testimony, there is  
13 the alternative, of course, of sending in the transcript.

14 MR. COHN: I don't think so. My client wishes to put  
15 on the record that he disagrees with my interpretation of the  
16 question and does not believe that the question requires an  
17 answer in regard to the specific Nairobi embassy bombing, and  
18 that it is only general.

19 THE COURT: Very well. The record will so indicate.

20 (Time noted 10:00 a.m., jury present)

21 THE COURT: Good morning.

22 JURORS: Good morning.

23 THE COURT: Your last note reads: For tomorrow --  
24 meaning today -- we would like to have Special Agent Gaudin's  
25 testimony read to us. Specifically, we are interested in what

1 he said regarding why embassies are targeted.

2           Let me say a few things before we read that. The  
3 first, I want to remind you that Agent Gaudin's testimony as  
4 to what Mr. Al-'Owhali said after his arrest was received in  
5 evidence solely against Mr. Al-'Owhali, and that of course  
6 applies.

7           Second, with respect to this note, as with respect to  
8 all of the notes we receive from you, we try to limit the  
9 response to what it is that you ask for, giving that a fairly  
10 strict interpretation. But please, if what we read or what we  
11 send you does not include everything you want, just simply  
12 send us a note.

13           So what we will have now read is the portions of the  
14 testimony specifically addressed to the testimony as to why  
15 embassies are targeted. If there is anything else in his  
16 testimony that you would like to have reread, just send us a  
17 note.

18           (Record read)

19           THE COURT: That is the testimony specifically  
20 related to why embassies are targeted. As I say, if there is  
21 anything else you want read, please send us a note.

22           MR. SCHMIDT: Your Honor, what we discussed prior  
23 to --

24           THE COURT: I said that.

25           (Jury excused)

1           THE COURT: Does it create any special hardship for  
2 counsel if we begin at 9:30? Because in fact this jury is  
3 arriving at 9:00. We will begin each day at 9:30. They  
4 arrive at 9, and I think they have a little breakfast.

5           With respect to the victim impact testimony, is that  
6 now ripe for adjudication?

7           MR. COHN: Yes.

8           THE COURT: The court has received various documents  
9 which have been furnished to counsel. These include the bill  
10 of particulars by cover letter dated May 10, specifying the  
11 particularized categories of "injury, harm and loss" that will  
12 be proffered at sentencing, and that consists of redacted  
13 302's.

14          MR. GARCIA: Names and identifying details.

15          THE COURT: And that will be furnished --

16          MR. GARCIA: Yes, Judge, except for the telephone  
17 numbers and addresses.

18          THE COURT: In addition, there is a chart that I take  
19 it is in response to the request for a summary, one for Kenya  
20 and one for Tanzania. There is also the government's  
21 response, which deals with, in particular deals with  
22 photographs, Exhibit A being photographs the government  
23 intends to introduce with respect to Nairobi, B with respect  
24 to Kenya, and Exhibit C, which I take it is by way of  
25 comparison, photographs which the government does not intend

1 to introduce, I take it for reasons which include gruesome  
2 character.

3 With respect to victim impact testimony, is there  
4 anything --

5 MR. COHN: There is also a tape, your Honor.

6 THE COURT: There is the tape, which I have watched,  
7 although I am not sure I watched it to its conclusion. I  
8 watched it to the point where foreign service officers were  
9 summarizing who was killed or injured in the -- who had  
10 accompanied her on a mountain climb. Is that the end of the  
11 tape?

12 MR. GARCIA: I think then just the scroll of names of  
13 Americans and foreign service nationals who were killed in  
14 both bombings.

15 THE COURT: My first question is, by way of discovery  
16 is there anything further which the defendants require in  
17 terms of what the government intends to offer at each of the  
18 two --

19 MR. COHN: Your Honor, we would --

20 THE COURT: Let me finish the sentence. I like when  
21 there is a sentence where you can put a period. Sometimes  
22 there is a pause.

23 MR. COHN: I apologize. It seems to be my nature to  
24 interrupt virtually everybody, no matter how powerful.

25 It is our contention that what we got was not

1 sufficient, for the reasons set we set forth.

2 THE COURT: Just to focus, what is there about what  
3 the government intends to introduce with respect to victims  
4 and victim impact that you don't have?

5 MR. COHN: What we have is what there is. That may  
6 seem to be a distinction without a difference. But unless we  
7 are to get advisory opinions from you on objectionable  
8 material in each of the 302's, it seems to me that we should  
9 be entitled to a precis of the expected testimony, not of the  
10 available information. There is material in a number of the  
11 302's that if introduced into evidence would call for an  
12 objection and too late.

13 THE COURT: I suppose it would be helpful if the  
14 government were to state what the function of these charts is.  
15 Maybe we should mark them in evidence as Court Exh GARCIA: Your Honor,  
yes. To be perfectly clear,  
22 on this photograph, she won't be able to respond because she  
23 can't see now.

24 THE COURT: She is blind.

25 MR. GARCIA: She is blind. The other photographs

1 that I believe there was objection to all deal with injured  
2 victims, which go directly to what we were speaking about, the  
3 category of aggravating factors. I think it is very limited  
4 considering that hundreds of people were injured, many far  
5 more seriously than those depicted in the photographs.

6 MR. COHN: Just let me point out, your Honor, that  
7 what we usually call a 403 analysis here is much less  
8 burdensome to the defendant than it is under the general rules  
9 of evidence, and that McVeigh certainly indicates to us that  
10 the court should exercise some balance in the amount of this  
11 stuff that comes in. That is what we are really addressing.

12 THE COURT: What is a fair balance? You start to do  
13 the arithmetic of McVeigh and the number of witnesses and the  
14 number of victims and you set up a formula?

15 MR. COHN: No, Judge. I believe that everyone in  
16 this courtroom on this side of the bar is an experienced trial  
17 lawyer or experienced judge, and you understand impact, if not  
18 better than I do, and I think that 42 victims testifying, 12  
19 before and 30 now, is a bit much, and that particularly, if  
20 you look at their chart, many are duplicative in terms of  
21 categories. How many blind people do you need to testify? I  
22 don't mean to be grotesque but that is what it is about. It  
23 is a parade of people who have serious injuries. Every family  
24 suffered from all of this and we all know it. How much of it  
25 is reasonable is something that is within your sound

1 discretion.

2           You are never going to be reversed on what you do, I  
3 know that.

4           THE COURT: That is not my criterion.

5           MR. COHN: And I know it is not, but it is not ours  
6 either. I just think it is too much. We had the film. Yes,  
7 the government was nice about it and didn't put in a lot of  
8 the stuff that they could have, but they got a lot for it.  
9 They didn't have to bring irrelevant witnesses from Nairobi  
10 and do all that stuff.

11           THE COURT: And that was a benefit to the government?

12           MR. COHN: Yes.

13           THE COURT: Unilateral benefit?

14           MR. COHN: Unilateral, no. I said they got something  
15 for it. It was a quid pro quo. While they are all nice young  
16 men individually is hardly being charitable.

17           THE COURT: Wait a minute. First of all, ad hominem  
18 comments, and there have been very few during the course of  
19 the trial, should not be made even at this stage as the trial  
20 winds down.

21           MR. COHN: It is not an attack on any of these people  
22 personally. The government does what it does.

23           THE COURT: The government has an obligation. It has  
24 an obligation to fulfill its mission. It has an obligation to  
25 present to this jury a fair and reasonable depiction of what

1 occurred. What occurred was not a bloodless event. You  
2 recall that when we voir-dired this jury they were alerted to  
3 the fact that the evidence might include photographs -- I  
4 don't have the exact language before me now, but basically  
5 gory. As I look through these photographs, I don't find that  
6 blood is being displayed in an excessive fashion. Blood was  
7 spilled. Part of the agony of the victims and the agony of  
8 members of their families and others who were observing was  
9 that. I think that the government's submission insofar as the  
10 photographs are concerned are reasonable, appropriate, within  
11 the scope of Payne and McVeigh, and insofar as the objections  
12 are directed to that, they are denied.

13           With respect to the video, what is the government's  
14 intent? I take it the video was not prepared for the trial.

15           MR. GARCIA: No, it was prepared for the one-year  
16 anniversary of the bombing.

17           THE COURT: Does the government plan to play any or  
18 all of that tape?

19           MR. GARCIA: Yes, your Honor. So the record is  
20 clear, we redacted the end of the video, which is available  
21 for your review, if you care to, which has Ambassador Bushnell  
22 giving a speech and things like that. The government would  
23 seek to play the video as we submit it to your Honor. If  
24 there is an objection to the portion of it describing the  
25 victims, then the government would contemplate only using the

1 photographic images and putting it in, authenticating it in a  
2 different way without any narrative.

3 THE COURT: Have defense counsel seen the video?

4 MR. COHN: My colleague has, I have not.

5 MR. BAUGH: I have, your Honor.

6 THE COURT: Are there objections to the video?

7 MR. BAUGH: Yes, your Honor.

8 THE COURT: What are the objections?

9 MR. BAUGH: Several, your Honor. As the tape opens,  
10 there is a list of words that fade in and out, with sort of a  
11 kind of spiritual and patriotic theme to them that we believe  
12 is not dispositive of any issue that is in controversy.

13 MR. GARCIA: We can redact that, Judge.

14 MR. BAUGH: Additionally, the rest of the tape  
15 appears to have been -- I don't know if the people who are  
16 speaking on the tape wrote it all themselves, other than those  
17 portions they attribute to poetry, but it certainly appears  
18 that they are reading off of something. More importantly,  
19 citing specific language in Payne, it goes way beyond showing  
20 what is lost. It is taking the jury to a memorial service,  
21 taking the jury to a funeral.

22 THE COURT: It varies. In some instances it seemed  
23 to me that the testimony, what the person said on the video  
24 could have been said on the witness stand. It fell within the  
25 scope of the aggravators, within the scope of Payne and

1 McVeigh, in some instances. The reading of the poetry, I  
2 suppose, would not. The description of a crime as a crime of  
3 hate, it is about the first 10 minutes. And the end, which is  
4 sort of an exhortation to foreign service officers to duty and  
5 the calls of duty, I think, would not be permitted.

6 Why don't you do, with respect to the tape, the same  
7 thing as you are doing with respect to the 302's. Maybe you  
8 can watch it together and agree on what could be redacted.

9 MR. COHN: We will try, Judge, but I am less sanguine  
10 about that than I am with the 302's.

11 THE COURT: You haven't seen it, right?

12 MR. COHN: No.

13 THE COURT: You are making that statement not having  
14 seen it. I am saying that, having watched it, there are some  
15 which in their totality would be permitted on the stand. If  
16 the defendants think it is to their advantage to have a longer  
17 parade of live victim witnesses, that's an alternative.

18 MR. COHN: It is not the only alternative, Judge,  
19 because what I was going to point out to the court was that if  
20 those people -- and I don't know how many there are --

21 THE COURT: You know what, Mr. Cohn, maybe it would  
22 really be more useful for you to have seen the tape before you  
23 venture your views on its admissibility.

24 MR. COHN: Perhaps, your Honor, but I think given  
25 your description of it I could have said what I was about to

1 say, but if the court doesn't want to hear it, that works for  
2 me.

3 MR. BAUGH: And I would agree with Mr. Cohn that if  
4 the government is going to put the live witnesses on and have  
5 them on videotape --

6 THE COURT: Not the same, right? Is there  
7 duplication?

8 MR. BAUGH: Yes, your Honor, there is. We have 302's  
9 from people who are on the tape.

10 MR. GARCIA: Your Honor, we will redact out so there  
11 is no overlap.

12 MR. BAUGH: However, we are still permitted to go  
13 through and point out to you those portions which we say  
14 should be excised as well.

15 MR. GARCIA: And we will indicate which we will  
16 redact so there is no duplication.

17 MR. BAUGH: And we will have that by the close of  
18 business tomorrow.

19 Your Honor, could I have until noon tomorrow on the  
20 instructions so I can do this today?

21 THE COURT: Yes. I don't know how you divide your  
22 work up.

23 MR. COHN: I take some comfort in the fact that  
24 neither do we -- never mind, Judge, another smart remark.

25 MR. BAUGH: Cocounsel points out, because as you

1 know, we are working a lot here, even though Mr. Cohn has  
2 kindly consented that we would present our objections to the  
3 printed material by the close of business tomorrow, could we  
4 submit ours with Mr. Ruhnke as well?

5 THE COURT: Yes.

6 MR. BAUGH: Thank you.

7 THE COURT: Anything else?

8 MR. RUHNKE: Your Honor, there is some victim impact  
9 evidence that we have not discussed with respect to K.K.  
10 Mohammed. Just by way of preamble to this, the danger here is  
11 that natural human emotion takes over what a juror's  
12 responsibilities are to the law.

13 THE COURT: You know, we know something -- I have the  
14 rest of the day. I have the rest of the day to listen to you,  
15 but I wanted to say, we know something now that we didn't know  
16 before. We know something about this jury. We know that this  
17 is a jury which hasn't had a kneejerk reaction to the  
18 magnitude of the losses. We know this is a jury which has  
19 already demonstrated that it is carefully considering,  
20 meticulously reviewing the evidence, and there is no reason to  
21 think that the response will change.

22 MR. RUHNKE: The danger that has been identified and  
23 associated with victim impact evidence is that it has a  
24 tendency to overwhelm reason with emotion.

25 THE COURT: You know, you are arguing against

1 yourself, you see, because one of the arguments was that it is  
2 duplicative. This jury has already seen the blood and the  
3 gore. But the seeing of the blood and the gore has not led  
4 this jury to say what a horrible catastrophe this was and to  
5 just check the box.

6           Anyhow, I will now be quiet.

7           MR. RUHNKE: Your Honor, anytime, obviously. There  
8 was a time in our history when the United States Supreme Court  
9 said this type of evidence is so entirely inflammatory that it  
10 cannot be allowed in a capital case. What happened is, two  
11 years later, the only thing that changed was the makeup of the  
12 United States Supreme Court, which said now it can come into  
13 evidence and it is perfectly fine that it come into evidence.

14           What we are guided by, accepting Payne and Gaithers  
15 and the Booth, Gaithers, Payne history, is that the laws  
16 enacted by Congress talk not in terms of evidence but  
17 information at a penalty phase that seems otherwise relevant.  
18 What Mr. Cohn alluded to before is that Congress, whether, God  
19 bless them, this was a conscious choice or they just didn't  
20 know what they are they were doing on that particular day,  
21 enacted a statute which says evidence may be excluded if its  
22 probative value is outweighed by the danger of creating unfair  
23 prejudice, confusing the issues or misleading the jury.  
24 Whether that is a conscious effort to make the standard  
25 broader than Rule 403, which talks about substantially

1     outweighing the danger, I don't know. The legislative history  
2     of this particular enactment is not anything that would take a  
3     long time to read, and there is no discussion of this  
4     particular change in the history of legislation.

5             So we come to a penalty phase where a jury is going  
6     to be required to decide whether or not to sentence someone to  
7     life or death. That is the issue at penalty. Then the  
8     argument becomes do, for example, photographs bear a relevant  
9     relation to that process, and if the answer to that is yes,  
10    whether there is danger of unfair prejudice from the  
11    photographs. That's the analysis that we need to undertake,  
12    accepting that Payne is the law and accepting what Congress  
13    did when it enacted the relevance exclusion of information  
14    standard that it did.

15            The government has proffered five photographs in  
16    connection with the bombing in Dar es Salaam. There are tabs  
17    behind Exhibit B in the materials that were submitted. I  
18    lodge an objection to the second photograph, which depicts a  
19    charred and disfigured corpse lying on the ground -- they are  
20    in different order? There is a photograph among the five of a  
21    charred corpse.

22            THE COURT: With burned out automobiles in the  
23    background.

24            MR. RUHNKE: Yes, and the embassy fence in the  
25    background.

1           If this was a case, for example, where the government  
2 had argued a statutory aggravating factor that the murder was  
3 accomplished in a manner that was heinous, atrocious and  
4 cruel, there might be some relevance to this photograph. But  
5 all this photograph does is show a horribly disfigured body of  
6 somebody who was killed in the bombing. It does not prove or  
7 move forward any of the aggravating factors alleged by the  
8 government that are not already in this case. So I object to  
9 that photograph.

10           I object as well to what is photograph number 4 in my  
11 set, which is what I can only describe as a pile of human  
12 corpses on the floor, it appears probably of some morgue in  
13 downtown Dar es Salaam, Tanzania. I argue that that proves  
14 nothing other than that people died, something which is part  
15 of the atmosphere of this case, something the jury will have  
16 decided if we are to move on to the penalty phase. I  
17 particularly argue that there is a danger of unfair prejudice,  
18 that simply there is a danger of unfair prejudice, not  
19 substantially outweighing probative value, but that there is a  
20 danger and that your Honor ought to exclude both of those two  
21 photographs.

22           THE COURT: All the photographs?

23           MR. RUHNKE: Those two photographs, two out of the  
24 five.

25           THE COURT: The pile of bodies and the charred

1 corpse.

2 MR. RUHNKE: Yes.

3 MR. GARCIA: Your Honor, I don't quarrel with Mr.  
4 Ruhnke's statement of the rule and the statute --

5 MR. RUHNKE: Could you keep your voice up.

6 MR. GARCIA: -- which is a different standard than  
7 403. We have five proposed photographs for Dar es Salaam,  
8 including the two Mr. Ruhnke specifies. We have noticed an  
9 aggravating factor of multiple killings. It is the same  
10 analysis as the government doesn't have to stip the cause of  
11 death. They are multiple killings. It is an aggravating  
12 factor that the government has to prove.

13 In addition, especially the photograph of the body  
14 lying outside the embassy, this is not a government  
15 photograph. This is what the scene looked like as other  
16 victims were walking out of the embassy. This is what  
17 happened in Dar es Salaam and this is an impact on the  
18 survivors, as well as the individual who was killed in this  
19 manner depicted in the photograph. There were 11 people  
20 killed in Dar es Salaam. These photographs show that and they  
21 also show the impact. This is a morgue photo of people going  
22 there and seeing this. It is also impact on survival victims.  
23 Sometimes it is seen in light of the Nairobi bombing but it is  
24 still a case of mass murder.

25 I think these photos are relevant and restrained and

1 that the jury should see them.

2 THE COURT: The motion to preclude use of the  
3 photographs is denied.

4 Anything else on our agenda?

5 MR. COHN: Does your Honor wish to discuss at all the  
6 sheer number of witnesses or do you want to await the  
7 analysis --

8 THE COURT: The government has told us -- how many  
9 witnesses, how long?

10 MR. COHN: They said about 30, maybe 29, maybe 31  
11 victim witnesses.

12 THE COURT: And the estimated length of time?

13 MR. GARCIA: Two days, Judge. Two to four, building  
14 in some cross or some delay. But they will be very short,  
15 victim impact testimony. Very short direct.

16 MR. COHN: I understand there are a lot --

17 THE COURT: Is there really an objection in the  
18 context of this case that that is excessive?

19 MR. COHN: Yes, your Honor. You have to put it in  
20 the context of 12 people who already testified. The jury is  
21 aware of victim impact. Cumulation mounts and I don't think  
22 it adds anything. They know that there were 5,000 living  
23 victims. They know that. I don't mean to make light of it or  
24 try to be morbidly funny. I am not. How many people with the  
25 same injuries need they see? That is cumulative. McVeigh

1 seemed to indicate that there ought to be some limit. One  
2 hundred seventy-six dead people in McVeigh, in the order of  
3 magnitude, a similar amount of injury.

4           THE COURT: There is also language which says the  
5 government has the right to enable the jury not to deal with  
6 these as abstractions but to recognize the fact that these are  
7 human beings, and there is specific language which says, both  
8 in Payne and McVeigh, that these are human beings with lives  
9 and families and so on.

10           I don't want to engage in rhetoric. One justice has  
11 commented that the position of the defendants is to have sort  
12 of an inverse ratio between the magnitude of the crime and  
13 what it is that the government can show. That is not  
14 appropriate. I think two days of testimony, that number of  
15 witnesses does show restraint, appropriate restraint on the  
16 part of the government, and I think it would be inappropriate  
17 for the court to impose any further restraint, inappropriate  
18 in attempting to enable that jury, which, as I have said, has  
19 shown that it is not likely to be stampeded or to be  
20 overwhelmed by emotion, because, as you have already pointed  
21 out, they have already had significant exposure to victim  
22 impact. But I think they are entitled at this phase of the  
23 case, if we reach it, to have some sense of the trauma, some  
24 sense of the consequences of blowing up these two embassies.  
25           Anything further?

1           MR. BAUGH: One thing briefly, your Honor. During  
2 your discussion, several times you mentioned discovery. I  
3 wanted the court to be reminded that nothing that has been  
4 tendered was pursuant to Rule 16. It was all done in response  
5 to notice. We have not figured made Rule 16 discovery  
6 requests in this case. The court will understand. Thank you.

7           THE COURT: What remains open? Where are we with the  
8 Brady material? Is that resolved?

9           MR. FITZGERALD: I believe the disclosure, classified  
10 disclosure was made by placing some documents in the secure  
11 facility for the defendants today. I know it was prepared  
12 yesterday evening.

13          MR. RUHNKE: That is fine. This is the first time I  
14 am learning that.

15          MR. FITZGERALD: It is ready to go. If it is not  
16 physically there we will have someone walk over and make sure.

17          THE COURT: Having reviewed that matter, if that  
18 disclosure and the way it is made and the restrictions to  
19 which it is subject does not resolve the matter, then I am  
20 available to hear from counsel.

21                 What is the status with respect to, I guess the  
22 military matter?

23          MR. BAUGH: I have not heard from him again. I will  
24 call him again today.

25          MR. FITZGERALD: The last I heard from Mr. Ailey,

1 when Mr. Baugh stated that he had not heard on the Friday, May  
2 11, despite a promise of a letter, Mr. Baugh told me he did  
3 not send a letter because he spoke to him on the 11th. When I  
4 asked him if he was aware that the focus was not the specific  
5 dates but the frequency, he said he was not aware of that and  
6 would pursue it. My suggestion is that we try to contact  
7 Mr. Ailey today and send a letter in writing.

8 THE COURT: Would you have any objection if Mr.  
9 Fitzgerald was a part of that telephone conversation?

10 MR. BAUGH: No, not at all.

11 THE COURT: I think it might be useful. There seem  
12 to be failures of communication here.

13 Then we are adjourned awaiting some further  
14 communication from the jury.

15 (Recess)

16 (Proceedings adjourned at 4:00 p.m. until 10:30 a.m.,  
17 Friday, May 18, 2001)

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