

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,)	
)	
v.)	
)	CRIMINAL NO. 12-10044-DPW
INOCENTE ORLANDO MONTANO,)	
)	
Defendant)	

GOVERNMENT’S REPLY TO DEFENDANT’S SENTENCING MEMORANDUM
(Leave to File Granted July 22, 2013)

The government submits this memorandum to respond briefly to certain assertions made in the Defendant’s Sentencing Memorandum.¹ The defendant makes a number of claims that are unfounded or irrelevant to the determination of a reasonable sentence. Specifically, Montano challenges (1) Professor Karl’s description of El Salvador’s military and governmental hierarchies during the Salvadoran civil war; (2) Professor Karl’s opinion that the defendant left El Salvador in 2001 and traveled to the United States, at least in part, to distance himself from authorities that could prosecute him for his alleged role in the 1989 Jesuit massacre; and (3) Professor Karl’s conclusion that, during his tenure as an officer in the Salvadoran civil war, troops over which Colonel Montano exercised authority and control committed numerous documented violations of human rights, including torture, extrajudicial killings, and forced disappearances. The United States will not re-visit the issues discussed in the Government’s Sentencing Memorandum, but instead will use this opportunity to address defense arguments that

¹The United States sought leave of Court to submit this memorandum in part to respond to the anticipated report of Professor J. Michael Waller, an expert witness previously identified by the defendant. The defendant has since decided not to proffer any testimony by Professor Waller.

tend to distract from the questions at issue.

To support his challenge to Professor Karl, the defendant relies largely on altogether irrelevant and distracting arguments concerning the politics of the Salvadoran civil war, such as the FMLN's responsibility for human rights violations, separate from abuses committed by the military, and support of the United States government for the Salvadoran government during the war. Support by this country for the Salvadoran government in no way diminishes the illegality of human rights abuses by troops reporting to the defendant. Nor do abuses committed by the FMLN diminish Colonel Montano's responsibility for human rights abuses committed under his command or explain the defendant's motivation to immigrate to the United States illegally.

The defendant's factual rendition relies heavily on the self-serving description of events in El Salvador espoused by General Ernesto Vargas, a fellow member of 1966 *Tandona* class of ESAF officers who rose together with the defendant to assume key command positions during the civil war.² *See* Vargas Statement, Docket Entry 77. The defendant has indicated an intent to call General Vargas as a witness at the sentencing hearing.³ As discussed below, General Vargas

²As discussed in Professor Karl's report and the Government's Sentencing Memorandum, the *Tandona* was the privileged and nearly all-powerful military class to which the defendant belonged and which controlled the ESAF during the Salvadoran civil war.

³The defendant appears to proffer General Vargas as a hybrid between a fact and expert witness. While Vargas's has served in the Salvadoran military, he has published nothing of a scholarly nature or that has been peer-reviewed. In addition, as discussed below, his bias makes his utility as an expert questionable. As the government will establish at the sentencing hearing, Vargas's characterization of the ESAF and Salvadoran law is misleading at best. Despite government requests, the defendant has yet to provide a copy of the defendant's military service record, upon which Vargas relies to make certain factual claims. Moreover, Vargas provides no documentary support or basis of knowledge for a number of the assertions he makes concerning the defendant's background, *e.g.*, claims concerning alleged economic circumstances that motivated Colonel Montano to immigrate to the United States. *See* Vargas Report (Docket Entry 77) at 14-15.

was not only a member of Colonel Montano's *Tandona* cohort, he was also – like the defendant – named by reliable authorities as the commander of troops responsible for prolific human rights abuses, including extrajudicial killings, and scorched earth practices that resulted in great harm to civilian populations.⁴ In addition, General Vargas, like the defendant, has publicly and loudly denied that ESAF troops committed even the most-thoroughly documented human rights abuses and has served as an apologist for even the most egregious human rights violators among the ESAF's ranks. Put simply, General Vargas's role as a protector of the interests of the *Tandona* make him unreliable as a fact witness or as an expert concerning facts relevant to sentencing.

In the discussion below, the government addresses three aspects of the Defendant's Sentencing Memorandum and the Vargas Report. First, much, if not most, of what General Vargas discusses in his report is inaccurate and irrelevant to the facts to be determined at sentencing. Second, General Vargas's role as a partisan and lack of experience as a scholar make him unreliable as a witness at sentencing. Third, the defendant's submission appears to misapprehend the government's position in certain key regards. Most significant, the defendant incorrectly characterizes the government's basis for seeking an enhanced sentencing as relying on an assertion that the Colonel Montano personally engaged in human rights abuses and fled El Salvador because of an actual risk of prosecution for such abuses. The government need not prove that the defendant personally committed extrajudicial killings or other human rights abuses. The government alleges that Colonel Montano's responsibility for human rights

⁴See, e.g., "Barriers to Reform: A Profile of El Salvador's Military Leaders," commissioned by the bi-partisan 1990 Arms Control and Foreign Policy Caucus of the United States Congress, at pp. 1 and 31.

violations stems from his authority over troops that committed widespread abuses. Similarly, the government does not contend that, in El Salvador, Colonel Montano was ever criminally charged with human rights violations or involvement in the Jesuit massacre. Thus, the assertion by the defendant (and General Vargas) that Colonel Montano has never been charged with a crime in El Salvador is irrelevant. Instead, the government alleges that the defendant lied to obtain an immigration benefit – TPS – at a time when there appeared to be a significant likelihood that Colonel Montano would be charged in connection with the Jesuit massacre. The timing of the defendant’s immigration and his subsequent denial, on TPS applications in 2008 and 2010, that he had served in the military strongly support the inference that Colonel Montano lied to avoid scrutiny of his military background by the United States.

1. The Defendant’s Factual Assertions and Much of the Vargas Report Are Inaccurate and Largely Irrelevant.

The Defendant’s Sentencing Memorandum (*see, e.g.* pp 6-8 and 25-26) and much of the Vargas Report (*see* pp. 4-17) rehearse partisan arguments revolving around the causes of the Salvadoran civil war and the relative culpability of the ESAF and the FMLN. These arguments are irrelevant to whether the defendant’s motivation to lie on TPS applications was in part to avoid potential liability for the Jesuit massacre. They are also irrelevant to whether the defendant’s command of troops that engaged in widespread human rights abuses is a factor that warrants an enhanced sentence. Regardless of the political underpinnings of the civil war or atrocities committed by the FMLN, if the defendant’s history is as portrayed by Professor Karl, an enhanced sentence is warranted. This would obtain equally if the defendant were a former FMLN commander who oversaw troops that engaged in atrocities. Such a defendant would also

merit a sentence that reflects his background, history, and why he lied to stay in this country.

Likewise, the fact that the United States supported the government of El Salvador during the civil war is irrelevant, as is the fact that the defendant received U.S. military training. In a similar vein, the defendant's assertion that he used his own name to enter the United States and his suggestion that his role in the Salvadoran government makes it likely that certain American authorities were aware of his identity and maybe even of his presence in this country are irrelevant. As this Court is aware, defendants who commit immigration violations often use their true names in dealing with United States authorities, as did the defendant in *Boskic*. Moreover, putting aside the fact that the United States government is not a monolith such that the officials who adjudicated Colonel Montano's various TPS applications would know of his military background, the failure by officials to recognize the defendant's lies in no way excuses those lies. The defendant's concealment of his military background thwarted the gatekeeper function served by officials charged with determining who among many applicants for TPS qualify for the benefit. Nor should the defendant's success in avoiding detection in any way affect this Court's consideration of the defendant's history and characteristics in determining a reasonable sentence.

The defendant appears to misapprehend the purpose of Professor Karl's report. Professor Karl's report does not purport to be an exhaustive analysis of the politics of the civil war or to document all human rights abuses committed by all combatants. It is thus, for example, inaccurate to suggest that "the Karl Report attributes essentially 100% of the deaths and human rights abuses that took place over the course of the Salvadoran conflict to the ESAF." Defendant's Sent. Mem. at 25. The Karl Report only reflects documentation of abuses by ESAF troops over which Colonel Montano had command authority. It is these abuses and not abuses

by troops under the command of other ESAF officers or the FMLN that are relevant here. As Professor Karl has explained and will further elucidate at the sentencing hearing, the data upon which her report is based derives from reputable organizations that have gathered extensive documentation in the form of testimony and sworn statements.

As explained by Professor Karl, assertions by General Vargas about Colonel Montano's authority over troops committing human rights abuses are inaccurate. Even if Vargas's assertion that, as Vice Minister of Defense for Public Security, Colonel Montano did not have authority over troops committing atrocities – an assertion the government anticipates will be the subject of contrary testimony by Professor Karl – while he was in charge of combat battalions prior to ascending to his position as Vice Minister, the troops over which he had direct operational authority were among the most vicious perpetrators of well-documented human rights abuses.

2. General Vargas's Role as A Partisan and Fellow *Tandona* Member Makes Him an Unreliable Witness.

Although General Vargas, in his report, does not provide a detailed history of his ESAF background, the government will present evidence of that history in the event Vargas testifies. As a member of the 1966 *Tandona* class of officers, Vargas rose together with Colonel Montano and his other classmates to assume key command positions during the civil war. Vargas' positions included high command positions over infantry troops throughout the civil war. Vargas's last position in the ESAF, prior to the removal by the Ad Hoc Commission⁵ of the entire *Tandona*, was in the Joint General Staff.

The 1990 Report to the Arms Control and Foreign Policy Caucus of the U.S. House of

⁵The Ad Hoc Commission was mandated by the 1992 Peace Accords to purge active duty military officers who had committed human rights violations .

Representatives— “Barriers to Reform: A Profile of El Salvador’s Military Leaders – included Vargas among 15 officers deemed “barriers to reform” in El Salvador. The report concluded that 14 of the 15, including Vargas and Montano, had risen to their positions despite documented human rights abuses committed under their command. The report further noted that in none of the cases of human rights violations listed in the report had anyone been held to account, “even though nearly every case would seem to point to officers either ordering the abuse, concealing it, or failing to investigate it.” Barriers to Reform at 1. Vargas is also named as a human rights violator by other reliable sources, such as the United States Department of Defense and Department of State and various non-governmental human rights organizations, all of which provided evidence to the Ad Hoc Commission.

Specific to General Vargas, the report attributes to troops under his command one of the more notorious scorched earth campaigns, in the province of Morazan in 1986. That campaign included burning fields, relocating civilians and extrajudicial killings. As with Colonel Montano’s failure to hold his subordinates accountable for human rights abuses, there is no indication that Vargas took any steps to investigate or hold anyone accountable for criminal acts committed in Morazan. With regard to the defendant’s responsibility for human rights abuses, Vargas emphasizes that there is no record of the defendant being charged in El Salvador with any such abuses. This of course, as Professor Karl makes clear, should come as no surprise in a country where impunity for most human rights crimes committed during the civil war was the

norm.⁶

Since the end of the war, Vargas has publicly denied participation by the military, including specific officers in gross human rights violations. For example, he has been quoted in news reports as mocking claims, corroborated by DNA tests, of children being kidnapped the military during the civil war. His role as a denier that human rights abuses were committed by the ESAF and as a defender of the *Tandona* render General Vargas unreliable as a witness on the question whether the defendant commanded troops engaged in human rights abuses. His partisanship also makes him unhelpful as a witness regarding Colonel Montano's motivation for leaving El Salvador and for lying on his TPS applications.

3. The Defendant's Responsibility for Human Rights Abuses Stems From His Role As A Military Commander, Not From His Direct Commission of Crimes

As discussed in the Government's Sentencing Memorandum, Colonel Montano occupied several high-level command positions within the ESAF during the civil war, ultimately rising to

⁶Where records of human rights abuses do exist, Vargas and the defendant ask the Court to ignore them. As discussed in Professor Karl's Report, for example, the bi-partisan 1990 Arms Control and Foreign Policy Caucus of the United States Congress – "Barriers to Reform: A Profile of El Salvador's Military Leaders" – specifically named Colonel Montano as a commander whose troops had committed human rights abuses. Karl Report at 13. The defendant derides "an American Congressional Delegation and other liberal leaning groups that championed the FMLN in their efforts to stop United States aid to the Salvadoran government and the ESAF." Defendant's Sent. Mem. at 25. The defendant is similarly dismissive of the U.N. Truth Commission, asserting that "the FMLN's views permeate the United Nation's Truth Commission Report that [the U.S. Congressional] delegation helped generate." *Id.* at 20. The Truth Commission Report has been found to be reliable by several courts. *See, e.g. Chavez v. Carranza*, 559 F.3d 486, 497 (6th Cir. 2009) (District Court did not abuse its discretion admitting Truth Commission Report as a public record: "Even though the Truth Commission did not conduct a formal hearing, it interviewed numerous witnesses, victims, and relatives associated with the events described in the Report. In addition, the Truth Commission reviewed thousands of complaints of acts of violence, examined documents, interviewed members of the military, and visited locations of acts of violence.").

the position of Vice Minister of Defense for Public Security. *See* Karl Report at 38-44. During his service in command positions, including his service as Vice Minister – during which he had authority over the country’s three principal security forces – Colonel Montano commanded troops that committed numerous documented violations of human rights, including torture, extrajudicial killings, and forced disappearances. *Id.* The defendant’s appointment as Vice Minister of Defense for Public Security “coincided with a strong resurgence of extrajudicial killings, torture, deaths in custody, and urban terror campaigns by the security forces aimed at blocking prospects for a negotiated settlement to the conflict.”⁷ *Id.* at 16. These “campaigns of state terror” were aimed at prominent civilians and civilian groups, such as human rights organizations and labor unions. *Id.* at 17-18.

As this Court recognized in *Xuncax v. Gramajo*, 886 F. Supp. 162 (D. Mass. 1995), a military commander aware of widespread acts of brutality committed by personnel over whom he exercised authority and control “bears command responsibility for the brutality” carried out by personnel under his command. 886 F. Supp. at 172-76; and *see, e.g., Chavez v. Carranza*, 559 F.3d 486, 499 (6th Cir. 2009)(“Three elements must be established for command responsibility to apply: (1) a superior-subordinate relationship between the defendant/military commander and the person or persons who committed human rights abuses; (2) the defendant/military commander knew, or should have known, in light of the circumstances at the time, that subordinates had

⁷As Professor Karl has explained and will testify, such crimes were committed by security forces under the defendant’s control and, in fact, increased during the defendant’s tenure as Vice Minister. Vargas’s claim that the defendant had no authority over such forces (Vargas Report at 20) is thus false. As Professor Karl will testify, if necessary, the Salvadoran Military Code of Justice gives the Vice Minister of Public Security the duty and authority to investigate “grave breaches” committed by officers and enables the Vice Minister to revoke the command of such officers.

committed, were committing, or were about to commit human rights abuses; and (3) the defendant/military commander failed to take all necessary and reasonable measures to prevent human rights abuses and punish human rights abusers.” (citation omitted)).⁸

The parallels between this case and *Carranza*, in which the Professor Karl also provided expert testimony, demonstrate the appropriateness of holding Colonel Montano responsible for the acts of his military subordinates. In *Carranza*, which arose under the Alien Tort Claims Act and the Torture Victims Protection Act, the defendant “spent nearly thirty years as an officer in the [ESAF and] served El Salvador’s Vice Minister of Defense and Public Security from October 1979 to January 1981.” *Carranza*, 559 F.3d at 491. Under a command responsibility theory, the defendant was found liable for acts of torture and extrajudicial killing. *Id.* at 491. In affirming the jury’s verdict, the Sixth Circuit noted that “[t]he law of command responsibility does not require proof that a commander’s behavior proximately caused the victim’s injuries,” so long as the elements of the doctrine are satisfied. *Id.* at 498. So too in this case. The sources upon which Professor Karl relies establish by at least a preponderance of the evidence that, during the civil war, the defendant (1) had a superior-subordinate relationship with members of the ESAF; (2) knew or should have known that his subordinates had committed, were committing, and were about to commit human rights abuses; and (3) failed to take all necessary and reasonable

⁸The command responsibility doctrine has been widely applied as a principle of international law. *See, e.g., Kadic v. Karadzic*, 70 F.3d 232, 242 (2d Cir.1995)(“[I]nternational law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities.”); *In re South African Apartheid Litigation*, 617 F. Supp.2d 228, 271 (S.D. NY 2009)(“[C]ommand responsibility-the military analogue to holding a principal liable for the acts of an agent-was firmly established by the Nuremberg Tribunals.”); and *see, e.g., ICTR, Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment, 21 May 1999, para. 209 (“The principle of command responsibility is firmly established in international law....”).

measures to prevent human rights abuses and punish human rights abusers. *See id.* This Court should consider human rights abuses committed under the defendant's command in determining a reasonable sentence.⁹

Finally, if necessary, the government will address at the sentencing hearing the manner in which the defendant, through General Vargas, seeks to obfuscate the command structure of the ESAF and the defendant's role in the various positions he held in order to discount, as a sentencing factor, human rights abuses committed under his command. As will be made clear, for example, the Ministry of Defense, including its Vice Ministers, made policy for and commanded the entire ESAF. In particular, the picture that Colonel Montano and General Vargas seek to paint of a purely administrative Ministry of Defense with little power is fundamentally deceptive.

⁹The defendant's complaint that the command responsibility doctrine is often used to obtain civil judgments is immaterial. *See* Defendant's Sent. Mem. at 24. "The principles and limits of sentencing accountability [for the purposes of determining relevant conduct] are not always the same as the principles of criminal liability." USSG §1B1.3, App. N. 1. The government need not, in this proceeding, prove the defendant is criminally liable for human rights abuses. So long as the Court finds the evidence establishes that fact by a preponderance of the evidence, the Court should consider it. *See* USSG §6A1.3 (commentary).

Conclusion

For the reasons set forth in the Government's Sentencing Memorandum, a sentence of imprisonment for a period of 51 months is reasonable.

Respectfully submitted,

CARMEN M. ORTIZ
United States Attorney

By: */s/ John A. Capin*

JOHN A. CAPIN
Assistant U.S. Attorney
(617) 748-3100

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JOHN A. CAPIN
Assistant U.S. Attorney