UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO.: 8:03-CR-77-T-30-TBM

SAMI AMIN AL-ARIAN,
SAMEEH TAHA HAMMOUDEH,
GHASSAN ZAYED BALLUT,
HATEM NAJI FARIZ

UNITED STATES' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANT FARIZ' MOTION
TO PRECLUDE THE ADMISSION OF EVIDENCE OF CERTAIN OVERT ACTS

The United States of America by Paul Perez, United States Attorney, Middle District of Florida, hereby respectfully submits the following Memorandum of Law in Opposition to Defendant Fariz's Motion In Limine to Preclude the Admission of Evidence of Certain Overt Acts (Doc. 981).

In his Motion, which in reality is an untimely motion to strike,[1] defendant Fariz

[1]Although it is ostensibly framed as a "motion to preclude evidence," in reality, this is a motion to strike allegations from the Superseding Indictment as legally insufficient because it argues that as a matter of law Overt Acts 17, 124, 131 and 321 "cannot serve as a basis for conviction under Counts One or Two." (Doc. 981 at 2.) As such, it is extraordinarily untimely. The overt acts that defendant Fariz challenges in this Motion were alleged in the first Indictment that was unsealed on February 20, 2003. (See Doc. 1 ¶¶ 43(13), 43(109), 43(115), and 43(254).) Thus, any challenge to their legal validity should have been raised on or before September 5, 2003, the deadline that this Court established for filing pretrial motions to dismiss. (See Doc. 196 at 1.) Defendant Fariz displays bad faith in waiting until the eve of trial – more than one and one-half years after the motions deadline for the first Indictment and nearly eight months after the filing of the Superseding Indictment – to raise these issues. His motion should be rejected on this ground alone.

Moreover, because this is a motion to strike in disguise, it cannot be resolved pretrial. It is settled law that, in the pretrial context, "[t]he sufficiency of a criminal indictment is determined from its face" and a district court is therefore "constitutionally barred from ruling on a hypothetical question" as to whether facts that may or may not

seeks to preclude the admission of evidence relating to the commission of Overt Acts 17, 124, 131 and 321, all of which were committed by Palestinian Islamic Jihad ("PIJ") coconspirators outside the United States in furtherance of the RICO conspiracy alleged in Count One and of the conspiracy to murder persons outside the United States alleged in Count Two. Specifically, Fariz first maintains that, under customary international law, the United States cannot assert criminal jurisdiction over these overt acts because they "concern incidents overseas involving nationals who are not nationals of the United States," and because the United States has no judicially-cognizable interest in exercising jurisdiction over them. In addition, Fariz argues that the overt acts in question cannot – as a matter of law – be treated as "murders," within the meaning of Florida and federal law because they constituted legitimate attacks on military targets during an armed conflict. (See Doc. 981 at 2-5.)

As we explain below, defendant Fariz's Motion is without substance and should be denied. With respect to his argument that federal and Florida law cannot cover incidents overseas involving nationals who are not nationals of the United States," the defendant is improperly trying to recast the charges as a simple extraterritorial murder. He, however, is not charged with extraterritorial murder. He is charged with a domestic conspiracy that was successfully brought to fruition by murders occurring in Israel. That some of his coconspirators are aliens located abroad and certain overt acts occurred

---

be adduced at trial will support the charges. United States v. Critzer, 951 F.2d 306, 307-08 (11th Cir. 1992). Inasmuch as the overt acts at issue plainly allege murders and assaults in violation of Florida and federal law, they constitute viable RICO conspiracy predicate crimes. Accordingly, they cannot be deleted from the indictment now because of the hypothetical possibility that facts to be adduced at trial will demonstrate that they were justifiable acts of war.

outside the United States does not change the fact that he is charged with domestic conspiracies. For this reason, Counts One and Two do not allege extraterritorial offenses.

In any event, even if he were charged with an extraterritorial murder, the plain language of the RICO statute, 18 U.S.C. § 956 and Florida law establish Congress' and the Florida legislature's clear intent to cover activities such as those alleged in Overt Acts 17, 124, 131 and 321. Furthermore, the assertion of extraterritorial jurisdiction over such activities is authorized by established principles of international law.

Fariz's second argument – that a purported "right to resist" under international law transforms the murders alleged in the disputed overt acts into lawful killings – is equally unavailing for the reasons outlined in our Motion In Limine No. 1 To Preclude Assertion of Defenses Based on Lawful Combatant Status.[2] At the outset, we note that he has mischaracterized the nature of two of the overt acts he challenges. Contrary to his assertions, Overt Act 131 describes a suicide bombing by a PIJ coconspirator at a public road checkpoint in which several civilians were injured. Likewise, Overt Act 321 describes a shooting attack by PIJ coconspirators in which they ambushed civilian settlers in the West Bank who were returning home from religious services. The Israeli civilian police, and later the army, responded.

Ultimately, however, the nature of the victims and targets of these particular attacks is irrelevant. Defendant Fariz's argument fails because he cannot (and does not even attempt to) establish that the PIJ – the entity whose members committed the

[2]The United States hereby incorporates by reference Motion in Limine No. 1 and Memorandum of Law in support thereof, and accompanying exhibits. (Doc. Nos. 972 and 973).

alleged attacks – is a lawful combatant. Well established and, most importantly, **binding** international law does not permit a recognized violent terrorist group (like the Palestinian Islamic Jihad or HAMAS or the Al Aqsa Brigades), or any other group of self-proclaimed "freedom fighters," to justify its murders of Israelis simply by invoking the Palestinian conflict, without first establishing its lawful combatant status under longstanding and customary criteria established in the 1949 Geneva Convention.[3] Try as he might, defendant Fariz cannot evade the stark reality that unless he can establish that the PIJ is a lawful combatant under the 1949 Geneva Convention, all attacks that the PIJ or its members commit are unlawful and unprotected, regardless of whether the victims or targets of particular attacks are military or civilians.

ARGUMENT

I. Counts One and Two Properly Include the Activities Described in Overt Acts 17, 124, 131 and 321 as Overt Acts.

Defendant Fariz first argues that the United States cannot reasonably assert jurisdiction over the challenged overt acts because they were committed by aliens overseas against other aliens in "militarily-occupied territories."[4] (Doc. 981 at 2-4.)

---

[3]The "1949 Geneva Convention" refers to the Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[4]Defendant Fariz is simply rehashing an argument that he unsuccessfully raised in a motion filed on November 1, 2004 in which he asserted that Count Two contained a "pleading error" because six of the alleged overt acts occurred in Israel and therefore not "within the jurisdiction of the United States." (See Doc. 718 at 28-29.) As we stated in our response to that motion, which we incorporate in relevant part herein, those overt acts were properly pled because all overt acts in furtherance of a section 956 conspiracy, including those committed overseas, are brought within the jurisdiction of the United States as long as at least one conspirator was within the United States at the time of the agreement. (See Doc. 773 at 14-16.) The Court denied the defendants' motion without discussing this issue. (See Doc. 833.)

To support this notion, defendant Fariz fails to cite any federal caselaw, statutes, or binding treaties, and instead relies wholly on the Restatement (Third) of Foreign Relations Law, a scholarly treatise. While it may be consulted as secondary authority, "the Restatement (Third) [of Foreign Relations Law] is not a primary source of authority upon which, standing alone, courts may rely for propositions of customary international law." United States v. Yousef, 327 F.3d 56, 99-103 (2d Cir. 1999) (holding that it is erroneous for courts to anchor decisions solely on the Restatement (Third)). For this reason, defendant Fariz cannot sustain his legal arguments by relying wholly on the Restatement (Third) of Foreign Relations Law.

He likely relies on the Restatement, however, because the position that he advocates – that the United States lacks jurisdiction over any overt acts that concern incidents overseas involving non-United States nationals – has no support in legal precedent of United States courts. His argument fails because he ignores the gravamen of the offenses under which he was indicted, disregards the specific allegations in the counts relating to those crimes, and ignores established principles of law governing the assertion of extraterritorial jurisdiction.

First, neither Count One, alleging RICO conspiracy, nor Count Two, alleging conspiracy to murder abroad, involve the assertion of extraterritorial jurisdiction. As the Supreme Court explained just weeks ago in Pasquantino v. United States, – S.Ct. –, 2005 WL 946716 (Apr. 25, 2005), simply because a federal crime can be applied to reach activity occurring outside the territory of the United States, such an application does not transform the federal crime into an extraterritorial offense; that is, an offense occurring outside the jurisdiction of the United States. Id. at *14; see also United States

v. MacAllister, 160 F.3d 1304, 1307 (11th Cir. 1998) ("Federal criminal statutes may properly include extraterritorial effects."). Indeed if defendant Fariz was correct, then the United States would never have jurisdiction over run-of-the-mill conspiracies to import cocaine, since the overt act of growing cocaine necessarily occurs outside the United States. Second, even if the statutes did constitute extraterritorial offenses, it is clear that Congress intended that they do so.

A. Neither Count One Nor Count Two Charge an Extraterritorial Offense.

As explained, the RICO conspiracy statute prohibits participation, through a pattern of racketeering activity, in an "enterprise engaged in, or the activities of which affect interstate or foreign commerce." 18 U.S.C. § 1962(c), (d). Consistent with this formulation, Count One alleges that the defendants unlawfully conspired "in the Middle District of Florida and elsewhere" to participate, through a pattern of racketeering activity, in the PIJ Enterprise, an "enterprise engaged in, and [whose] activities affected, interstate or foreign commerce." (Doc. 636 at 9 ¶ 25.) Count One further alleges that the PIJ Enterprise conducted its activities and operated in part "in the Middle District of Florida" and that its activities "affected interstate and foreign commerce." (Id. at 8 ¶ 24, 9 ¶ 25.) For example, Count One alleges that PIJ Enterprise coconspirators "in the United States utilized the structure, facilities, and academic environment of USF to conceal the activities of the PIJ" and that they engaged in a multitude of other activities from within the United States and that involved interstate and foreign commerce, including recruiting members, traveling within the United States and abroad to further the PIJ Enterprise, using international and interstate communication facilities, soliciting funds, and transferring funds interstate and abroad. (See id. at 11 ¶ 28, 13-16.)

The territorial nature of the charge stated in Count Two, and in naming section 956 as a RICO conspiracy predicate, is even more apparent. The gravamen of section 956 is conspiring "***within the jurisdiction of the United States*** to commit at any place outside of the United States an act that would constitute the offense of murder, kidnaping, or maiming, if committed within the special and maritime jurisdiction of the United States," coupled with the commission of an overt act in furtherance of the conspiracy "***within the jurisdiction of the United States***." See 18 U.S.C. § 956(a)(1) (emphasis added). In this respect, the Superseding Indictment alleges that defendant Fariz and his co-conspirators violated this section by conspiring "in the Middle District of Florida and elsewhere" "to commit at places outside the United States, acts that would constitute the offenses of murder or maiming if committed within the special maritime and territorial jurisdiction of the United States." (Doc. 636 at 101-03 ¶ 4.) Finally, it alleges that the defendants committed overt acts "[w]ithin the jurisdiction of the United States" in furtherance of the conspiracy to commit murder abroad. (Id. at 103 ¶ 6 (incorporating Overt Acts 236 through 324 of Count One that include many acts alleged to have been committed within the United States).) Likewise, in identifying Florida law prohibiting murder and conspiracy to murder as a RICO predicate, Count One alleges a panoply of overt acts committed within Florida in furtherance of the conspiracy. (See id. at 10 ¶ 26 (identifying as a predicate racketeering activity "acts involving murder, in violation of" Fl. Stat. §§ 782.04, 777.04(3)), 16-100.)

The fact that some overt acts committed by PIJ Enterprise coconspirators in furtherance of these conspiracies occurred outside of the territory of the United States, however, in no way affects the essentially territorial character of the offenses

themselves. In Pasquantino, the Supreme Court recently rejected the similar argument that the government had improperly employed the federal wire fraud statute, 18 U.S.C. § 1343, to reach extraterritorial conduct – the smuggling of liquor into Canada to avoid paying Canadian import taxes. Expressly addressing concerns that the use of the wire fraud statute for such a purpose would contravene the presumption of extraterritoriality, the Court reasoned:

> [O]ur interpretation of the wire fraud statute does not give it 'extraterritorial effect.' [The defendants] used U.S. interstate wires to execute a scheme to defraud a foreign sovereign of tax revenue. Their offense was complete the moment they executed the scheme inside the United States; '[t]he wire fraud statute punishes the scheme, not its success.' . . . This domestic element of [the defendants'] conduct is what the Government is punishing in this prosecution, no less than when it prosecutes a scheme to defraud a foreign individual or corporation, or a foreign government acting as a market participant.

Id., 2005 WL 946716, at *14. Likewise, here, RICO conspiracy and section 956 punish "the domestic element of [the defendants'] conduct"; that is, domestic conspiracies to engage in racketeering activity and to murder persons overseas. Ibid. The essentially domestic character of those schemes was not altered in the least by virtue of the fact that overt acts occurred outside of the United States. Accordingly, as in Pasquantino, it is unnecessary to consider whether the statutes at issue pass muster as proper exercises of extraterritorial jurisdiction.

B. Even if Counts One and Two are Extraterritorial Offenses, Congress Clearly Intended Them to Reach Extraterritorial Activity.

Even if the offenses at issue could be viewed as extraterritorial crimes, it is equally clear that, in enacting the statutes under which the violations were charged, Congress could and did contemplate that their breadth could reach activities occurring (or intended to occur) outside the territory of the United States. (See Doc. 981 at 4-5

(asserting, without any legal support, that Congress did not intend to reach extraterritorial activity).)

Although "Congress legislates against the backdrop of the presumption against extraterritoriality," it is beyond doubt "that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States." Equal Employment Opportunity Comm'n v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991); Yousef, 327 F.3d at 86. Thus, the presumption that the reach of a statute is exclusively territorial is overcome when Congress expresses a broader intent. See Arabian Am. Oil Co., 499 U.S. at 248; MacAllister, 160 F.3d at 1307-08.

Congress expresses such a broader intent when "'language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of control.'" Arabian Am. Oil Co, 499 U.S. at 248; MacAllister, 160 F.3d at 1307. Congress need not expressly provide for extraterritorial application of a criminal statute if the nature of the offense is such that it may be inferred. MacAllister, 160 F.3d at 1307-08. In such instances, "[a]s long as Congress has indicated its intent to reach such conduct, a United States court is bound to follow the Congressional direction unless this would violate the due process clause of the Fifth Amendment." Yousef, 327 F.3d at 86 (internal quotation marks and citation omitted). Indeed, this is true even where the assertion of extraterritorial jurisdiction in a criminal case would arguably exceed that permitted under customary international law. See United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991); FTC v. Companagnie de Saint-Gobain-Pont-a-Mousson, 636 F.2d 1300, 1323 (D.C. Cir.1980).

In enacting the RICO conspiracy statute and 18 U.S.C. § 956, Congress has made it unambiguously clear that it intended them to reach activity that occurs (or is contemplated to occur) outside the United States. For example, by including in its catalogue of crimes constituting predicate "racketeering activity" "any act that is indictable under any provision listed in section 2332b(g)(5)", Congress has swept within the RICO conspiracy statute's embrace numerous federal offenses that are, in many or most of their applications, facially extraterritorial in scope, such as violence at international airports (18 U.S.C. § 37); conspiring to murder or maim persons abroad (18 U.S.C. § 956(a)(1)); murder of a foreign official or internationally protected person overseas (18 U.S.C. § 1116); overseas hostage-taking (18 U.S.C. § 1203 (b(1)); violence against maritime navigation (18 U.S.C. § 2280); extraterritorial homicides of U.S. nationals for terrorism-related purposes (18 U.S.C. § 2332); acts of terrorism transcending national boundaries (18 U.S.C. § 2332b); providing material support to terrorists (18 U.S.C. § 2339A); providing material support to terrorist organizations (18 U.S.C. § 2339B); and extraterritorial torture (18 U.S.C. § 2340A). See 18 U.S.C. § 1961(1)(g). Thus, it is manifest that, in enacting the RICO statute, Congress fully intended it to reach extraterritorial predicate crimes. See also United States v. Noriega, 746 F. Supp. 1506, 1517 (S.D. Fla. 1990) ("RICO . . . applies to conduct outside the United States."), aff'd, 117 F.3d 1206 (11th Cir. 1997).

Moreover, RICO expressly criminalizes racketeering enterprises "engaged in or the activities of which affect, interstate ***or foreign*** commerce." See 18 U.S.C. § 1962(c). To paraphrase the Supreme Court's recent observation in Pasquantino, given the fact that the statute reaches RICO enterprises engaged in foreign commerce, "this is

surely not a statute in which Congress only had domestic concerns in mind." Id., 2005 WL 946716 at *12.

Section 956's manifest purpose is to interdict and punish murders committed outside the United States. Indeed, on its face, it prohibits conspiracies to commit murder outside the United States when at least one member was within the jurisdiction of the United States when the conspiracy was made and a conspirator commits an act within the jurisdiction of the United States to effect an object of the conspiracy. 18 U.S.C. § 956(a)1). "Logic dictates that Congress would not have passed" a murder conspiracy statute that prohibits murder outside the United States, "while simultaneously undermining the statute by limiting its extraterritorial application." MacAllister, 160 F.3d at 1308 (holding that Congressional intent to apply criminal statute prohibiting international drug smuggling extraterritorially was evident from the nature of the prohibited activity).

Although the Florida murder statute does not explicitly state that it covers murders committed abroad, it is clear that Florida law permits the assertion of jurisdiction over them. Florida law provides that a person is subject to prosecution in Florida for an offense that he commits, while either inside or outside the state, by his conduct or that of another for whom that person is legally accountable (like a coconspirator), if: (1) the offense is committed wholly or partly within the state; or (2) the conduct within the state constitutes an attempt or conspiracy to commit in another jurisdiction an offense under both the laws of Florida and the other jurisdiction. Fl. Stat. § 910.005(1)(a), (d). Assertion of jurisdiction over the challenged overt acts, therefore,

is proper under both prongs.[5] Since the Superseding Indictment alleges a large number xxof overt acts committed within Florida in furtherance of the conspiracy, the offense was committed partly within Florida. In addition, the conduct within Florida constitutes a conspiracy to commit murder, which is an offense both in Florida and in Israel.

Lastly, giving extraterritorial effect to these statutes would not violate general principles of international law. See MacAllister, 160 F.3d at 1308 ("Prior to giving extraterritorial effect to a penal statute, we consider whether doing so would violate general principles of international law."). The "objective territorial principle" of jurisdiction applies where a defendant was a part of a conspiracy in which any conspirator's overt acts were committed within the United States territory. Id. at 1308. Thus, it is well settled, that as long as the conspiracy takes place at least in part within the United States, the United States has the power to prosecute every conspirator, even those who never entered the United States. See id. at 1307 & n.4 (listing cases); Noriega, 746 F. Supp. at 1513 (listing former Fifth Circuit cases). Since the United States has jurisdiction over each coconspirator, the United States also has jurisdiction over every act committed by a coconspirator in furtherance of such a conspiracy, regardless of whether the act is committed within the United States or abroad. See Pinkerton v. United States, 328 U.S. 640, 646-48 (1946) (establishing the principle of

[5]Indeed, Florida courts have upheld prosecutions of murders occurring outside Florida where actions related to the crimes occurred within Florida. See, e.g., Tarawneh v. State, 562 So. 2d 770, 772 (Fla. Dist. Ct. App. 1990) (holding that Florida had jurisdiction over a conspiracy to murder in which most of the conspiratorial activities occurred outside Florida because some occurred in Florida); Keen v. State, 504 So. 2d 396, 398-99 (Fl. Dist. Ct. App. 1987) (finding jurisdiction for murder on high seas when murder planned in Florida), overruled on other grounds in Owen v. State, 596 So. 2d 985 (Fla. 1992); Lane v. State, 388 So. 2d 1022, 1026 (Fla. 1980).

coconspirator liability). Thus, Overt Acts 17, 127, 131 and 321 are properly within the United States objective territorial jurisdiction because they are acts of a coconspirator committed in furtherance of a conspiracy engaged at least in part in the United States.

For all of these reasons, Fariz is simply mistaken in his assertion that RICO conspiracy and 18 U.S.C. § 956 constitute "extraterritorial" offenses. Each has firm roots in territorial conduct even though they may involve activities abroad. In any event, even if they are, Congress clearly intended them to reach extraterritorial activity and such extraterritorial effect is proper under international law. Consequently, his contention that the Superseding Indictment improperly embraces extraterritorial overt acts must be rejected.

II. Overt Acts 17, 124, 131 And 321 Constitute Murder Because Defendant Fariz Fails to Establish That They Were Acts of Lawful Combatants.

Just as the United States predicted in its Motion in Limine No. 1, defendant Fariz next attempts to raise the "right to resist" as a defense to the murder charges alleged in Counts One and Two. As an alternative basis for excluding evidence of Overt Acts 17, 124, 131 and 321, defendant Fariz argues that the overt acts cannot be deemed unlawful murders under Count One or Count Two because they were committed against "soldiers or armed settlers" during the course of "armed struggle" pursuant to "the right of an occupied people to resist . . . military occupation." As with his prior argument, rather than citing any law that is actually binding on the United States, defendant Fariz instead relies on vague declarations in United Nations resolutions, decisions of foreign courts and scholarly treatises.[6] Based on such sources and information turned over in

[6]Even his "corollary" citation to a "political offense" exception to an extradition request is irrelevant to this case. Not only does he overstate its scope, but that

discovery about the particular overt acts, he attempts to show that the Israeli presence in the Territories is illegal and that the Palestinians have a "right of self-determination," and that the overt acts involved victims who were either "soldiers or armed settlers." He then leaps to his final conclusion that "peoples like the Palestinians . . . are entitled to all the protections of international humanitarian law, which treats them as combatants permitted to engage in clashes with foreign troops according to the laws of war." (Doc. 981 at 2, 8.)

Defendant Fariz's argument fails because the murders alleged in the challenged overt acts were lawful under United States or Florida law only if they were committed by lawful combatants as defined in the 1949 Geneva Convention.[7] The main fallacy in defendant Fariz's argument is that he seeks to improperly recharacterize the issue from one of "lawful combatant immunity," established under duly ratified treaties to which the United States is bound, to that of an amorphous "right to resist" of all "occupied peoples." In doing so, defendant Fariz seeks to benefit from the doctrine of lawful combatant immunity established in the 1949 Geneva Convention – which is the only binding law providing immunity from prosecution for combatants – while simultaneously sidestepping the prerequisites for its applicability. He flatly ignores that treaty, the

---

exception applies only to a defendant facing extradition under a particular treaty between the United States and the United Kingdom. (See Doc. 981 at 11 n.4 (citing Barapind v. Enomoto, 360 F.3d 1061, 1066-67, 1073-74 (9th Cir. 2004)).)

[7]The Memoranda of Law Supporting the United States' Motions in Limine Nos. 2-4, which we hereby incorporate by reference, further establish that defendant Fariz's purported "right to resist" (or "right to self-determination" as he calls it here) does not support any other legally-viable defense.

Hague Convention,[8] and other clear legal precedent that establishes that in order for any self-proclaimed 'freedom fighters' to be immune from prosecution for the commission of violent acts, they must establish that they are entitled to immunity as lawful combatants under the 1949 Geneva Convention.[9] Thus, in order to show that the overt acts that he challenges cannot support criminal charges, he must prove that the Palestinian Islamic Jihad – whose conspirators are the "peoples" who committed the acts – is entitled to immunity as lawful combatants. Because he cannot sustain that burden, he instead invites the Court to endorse the ridiculous and unsupported notion that anyone who connects himself to a group of people who believe that their land is wrongfully occupied by a foreign military force may lawfully kill soldiers, or whomever else they choose, as an act of resistance. The Court should reject his invitation.

As we explained in the Memorandum of Law in Support of Motion in Limine No. 1 (Doc. 973), which is incorporated here by reference, regardless whether the Israeli presence in the Territories is proper or improper or legal or illegal, persons who engage in violent acts during a conflict are protected from prosecution, only if the group to which they belong satisfies the criteria for lawful combatant status listed the 1949 Geneva

---

[8]The "Hague Convention Annex" refers to the Annex of Regulations to the Convention between the United States and Other Powers Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

[9] Our argument here assumes *arguendo* that the United States would be obliged to apply the 1949 Geneva Convention to these defendants. As we explained in the Memorandum of Law in Support of Motion in Limine No. 1, which we have incorporated by reference into this response, even if they could establish that they or the PIJ Enterprise are lawful combatants under the 1949 Geneva Convention, these defendants would not be immune from prosecution in the United States because their conflict with Israel is not one covered by the treaty. Since the United States is not a party to that conflict, it is not bound to apply the treaty to them. (See Doc. 973 at 6-7.)

Convention and in the Hague Convention Annex. See Ex Parte Quirin, 317 U.S. 1, 30-31 (1942); United States v. Lindh, 212 F. Supp. 541, 554 (E.D. Va. 2002); (see also generally Doc. 973 at 3-5, 7-19). These criteria were originally established for the precise purpose of limiting "prisoner of war" status, and its concomitant immunity from prosecution, to those people who participated in armed conflicts lawfully under international law. See Quirin, 317 U.S. at 30-31; Lindh, 212 F. Supp. 2d at 554. Roaming bands of outlaws, armed brigands, common thieves, and terrorists who cannot satisfy these criteria are barred from availing themselves of this defense.

Under the customary criteria for lawful combatants as expressed in the 1949 Geneva Convention and Hague Convention Annex, in order to claim immunity from prosecution for acts committed during armed conflicts, the group to which such persons belong must: (1) be commanded by a person responsible for his subordinates; (2) have a fixed distinctive sign recognizable at a distance; (3) carry arms openly; and (4) conduct their operations in accordance with the laws and customs of war. See 1949 Geneva Convention, art. 4(A)(2)(b); Hague Convention Annex, art. 1; United States v. Yunis, 924 F.2d 1086, 1097-98 (D.C. Cir. 1991); Lindh, 212 F. Supp. 2d at 557 n. 35 (stating that any lawful armed force must meet these criteria). Even irregular combatants who kill during a spontaneous uprising to fight occupation must carry their arms openly and conduct themselves in accordance with the laws and customs of war. See 1949 Geneva Convention, art. 4(A)(6); Hague Convention Annex, art. 2.

The Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts ("Protocol I") does not supplant these basic requirements for protection under the 1949 Geneva

Convention. All that Protocol I purported to do was to extend coverage under the 1949 Geneva Convention to peoples whose areas had already been occupied, see Protocol I, art. 1(4), and then only for those who are members of the armed forces of a Party to a conflict, see id., art. 43(2), 44(1).[10] Moreover, the Protocol did not eliminate the requirement that such "armed forces" would be limited to the laws and customs of war in the methods and means of fighting that they chose. See id., art. 35. Nor did it eliminate the requirements that such "armed forces" must distinguish themselves from the civilian population or, at least, carry their arms openly before and during attacks. See id., art. 44. Nor may they target civilians or civilian objects. See id., arts. 50-53, 57. If, as defendant Fariz argues, the PIJ seeks to benefit from whatever immunity, if any, that Protocol I conveys, then it must comply with Protocol I's dictates. He, however, fails to show that the PIJ does.

In any event, even if the Protocol did replace the 1949 Geneva Convention with the entirely new and unprecedented rule that anyone connected with self-proclaimed "freedom fighters" are automatically treated as lawful combatants regardless of their refusal to comply with the laws of war and failure to carry arms openly and wear distinctive emblems, Protocol I has not been ratified by the United States and is thus not binding upon it.[11] (Doc. 981 at 8.) This Court cannot, therefore, apply Protocol I to

---

[10]As we explained in our Memorandum of Law in Support of Motion in Limine No. 1, neither the PIJ Enterprise nor its members is an armed force of a party to a conflict. Nor are they representatives of the "Palestinian people." (See Doc. 973 at 10-12.)

[11]We cited Protocol I not to impose any new legal obligations on the United States as defendant Fariz does, but to further explain certain aspects of customary practice that were generally expressed in the Hague Convention Annex and the 1949 Geneva Convention in the context of traditional warfare. See 1949 Geneva Convention, art. 3 (prohibiting "murder of all kinds" of persons not taking an **active** part in the

place any obligation or constraint upon the United States in the prosecution of these defendants, regardless of how many other countries have ratified it.

Although defendant Fariz expends great energy showing the existence of an armed struggle between Israeli military forces and ethnic Palestinians in the West Bank and Gaza Strip, and trying to support the existence of a theoretical "right to resist," he makes no effort whatsoever to demonstrate that the PIJ, whose members Fariz concedes are responsible for the homicidal acts alleged in Overt Acts 17, 127, 131 and 321, is a lawful belligerent in that conflict, or that its members and agents qualify as members of an armed force within the meaning of the 1949 Geneva Convention. More specifically, he does not (and cannot) demonstrate that PIJ constitutes an armed force, militia or volunteer corps that belongs to a party to the conflict within the meaning of the 1949 Geneva Convention. (See Doc. 973 at 10-12 & n.7.) Similarly, defendant Fariz fails to present any evidence whatsoever that conspirators associated with the PIJ Enterprise fulfill the four criteria set out in the 1949 Geneva Convention, art. 4(A)(2) to qualify as members of an organized or spontaneous resistance movement in occupied territory to whom the status of lawful combatant would apply. In fact, he virtually concedes that the PIJ does not wear uniforms or carry its arms openly. (See Doc. 981 Ex. A at 2 ¶ 1.) Since he challenges only four overt acts as being against military targets, defendant Fariz also essentially concedes that the other thirteen alleged violent overt acts were against civilians. As our preceding submission explained in detail, far from conducting military operations in accordance with the laws of war, PIJ operatives

---

hostilities); Hague Convention Annex, arts. 22, 23, 25, 26 (limiting permissible means of combat); (Doc. 973 at 14-16).

routinely carry out their murderous objectives by targeting the Israeli civilian population through indiscriminate and clandestine attacks in public areas and modes of transportation. (See Doc. 973 at 12-13.) Such acts plainly contravene both customary and conventional norms of armed conflict. See, e.g., Lindh, 212 F. Supp. 2d at 557; Hague Convention Annex, arts. 23(b) (killing or wounding treacherously individuals belonging to the hostile nation or army), 23(e)(employing, arms, projectiles, or material calculated to cause unnecessary suffering). Thus, defendant Fariz fails to establish in his motion that the PIJ or any of its conspirators are lawful combatants whom international law "permit[s] to engage in clashes with foreign troops according to the laws of war." (See Doc. 981 at 8.)

Defendant Fariz's failure to establish that the PIJ or its coconspirators are lawful combatants is fatal to his argument because only lawful combatants are immune from prosecution for killing, or conspiring to kill, members of the opposing armed forces. The court in United States v. Lindh, 212 F. Supp. 2d 541 (E.D. Va. 2002), rejected an identical argument. The defendant in that case, John Walker Lindh, fought in armed combat against the United States military and Northern Alliance forces in Afghanistan on behalf of the Taliban. See id. at 545. When he was brought to trial in this country on charges of conspiracy to murder American soldiers under 18 U.S.C. § 2332, he asserted that he was immune from prosecution because he was a lawful combatant in his capacity as a Taliban soldier. Id. at 545, 552. The Court held that the Taliban did not satisfy two of the criteria for lawful combatants established in the 1949 Geneva Convention. Id. at 557-58. Accordingly, Lindh, as a member of the Taliban, could not be considered a lawful combatant nor claim immunity for conspiring to kill United States and Northern Alliance soldiers. Id. at 558.

Just as in Lindh, because he does not and cannot establish that the PIJ was a lawful combatant, defendant Fariz cannot claim immunity from the murder charges regardless of whether the victims of particular attacks were military or civilian. It is the nature and regular activities of the organization that controls the analysis of lawful combatant status, not the character of any particular attacks that it may carry out. The Taliban attacked United States and other military targets, but because it also regularly targeted civilians, it could not be deemed to be a lawful combatant with respect to any attacks. See id. at 558.

CONCLUSION

For the foregoing reasons, the Court should deny defendant Fariz's motion.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

By: */s Cherie L. Krigsman*
Cherie L. Krigsman
Trial Attorney, U.S. Department of Justice
United States Attorney No. 089
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6156
Facsimile: (813) 274-6108
E-mail: Cherie.Krigsman@usdoj.gov

By: */s Alexis L. Collins*
Alexis L. Collins
Trial Attorney, U.S. Department of Justice
United States Attorney No. 089
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6130
Facsimile: (813) 274-6108
E-mail: Alexis.Collins3@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Kevin T. Beck
Stephen N. Bernstein
M. Allison Guagliardo
Bruce G. Howie
William B. Moffitt
Linda G. Moreno
Wadie E. Said

/s Cherie L. Krigsman
Cherie L. Krigsman
Trial Attorney, U.S. Department of Justice
United States Attorney No. 089
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6000
Facsimile: (813) 274-6108
E-mail: Cherie.Krigsman@usdoj.gov

/s Alexis L. Collins
Alexis L. Collins
Trial Attorney, U.S. Department of Justice
United States Attorney No. 089
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
Telephone: (813) 274-6130
Facsimile: (813) 274-6108
E-mail: Alexis.Collins3@usdoj.gov