

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION**

UNITED STATES OF AMERICA,

Case No. 8:03-CR-77-T-30TBM

v.

SAMI AMIN AL-ARIAN, et al.,

Defendants.

_____ /

**MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS COUNT ONE (RICO)**

INTRODUCTION

In the instant case the government has constructed in Count (1) a RICO indictment that clearly infringes on the Accused First Amendment Rights. In the section of the count one (1) conspiracy entitled means and methods, the indictment lists thirteen (13) statements it alleges were made by the accused. At the outset it is important to note that the indictment fails to specify when, where and under what circumstances each of these statements were made. The accused asserts that each of these statements was made in an open and public forum where the issues being discussed involved the long-standing dispute between the Palestinian and the Israelis. Each of the statements was made in the United States and each statement was clearly made in a political context. Each of them was a response, whether “politically correct” or not, to events transpiring in the Middle East and are clearly political speech. The government utilizes this speech to attempt to create a bridge between the Accused and the violence in the Middle East so that his words form the basis of the Count one (1) conspiracy.

RICO AND THE FIRST AMENDMENT

In *Watts v. United States*, 394 U.S. 705, the petitioner Watts was accused of a violation of 18 U.S.C. § 871 (threatening the president). Mr. Watts had responded to a member of Army Counter Intelligence that he wanted to get his sights on the President of the United States if they ever made him carry a gun. In a *per curiam* opinion, the Court held that 18 U.S.C. § 871 as applied to these facts was unconstitutional.

Nevertheless a statute such as this one which makes criminal a form of pure speech must be interpreted with the commands of the first amendment in mind. What is a threat must be distinguished from what is constitutionally protected speech.

See id. at 707.

The Court also expressed an understanding of the nature of political speech, stating that the language of the political arena like the language used in labor disputes is often vituperative, abusive and inexact. See also *Cohen v. California*, 403 U.S. 15 (1971).

In the instant case the government seeks to establish a violation of the criminal law by establishing that the defendant said things, which can at best be considered, vituperative and abusive. From the indictment the government lists these statements made by Defendants:

1. The enemy forcibly took our land and the Jihad will continue until the complete liberation of our country, from the river to the sea;
2. Every Jew on the land of Palestine will be a target to our bullets and daggers, and without mercy;
3. It is a call for a holy Jihad, to liberate and to cleanse the entire Palestinian lands from the filth of the Zionist criminals;

4. Either the Zionists leave Palestine, or we will make it a graveyard for all of them;
5. Our goal is the complete elimination of the Zionist existence from our holy land;
6. We will chase the Zionists to any place we can get them to liberate our land; Palestine is ours and not theirs; there is nothing in front of the Zionists but to leave our holy land;
7. The existence of any Zionist on Palestinian land, all of Palestine, from the river to the sea, will be the target of our weapons;
8. The attack at Beit Lid Junction was to avenge our people at the town of Khodairah, and on all Palestinian land that Rabin's gangs confiscated from its occupants who lived on it for thousands of years;
9. We had our right to resist the Zionist enemy in every way and at any time on any spot of our Palestinian land;
10. We will remain loyal to the martyrs until every inch of our holy Palestine is returned to the Palestinians;
11. Blood will flow until the complete liberation of our country Palestine;
12. The Zionist entity will not enjoy any security or stability as long as the occupation of our land Palestine remains; and
13. It is our duty to resist that occupation of Palestine, occupied since 1948, and raise their occupational costs, so they will compare between occupation and leaving.

These statements made in the United States, not in Israel, in an open forum purport to establish the accused's involvement in the RICO conspiracy to commit:

1. multiple acts involving murder, in violation of Florida Statutes 782.04; 777.04(3);
2. multiple acts involving extortion in violation of Florida Statute 836.05, 777.011 and 777.04;
3. acts indictable under Title 18, United States Code, Section 1956(a)(2) and (h) [money laundering]
4. acts indictable under Title 18, United States Code, Section 1952 [interstate or foreign travel or transportation and use of any facilities in interstate or foreign commerce with the intent to promote and carry on an unlawful activity];
5. acts indictable under Title 18, United States Code, Section 956 [conspiracy to kill, kidnap, maim or injure persons in foreign country];
6. acts indictable under Title 18, United States Code, Section 2339B [providing material support or resources to designated Foreign Terrorist Organizations];
7. acts indictable under Title 18, United States Code, Section 1546 [fraud and misuse of visas, permits, and other documents]; and
8. acts indictable under Title 18, United States Code, Section 1503 [obstruction of justice].

The subject of these discussions was the right of the Palestinian people to resist an illegal occupation of the occupied territories. See U.N. Resolution 242.¹

It appears from this indictment that any discussion of the plight of the Palestinian people by any person having connection to the P.I.J. would subject the individual to RICO liability. It is also appears that any solicitation for money regardless of when the solicitation occurred (as early as 1984, in this instance) and regardless of the intended purpose of the solicitation would subject an individual who solicited it to RICO liability.

These facts raise two questions. In the first instance can an Executive Order of the President, such as Presidential Executive Order 12947, and a designation by the Secretary of State, make discussions of the war between the Palestinians and the Israelis against the law if your sympathies lie with the Palestinians? And if the Executive Order and the Secretary of State's designation could make such a discussion illegal after their promulgation, can the Executive Order and the Secretary of States reach back in the nature of an *Ex Post Facto* law and criminalize conduct which was not criminal when it occurred? Where was the notice to the accused that any association with the P.I.J. was illegal or, perhaps even more important, would subject him to life imprisonment?

Counsel believes that the First Amendment stands as a bar to criminalizing the accused words regardless of when they were spoken. Counsel also suggest that the RICO conspiracy which charges as part of the enterprise a conspiracy to violate 18 U.S.C. § 2339B cannot date from 1984, twelve years prior to the promulgation of § 2339B and 17 years from its most recent amendment pursuant to the Patriot Act. Fundamental to our

¹ The indictment in this case establishes just how political discussions of these matters are. The Superseding Indictment calls the Gaza Strip and Golan Heights the territories, an *Israeli* view. The initial indictment called them the occupied territories as the rest of the U.N. and the rest of the world prefer to them.

concept of criminal law is notice. How would a defendant in 1984 have notice of what the law would be in 2001? Even more fundamental, how is the Defendant suppose to know his non-violent association with a political organization would subject him to RICO liability for violent acts undertaken by the organization not in the U.S., but *in* Israel?

The war between the Palestinians and the Israelis is violent and that violence extends back to 1948. Many commentators have suggested that the United States' unqualified support for Israel is the reason that the dispute continues with the intensity that has existed for decades. If this indictment survives, the government will have the ability to criminalize, through RICO, spoken efforts to change its policy. As Justice Souter noted in his concurrent opinion *Now v. Scheidler*, 549 U.S. 249, 263 (1994):

Accordingly, it is important to stress that nothing in the Court's opinion precludes a RICO Defendant from raising the First Amendment in its defense in a particular case. Conduct alleged to amount to Hobbs Act extortion for example or one of other somewhat, elastic RICO Predicate Acts may turn out to be fully protected First Amendment activity, entitling the defendant to dismissal on that basis.

Justice Souters' concurrence also notes that even where a RICO violation has been validly established, the First Amendment may limit relief that might be granted against an organization otherwise engaging in protected expression. *Id.*

In *NAACP v. Claiborne Hardware Company*, 458 U.S. 886 (1982), the Court noted:

"The term 'concerted action' encompasses unlawful conspiracies and constitutionally protected assemblies. The 'looseness and pliability' of legal doctrine applicable to concerted action led Justice Jackson to note that certain joint activities have a chameleon – like character."

The Court in *Claiborne* recognized that the First Amendment specifically protects the freedom to associate:

Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association, as this Court has more than once recognized by remarking upon the close nexus between the freedoms of speech and assembly.

Id. at 908.

But *Claiborne* goes further and states a clear affirmation of First Amendment principles with respect to nonviolent political activity.

It follows from these considerations that, consistently with the Federal Constitution, peaceable assembly for lawful discussion cannot be made a crime. The holding of meetings for peaceable political action cannot be proscribed. Those who assist in the conduct of such meetings cannot be branded as criminals on that score. The question, if the rights of free speech and peaceable assembly are to be preserved, is not as to the auspices under which the meeting is held, but as to its purpose; not as to the relations of the speakers, but whether their utterances transcend the bounds of the freedom of speech which the Constitution protects. If the persons assembling have committed crimes elsewhere, if they have formed or are engaged in a conspiracy against the public peace and order, they may be prosecuted for their conspiracy or other violation of valid laws. But it is a different matter when the State, instead of prosecuting them for such offenses, seizes upon mere participation in a peaceable assembly and a lawful public discussion as the basis for a criminal charge.

Id. at 908-09.

At issue in this case are not only the First Amendment Rights of the speaker, Dr. Al-Arian, but also the First Amendment Rights of the listener. If the government's theory in this case becomes the law of the land, it would mean an end to any public discourse regarding the current policies of the government with respect to Israel and Palestine. The use of RICO in this instance would have the effect of silencing those advocates on behalf of the Palestinian cause who have the most information regarding that cause. Like it or not, the people who have suffered at the hands of this never ending conflict have the right to explain the conflict, their side of the story, and the conflict's history. They also have the right

to explain even why suicide bombings are justified. The government does have the right to make its policies unassailable. *Here the government is attempting to use the threat of life imprisonment without parole to silence all advocates of the Palestinian cause.* There can only be one threat greater than the threat of life imprisonment and that would be death for speaking out. This threat is enhanced when the government utilizes the RICO Statute to extend the scope of criminality to acts which were not criminal at the time they were undertaken. This indictment does not just chill First Amendment Rights, it places them in deep freeze never to be given more than lip service again. It is important to remember that the government has acknowledged that Dr. Al-Arian never committed an act of violence and never was aware prior to commission of an act of violence that it was to be committed.

We further believe that the government would be forced to concede that they cannot show that any contribution solicited by Dr. Al-Arian ever contributed directly to an act of violence. The notion that cash is fungible was never codified in 18 U.S. C. § 2339B, and an extension of the statute is unauthorized by the words of the statute. The use of the RICO Statute against Dr. Al-Arian under the circumstances of this case is like utilizing the H-Bomb to kill a moth and, therefore, overkill and inappropriate.

WHEREFORE, the accused, by and through undersigned counsel, respectfully requests dismissal of Count (1) RICO.

Dated: November 2nd, 2004

Respectfully submitted,

/s/Linda Moreno
LINDA MORENO, ESQ.
1718 E. 7th Avenue
Suite 201
Tampa, Florida 33605
Telephone: (813) 247-4500
Telecopier: (813) 247-4551
Florida Bar No: 112283

WILLIAM B. MOFFITT, ESQ.
(VSB #14877)
Cozen O'Connor
1667 K Street, NW
Washington, D.C. 20006
Telephone: (202) 912-4800
Telecopier: (202) 912-4835

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2004, a true and correct copy of the foregoing has been furnished, by CM/ECF, to Walter Furr, Assistant United States Attorney; Terry Zitek, Assistant United States Attorney; Kevin Beck, Assistant Federal Public Defender, M. Allison Guagliardo, Assistant Federal Public Defender, counsel for Hatim Fariz; Bruce Howie, Counsel for Ghassan Ballut, and by U.S. Mail to Stephen N. Bernstein, P.O. Box 1642, Gainesville, Florida 32602, counsel for Sameeh Hammoudeh.

/s/ Linda Moreno
Linda Moreno
Attorney for Sami Al-Arian