IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAMIZ ZIJAD HODZIC,
a/k/a Siki Ramiz Hodzic
SEDINA UNKIC HODZIC,
NIHAD ROSIC,
a/k/a Yahya Abu Ayesha Mudzahid,
MEDIHA MEDY SALKICEVIC,
a/k/a Medy Ummuluna,
a/k/a Bosna Mexico,
ARMIN HARCEVIC, and
JASMINKA RAMIC.

Defendants.

Case No. 4:15-CR-00049 CDP- DDN

DEFENDANT HARCEVIC'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS COUNTS I AND III OF THE INDICTMENT PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 12(b)(3)(B)

DEFENDANT HARCEVIC'S REPLY TO GOVERNMENT'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS

In response to Mr. Harcevic's motion to dismiss the indictment against him on the failure to allege sufficient *mens rea*, the Government agrees that material support of a terrorist act under §2339A requires a specific intent to further enumerated illegal activity.[1] The Government further agrees that the fungible theory associated with §2339B is not applicable to §2339A, and accordingly Mr. Harcevic is not liable if he provided the funds to Mr. Pazara without the intent they be used for fighting.[2] The Government nevertheless maintains that the bare allegations that Mr. Harcevic knew Mr. Pazara was fighting or intended to fight in Syria, Iraq, or elsewhere

[1] *See* Gov. Response at 15-16, 18.
[2] Gov. Response at 18.

satisfies the specific intent required for a violation of §2339A.[3] This contention is in error because the factual allegations read in the light most favorable to the government are insufficient to constitute a reckless disregard on Mr. Harcevic's part that the funds provided to Mr. Hodzic for transfer to Mr. Pazara would be used to support a conspiracy to murder and maim,

The Indictment With Respect to Mr. Harcevic Does Not Allege the *Mens Rea* Required For a Violation of 2339A

The Government alleges in its indictment that Mr. Harcevic provided funds via Mr. Hodzic to Mr. Pazara, who is alleged to have been a participant in a conspiracy to commit murder and maiming abroad. The only allegation that separates Mr. Harcevic from other uncharged persons whom Mr. Hodzic allegedly solicited for funds is that Mr. Harcevic had knowledge of Mr. Pazara's intent to fight in Syria, Iraq, or elsewhere at the time of the solicitation.[4]

The government contends Mr. Harcevic's knowledge that Mr. Pazara intended to fight is sufficient to establish the necessary *mens rea* for a violation of §2339A, arguing "[t]he plain language of the statute dictates that the defendant's knowledge of what the material support would be used for satisfies the *mens rea* element in §2339A."[5] Contrary to the Government's claim that Mr. Harcevic knew the funds would be used to support the alleged conspiracy, the pleadings only allege Mr. Harcevic agreed to provide and then did in fact provide Mr. Pazara with $1,500 in funds with the knowledge Mr. Pazara was either fighting or intended to fight in Iraq, Syria, or elsewhere.[6] There is no allegation as to what Mr. Pazara actually used the money for. Reading these allegations in the light most favorable to the government, they are at best an allegation that Mr. Harcevic was aware of the possibility his funds would be used to support fighting in Syria, Iraq, or elsewhere. For Mr. Harcevic's knowledge of Mr. Pazara's intent to engage in combat to constitute the necessary *mens rea* for a violation of §2339A, knowledge of

[3] *See* Gov. Response at 10.
[4] Indictment at ¶ 11
[5] Gov. Response at 12-13.
[6] Indictment at ¶ 11.

that fact must constitute a reckless disregard of the possibility that providing funds to Mr. Pazara would further murder and maiming.[7] Knowledge of Mr. Pazara's general intent to engage in combat is insufficient to establish the requisite reckless disregard for the possibility that funds given to him would be used to further a conspiracy equal to murder, maiming, or terrorism, for the following reasons: 1) the allegation concerning Mr. Harcevic's knowledge of Mr. Pazara's conduct is not sufficiently particularized as to constitute reckless disregard of the potential that funds to Mr. Pazara would be used to support the specific conspiracy to commit murder and maiming; 2) knowledge of fighting on Mr. Pazara's part does not equate to knowledge that Mr. Pazara was engaged in murder and maiming; and 3) the failure to allege the victim or victims of the conspiracy to murder and maim does not provide Mr. Harcevic with sufficient notice to plead defense, plead guilty, and/or plead double jeopardy to subsequent prosecution.

The allegation concerning Mr. Harcevic's knowledge of Mr. Pazara's conduct is not sufficiently particularized as to constitute reckless disregard of the possibility that funds to Pazara would be used to support a conspiracy to commit murder and maiming

In *Boim v. Holy Land Found. For Relief & Development* Judge Posner held that the *mens rea* for knowingly providing material support in violation of 2339A when giving funds to an individual or organization required a reckless disregard for the possibility that the funds would be used to support a conspiracy to murder or maim.[8] Judge Posner emphasized that whether or not a defendant's conduct was reckless was a function of what the defendant knew concerning the activities of the individual or organization to whom the monies where given.[9] Analogizing

[7] *Boim v. Holy Land Found. For Relief & Development.*, 549 F.3d 685, 693 (7th Cir. 2008) ("To give money to an organization that commits terrorist acts is not intentional misconduct unless one either knows that the organization engages in such acts or is deliberately indifferent to whether it does or not, meaning that one knows there is a substantial probability that the organization engages in terrorism but one does not care…That is recklessness.").

[8] Id.

[9] In *Boim*, Judge Posner was asked to analyze liability under 2339A, specifically as it related to an 18 U.S.C. §2333(a) action for the murder of the young David Boim, a Jewish teenager who was both an Israeli and American citizen. *Boim*, 549 F.3d at 687-88. Though *Boim* was a civil case, the criminal statute was a key component of the case "by this chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332)." *Boim*, 549 F.3d at 690. Furthermore, the criminal concept of knowledge and recklessness, in this case, was found equivalent to that of the tort and thus applied in the same manner. *See Boim*, 549 F.3d at 694 ("Critically, the criminal (like the tort) concept of recklessness is

recklessness to giving a loaded gun to a child, as compared to giving a loaded gun to an adult, Judge Posner held that donating to an individual or organization is not a reckless or criminal act "unless one either knows that the organization engages in [terrorist] acts or is deliberately indifferent to whether it does or not."[10] Judge Posner concluded that "[a] knowing donor to Hamas – that is, a donor who knew the aims and activities of the organization – would know that Hamas was gunning for Israelis, … that Americans are frequent visitors to and sojourners in Israel, that many U.S. citizens live in Israel, … and that donations to Hamas, by augmenting Hamas's resources, would enable Hamas to kill or wound, or try to kill, or conspire to kill more people in Israel."[11] Applying this reasoning, the *Boim* Court reversed the lower Court's decision that defendant Holy Land Foundation was liable because the district court had not considered whether the defendants had the requisite knowledge concerning Hamas at the time of their donations.[12]

The same deficiency that Judge Posner identified in *Boim* exists with respect to the factual allegations concerning Mr. Harcevic's knowledge. To be sure, the Government, like *Boim,* has made multiple allegations concerning the alleged conspiracy's ties to terrorism and the murderous acts of Mr. Pazara, such as the killing of prisoners. What the indictment fails to do, like *Boim*, is allege that Mr. Harcevic had knowledge of Mr. Pazara's intent to fight in support of

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more concerned with the nature and knowledge of the risk that the defendant creates than with its magnitude.").

Boim's parents filed the action after his murder, and brought it against multiple defendants, including the Holy Land Foundation, for "providing financial support to Hamas." *Boim*, 549 F.3d at 688. The district court denied defendants' motion to dismiss, and defendants were found liable after a jury trial for $52 million in damages. Judge Posner reversed the verdict and remanded to the district court to inquire as to the extent of Holy Land Foundation's knowledge at the time of their donations to Hamas and to determine whether the donations were reckless.

[10] *Boim*, 549 F.3d at 693.

[11] *Id.*

[12] Judge Posner sets out that donating to a terrorist organization alone is not enough "if the actual defendant did not realize it. That would just be negligence." *Boim*, 549 F.3d at 693. Where one knew of the terrorist activities of the organization one would also have knowledge of the potential activities. But if the donor had no knowledge of the *terrorist* activities one could not have reckless knowledge. Judge Posner stressed that the reason knowledge of the *terrorist* activities was important is because they are by their nature murderous. That is a far cry from "fighting," which can include lawful activities, such as helping to build walls. Military actions quite often encompass defensive activities.

Al Qaeda, Al Nusra ISIS, or other activities that Mr. Harcevic had knowledge of, or his intent to engage in unlawful combat. Rather, the indictment is limited to Mr. Harcevic's knowledge of Mr. Pazara's "fighting" or his intent to fight generically. Generic knowledge of fighting without specific allegations as to knowledge of how and with whom Mr. Pazara was going to fight is insufficient to constitute a reckless disregard of the potential for the funds to be used in a conspiracy to murder and maim.

This point is underscored by the issue raised in Mr. Harcevic's original memo in support of his motion to dismiss: "This leads to the absurd conclusion that a person or organization knowingly giving humanitarian aid to rebel soldiers that the United States is training for battle against the Syrian government is guilty of providing material support for terrorist acts."[13] Normally a rebuttal would not simply repeat its previous contentions, but the Government's response has made no efforts to separate or distinguish those actions taken by the United States and those of Mr. Harcevic other than to say that they are "not germane."[14] Instead, the point is highly relevant – based on the indictment alone, Harcevic has been no more reckless than the United States and thousands of others who supported the Free Syrian Army and similar groups' efforts to topple the Assad regime after it attacked its own population in retaliation for their protests against the regime's oppressive policies.

Fighting does not amount to murder

The Government steadfastly and erroneously equates fighting with murder. This is, to an extent, understandable given the manner in which Mr. Pazara is alleged to have conducted his combat activities. When it comes to Mr. Harcevic, however, that recalcitrance ignores the point. Mr. Harcevic's contribution predates the alleged combatant activities of Mr. Pazara. How Mr. Pazara actually fought therefore is not relevant to Mr. Harcevic's *mens rea*. Instead, in

[13] Harcevic Memo in Support of MTD at 14-15; *See* Mark Landler & Michael R. Gordon, *U.S. Offers Training and Other Aid to Syrian Rebels*, Feb. 27, 2013, http://www.nytimes.com/2013/02/28/world/middleeast/us-expands-aid-to-syrian-rebels.html.
[14] Gov. Response at 36.

determining whether Harcevic recklessly disregarded the possibility that the funds he gave would be used to support a conspiracy to commit murder, the only relevant inquiry would address what Mr. Harcevic knew about how Mr. Pazara was going to fight. Mr. Harcevic's argument is that knowledge of fighting on the part of Mr. Pazara does not amount to reckless disregard because fighting includes lawful combat, which does not amount to murder and maiming.

As already pointed out in Mr. Harcevic's memo, and unopposed by the government, the term "murder" within 18 U.S.C. § 956(a)(1) has been interpreted as having the meaning of murder provided in 18 U.S.C. § 1111.[15] Murder is defined in § 1111 as "the unlawful killing of a human being with malice aforethought."

The Government attempts to meet Mr. Harcevic's contention above relying primarily on the court's analysis in *Awad.*[16] *Awad* dealt with a much simpler question: whether or not the indictment's use of the words "intent to defraud" could reasonably be read to encompass the statutory language of "willfully."[17] Unsurprisingly, the Court accepted this construction, as something done intentionally is, by common sense and practicality, something done willfully.[18]

But here, the Government asks the Court to go much further. In essence, the Government argues not that it has pled sufficient facts to show that fighting amounts to murder, but that compared to *Awan* it has pled so many facts that the Court should grant its argument that fighting amounts to murder. In doing so, the Government has ignored Mr. Harcevic's analysis and the myriad lawful and legitimate forms that fighting takes, especially in times of war. Unlike *Awad*, which simply had to interpret "intent" as encompassing "willfully," this Court, should it grant the

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[15] *See United States v. Awan*, 459 F. Supp. 2d 167, 175-176 (E.D.N.Y. 2006).
[16] *See* Gov Response at 29; *see also United States v. Awad*, 551 F.3d 930, 935-936 (9th Cir. 2009)
[17] *Awad*, 551 F.3d at 935-36 ("The indictment in this case … alleged that … Defendant and Thomas "knowingly and with the intent to defraud, devised, executed, and participated in a scheme to defraud Medicare." Defendant argues that the omission of the word "willfully" from the indictment renders it insufficient and that, as a result, counts 1 through 24 must be dismissed.").
[18] *Awad*, 551 F.3d at 936 ("Similarly, here, an inference of willfulness is obvious because of the facts alleged in the indictment. The United States Supreme Court has held that, in the criminal context, a 'willful' act is 'one undertaken with a 'bad purpose.'' *Bryan v. United States*, 524 U.S. 184, 191 (1998). In the present case, although the word 'willfully' does not appear in the indictment, sufficient facts were pleaded so that any reader would infer that Defendant acted with a bad purpose.").

Government's argument, would have to ignore scores of common uses of "fighting." *Awad* had pure logic: one cannot unwillfully intend to do something or intentionally do something unwillfully, whereas one may very easily fight without killing someone with malice aforethought.

In its Response, the Government rightly points out that an analysis under the law of war is, by its nature, a fact intensive inquiry that may not be appropriate at this point in the proceedings.[19] But, because this may be a viable defense depending upon the "fighting" engaged in by Pazara, it is worth noting the Government's error in arguing that the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) does not apply to individuals in a civil conflict. On the contrary, as noted in *Hamdan*, terrorist activities may in fact be war crimes because the law of war, and thus lawful combatant status, applies to them in civil war.[20] Additionally, the Supreme Court noted in *Dow* that civil war may bring about the protections and obligations of war.[21] As the Government has conceded it may be a viable affirmative defense, Mr. Harcevic's complaint that the indictment does not give enough notice to mount a substantive defense is buttressed. Because "fighting" is ambiguous, this viable defense may or may not be relevant to Harcevic.

Murder requires a target, but there is no target to be found in the indictment

Not only has the indictment failed to allege knowledge Mr. Harcevic's specific intent, it has failed to allege the all-important "who." For murder, as opposed to mere fighting, to occur, there necessarily must be a victim alleged in the indictment.[22] The Government contends that "the Indictment need not allege a specific target or victim of the § 956 conspiracy,"[23] and leans on a

[19] *See* Gov. Response at 33-36.
[20] *See Hamdan v. United States*, 696 F.3d 1238, 1249-1250.
[21] *See Dow v. Johnson*, 100 U.S. 158, 164 (U.S. 1880) ("This brings us to the consideration of the main question involved, which we do not regard as at all difficult of solution, when reference is had to the character of the late war. That war, though not between independent nations, but between different portions of the same nation, was accompanied by the general incidents of an international war. It was waged between people occupying different territories, separated from each other by well-defined lines.).
[22] *See e.g. Jackson v. Holt*, 1995 U.S. Dist. LEXIS 9181, *15 (S.D.Al. 1995).
[23] Gov. Response at 26.

string of cases to support its proposition.[24] Each of these cases, however, is either distinguishable or supportive of the need for a target.

Each of the cases deals with the direct contribution to a conspiracy, not, as here, to the support of a conspirator. This is notable because the question of the target of the support was never raised in each of these cases, as it was clear from the conspiracy itself.

The government posits that *Stewart* supports their contention because it upheld a conviction under 2339A for a conspiracy to materially support "the killing of Jews wherever they are and wherever they are found."[25] As is obvious, "Jews" are the target of that conspiracy…the same component that is lacking in Mr. Harcevic's indictment.[26]

Each case that follows *Stewart* in the Government's response contains an equally obvious target. In *Jayyousi* the case involved direct support of an FTO, the mujahideen, whose purpose and targets are and were well known.[27] In *Wultz* the government fails to point out its focus on another FTO with similarly obvious targets, the Palestinian Islamic Jihad.[28] Finally, in *Sattar*, the focus was on the "Islamic Group, an organization led by Sheikh Abdel Rahman" with the stated goal to wage war against "infidels" defined as those "nations, governments, institutions, and

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[24] *See* Gov. Response at 26-28, citing *United States v. Stewart*, 590 F.3d 93, 116 (2nd Cir. 2009); *United States v. Jayyousi*, 657 F.3d 1085, 1105 (11th Cir. 2011); *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 46 (D.D.C. 2010); *United States v. Sattar*, 314 F. Supp. 2d 279, 304 (S.D.N.Y. 2004); *United States v. Salameh*, 152 F.3d 88, 154 n. 16 (2nd Cir. 1998); *United States v. Wharton*, 320 F.3d 526 (5th Cir. 2003).

[25] *United States v. Stewart*, 590 F.3d 93, 116 (2nd Cir. 2009); Gov. Response at 27.

[26] In fact, the Second Circuit went on to describe, from the facts laid out in the indictment, that the conspiracy (which involved the writing of a fatwa against Jews and Crusaders) was "not materially different in substance from a crime boss making decisions about his criminal enterprise from prison and ordering a 'hit.'" *Stewart*, 590 F.3d at 116. A crime boss's hit needs a target.

[27] *Jayyousi* found that the mujahideen "shared a common purpose to support violent jihad to regain the lands that were once under Islamic control." *United States v. Jayyousi*, 657 F.3d 1085, 1105 (11th Cir. 2011). First, this case involves the mujahideen specifically, whose targets and objectives are well-known and existent. Second, there is a clearly implied target – namely, persons occupying lands formerly under Islamic control and impeding the mujahideen from establishing its Islamic State on those lands. Finally, the case involves an individual seeking out al-Qaida and hoping to join Osama Bin Laden in his jihad…an individual who clearly had specific targets in mind.

[28] This group's clear purpose is to terrorize Israeli civilians, and thus the target here exists and is clear: Israeli civilians. Additionally, the target alleged in the case is more specific than even "Jews" or "Israeli civilians." In fact, it's in the name of the case: Daniel Wultz, who was killed in the suicide bombing attack on the Tel-Aviv restaurant at issue.

individuals that did not share [Sheikh Abdel Rahman]'s radical interpretation of Islamic law."[29]

While the Government may be correct that a violation of §2339A need not be directed at a particular FTO, each of its cases deals with a specific FTO.[30] In the absence of an FTO from which defendants may conclude the objectives and targets of their alleged conduct, Mr. Harcevic must be put on notice of the target directly to provide him with adequate notice to plead defenses, plead guilty, and/or plead double jeopardy to subsequent prosecution.

Respectfully Requests to Present Oral Arguments

In recognition of the issues of first impression presented by Mr. Harcevic's indictment and motion to dismiss the same, Mr. Harcevic requests to present oral argument before the Court in support of his motion to dismiss.

Conclusion

For the reasons set forth in his memorandum of law in support of his motion to dismiss the indictment and in this reply, Mr. Harcevic prays that this court dismiss him from the present indictment.

DATED this 4th Day of February 2016

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[29] *Sattar*, 314 F. Supp. 2d at 287. The indictment further specified that "Sheikh Abdel Rahman allegedly supported and advocated jihad to, among other things (1) overthrow the Egyptian government and replace it with an Islamic state; (2) destroy the nation of Israel and give the land to the Palestinians; and (3) oppose those governments, nations, institutions, and individuals, including the United States and its citizens, whom he perceived as enemies of Islam and supporters of Egypt and Israel."[29] Those are very particularized objectives, and by tying the conspiracy to the support of this particular FTO, it is a reasonable inference that the indictment alleges these objectives as the targets of the 2339A and §956 violations.

[30] *See* Gov. Response at 24.

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of defendant Harcevic's Reply to Government's Response to Defendant's Motion to Dismiss was electronically filed and served on the Court's electronic filing system:

DATED this 4th day of February, 2016.

/s/ Charles D. Swift

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