US, Combatant Immunity and Recognition of belligerency

***Introductory text**: The case discusses a motion presented before a US magistrate court in the Eastern District of Missouri. In response to their charges for providing assistance to a member of foreign terrorist organization the defendants claimed that the person they were accused of assisting benefited from the combatant immunity. The Magistrate Court decided that this defense could be made as the US had recognized the belligerency of the group he was fighting for. However, this decision was reversed by the district judge.*

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A. Opinion of David D. Noce, United States Magistrate Judge

[**Source**: *United States of America v. Ramiz Zijad Hodzic et al.,*United States District Court for the Eastern District of Missouri, Eastern Division, No.4:15CR49CDP/DDN, 9 May 2018, footnotes omitted]

OPINION

ORDER AND RECOMMENDATION REGARDING LAWFUL COMBATANT AFFIRMATIVE DEFENSE

[1] Before the Court, are the pending original joint motion and supplemental motions of defendants Ramiz Hodzic, Sedina Hodzic, Nihad Rosic, Mediha Salkicevic, and Armin Harcevic to dismiss Counts 1 and 3 of the indictment based on the affirmative defense of lawful combatant immunity under Federal Rule of Criminal Procedure 12(b)(1) […] ("motion to dismiss"), as well as their motion for a hearing on the motion to dismiss. The pretrial matters were referred to the undersigned United States Magistrate Judge under 28 U.S.C. ß 636(b).

[2] All five movant-defendants are charged in Count 1 with conspiring with one another, with Abdullah Ramo Pazara, and with others, beginning in May 2013 and continuing to the date of the indictment (February 5, 2015), to provide material support to terrorists, in violation of 18 U.S.C. ß 2339A. Defendants Ramiz Zijad Hodzic and Nihad Rosic are charged in Count 2 with conspiring with Pazara and others, beginning in April 2013 and continuing to the date of the indictment, to kill or maim persons in a foreign country, in violation of 18 U.S.C. ßß 956 and 2. In Count 3, all five movant-defendants and Pazara are alleged to have provided material support to terrorists, from May 2013 to the date of the indictment, in violation of ß 2339A. […]

[3] Defendants argue that the indictment must be dismissed for failing to state an offense, because the plain language of the indictment refers only to hostile acts that were part of lawful warfare against the regime of Syrian leader Bashar al-Assad, and support of these acts is therefore immune from prosecution under the lawful combatant immunity doctrine. The government argues that lawful combatant immunity is legally impossible to apply to these defendants, both because the Syrian civil war is a non-international armed conflict ("NIAC") and because the foreign terrorist organizations ("FTOs") defendants are alleged to have supported are categorically barred from receiving combatant immunity protection under United States interpretation of international law. […]

[…]

1. Facts Relevant to Lawful Combatant Immunity Defense

[…]

[4]

[…] In December 2012, President Barack Obama and deputy Secretary of State William J. Burns recognized the Syrian Opposition Council as "the legitimate representative of the Syrian people." […]

[…] Before and during the period of the alleged conspiracy, the Executive Branch of the United States Government ("Executive" or "President") provided the Free Syrian Army with supplies and assistance in its military operations against the Assad regime.

[…]

2. Justiciability of Lawful Combatant Immunity Issue

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A. The Offenses Charged

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B. Lawful Combatant Immunity Defense

[…]

[5] Lawful combatants enjoy "combatant immunity" for acts of warfare, including the wounding or killing of other human beings, "provided those actions were performed in the context of ongoing hostilities against lawful military targets, and were not in violation of the law of war." […] The Third Geneva Convention Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316 (Aug. 12, 1949) ("GPW") is a treaty that has been signed and ratified by the United States and incorporated extensively into United States law. […]

[6] Under the GPW, a lawful combatant is generally only a member of regular armed forces of a party to an "international armed conflict" ("IAC"), including "members of militias or volunteer corps forming part of such armed forces." GPW Arts. 2 and 4. Members of other militia, volunteer corps, and organized resistance movements belonging to a State party in an IAC are considered lawful combatants if:

(1) They are under the command of an individual who is responsible for his or her subordinates;

(2) They wear a fixed, distinctive sign or symbol recognizable at a distance;

(3) They carry weaponry openly; and

(4) They conduct operations in accordance with the laws and customs of war.

[…]

[7] However, lawful combatant protections are not exclusively reserved for those fighting in IACs. The GPW makes lawful combatant immunity protections applicable to fighters in non-IACs "*as a minimum*", and encourages signatory states to extend such protections to non-IACs ("NIACs"). GPW art. 3 ("each Party to the [non-international] conflict shall be bound to apply, as a minimum" various provisions that relate to hostages, treatment of civilians, humanitarian aid, and war crimes).

[8] American courts have applied international law principles, as codified in the GPW and in the customary international law of war preceding it, in certain NIAC cases, such as the Mexican Civil War, *Ex parte Toscano*, 208 F. 938, (S.D. Calif. 1913), and our own Civil War. *Ford v. Surget*, 97 U.S. 594, 605-08, 24 L. Ed. 1018 (1878). At the same time, courts have consistently denied combatant immunity to members of designated foreign terrorist organizations, who did not qualify for lawful combatant status under the GPW. […]

[9] Accordingly, the issues pending before the Court are (1) whether the Syrian conflict is an IAC; (2) if it is not an IAC, whether United States interpretation of international law would nonetheless apply lawful combatant immunity protections to it; and (3) whether Abdullah Pazara, whom defendants allegedly supported, would be precluded from claiming lawful combatant status by his asserted membership in a foreign terrorist organization. These issues are not intertwined with the elements of the offenses alleged in the indictment.

[…]

C. The Government's Political Question Argument

[…]

3. DISCUSSION

[10] The undersigned now takes up the issues regarding the substantive elements of the lawful combatant immunity defense.

A. Whether the Syrian Conflict Is an International Armed Conflict

[11] […] The armed conflict at issue here is between the state of Syria, which is a party to the GPW, and an army of rebels, which is not. The parties in this case do not appear to dispute that at all times relevant to the indictment the conflict was not an IAC, nor does the undersigned consider it an IAC. […]

[12] Instead, defendants ultimately argue that the Syrian conflict is a civil war, with the rebels engaged in legitimate warfare that confers on them “belligerent” status, including the protections of lawful combatant immunity. […] Accordingly, a cardinal question for the Court is whether the Syrian conflict constitutes a belligerency or otherwise warrants the conferral of lawful combatant immunity protections.

B. Whether Lawful Combatant Immunity Is Applicable to the Syrian Conflict

[13] The customary laws of war, including those involving lawful combatant immunity, apply during an armed conflict between a state and a belligerent. […] The current doctrine of lawful combatant immunity is reflected in the GPW, which essentially codified the international law of armed conflict. […] Reported cases following the United States' ratification of the GPW have analyzed the lawful combatant immunity defense according to GPW standards. […]

[14] Additionally, the lawful combatant immunity doctrine has a long history outside of the GPW. The doctrine finds its roots in common law principles and agreements between nations concerning the rights of enemy combatants during the conduct of war. […] In traditional international law, the legal status of an insurgent movement was usually determined by "the nature and extent of the insurrectionary achievement. […] If the parent State is able to rapidly suppress the insurgents, the event was described as an “insurgency.” […]But if the insurgents become a serious challenge to the government and achieve formal recognition as “belligerents,” then the struggle between the two factions becomes the equivalent of war. […]

[15] Under historical international law, a non-state organization was a belligerent if: (1) there was a state of general, as opposed to localized, armed conflict; (2) the insurgent body established a governmental structure exercising control over a part of the national territory; and (3) the insurgent forces fought in accordance with the laws and customs of war. […]

[16] The Supreme Court has held that lawful combatant immunity extends to “belligerents” for acts of legitimate warfare in the context of a civil war. The Court has held that a civil war constitutes “legitimate warfare,” *i.e.* belligerency, when it meets the following test:

When the party in rebellion [1] occupy and hold in a hostile manner a certain portion of territory; [2] have declared their independence; [3] have cast off their allegiance; [4] have organized armies; [5] have commenced hostilities against their former sovereign, the world acknowledges them as belligerents, and the contest a *war*.

[…] Defendants have proffered evidence of these factors. […]

[17] Defendants have shown that the United States Executive recognized the Syrian Opposition Council and the Free Syrian Army as a belligerent entity. […] Recognition of a belligerent by others confirms the application of international law to an armed conflict between that entity and a state. (“’recognition of belligerency’ . . . is usually deduced by implication. There is no need for an express proclamation of [it] inasmuch as it may be distilled from the conduct of States.”) […]

[18] “[T]he applicable provisions [of the GPW] represent a compulsory minimum. The words ‘as a minimum’ [used in GPW Article 3] must be understood in that sense. At the same time, they are an invitation to exceed that minimum.” *Commentary on the Geneva Conventions of 12 August 1949: III Geneva Convention Relative to the Treatment of Prisoners of War* 38 (Jean S. Pictet ed., 1960), […] “[I]f one Party to a conflict is recognized by third parties as being a belligerent, that Party would then have to respect the Hague rules.”

An internal conflict may, as it continues, become to all intents and purposes a real war. The situation of thousands of sufferers is then such that it is no longer enough for Article 3 [which applies only to non-international armed conflicts] to be respected. Surely the most practical step is not to negotiate special agreements, but simply to refer to the Convention as it stands[.]

[…]

[19] While the undersigned does not conclude that the Syrian conflict is an International Armed Conflict, it is factually analogous to non-IACs in which the United States recognized lawful combatant immunity for participating forces, especially civil wars. In the United States Civil War, the United States treated Confederate soldiers as prisoners of war even though it did not recognize the Confederacy as a separate government, and in the Mexican Civil War, the United States applied the law of war to both sides even though it had not accorded official recognition to either party. […]

[20] The United States viewed the Vietnam War as a conflict international in character. […] As in Vietnam, in Syria there are two native factions each claiming *de jure* sovereignty over the entire state, each receiving support from opposing international coalitions. […]

[21] Defendants have proffered sufficient evidence of the circumstances of the Syrian conflict to indicate the viability of the lawful combatant immunity defense. The United States recognized the Syrian opposition and its claim to *de jure* sovereignty as superior to that of the Assad regime during the periods relevant to the indictment. The Executive not only recognized the Syrian opposition as the country's lawful authority and called for Bashar al-Assad to step down, it provided the Free Syrian Army with supplies and assistance in its military operations. The American Executive granted a United States non-profit organization a license to support the FSA. And it has routinely permitted United States citizens to travel to Syria and other civil conflicts to fight

with non-FTO military organizations. […]

[22] The undersigned concludes that the circumstances of the Syrian conflict indicate the potential application of the lawful combatant immunity defense.

C. Whether Abdullah Ramo Pazara Was A Lawful Combatant

[23] Defendants' entitlement to invoke the lawful combatant immunity affirmative defense depends ultimately on the question, for which faction of the Syrian opposition did Abdullah Ramo Pazara actually fight? Defendants argue that Pazara and the Bosnian unit he was in fought within or alongside the Syrian rebels engaged in legitimate warfare against the Assad regime. […] They argue that Pazara initially joined the Free Syria Army ("FSA"); and the Bosnian unit was subsequently placed under the command of Jaish al-Mujajireen wal-Ansar ("JMA" or "JAMWA"), still under the umbrella of the FSA. […] In January 2014, Pazara joined another group called the Bayt Commandos. […] In support of these claims, defendants cite to the Doha Agreement, news articles, and the interviews of an investigator with people who were on the ground with Pazara.

[24] The government argues that, even if combat against the Assad regime is otherwise lawful under the GPW, Pazara was not a lawful combatant, because he fought "in support of" certain FTOs. […] Foreign terrorist organizations are barred from claiming eligibility for combatant immunity. […] This argument is consistent with United States jurisprudence following September 11, 2001. […]

[25] The government and the defendants both cite *Lindh*, in which the defendant sought dismissal of certain counts charging him with participating in combat in foreign terrorist organizations and against American and allied forces. […] He argued before trial that he was entitled to lawful combat immunity as a Taliban soldier. […] In deciding that Lindh was not entitled to lawful combatant immunity status, that court considered five criteria: (1) the president's determination of the individual's combatant status, (2) whether the organization is commanded by a person responsible for subordinates, (3) whether the members have a recognizable, fixed emblem or uniform; (4) whether the members carry arms openly, and (5) whether the members conduct their operations in accordance with the laws and customs of war. […]

[26] This Court can construe the United States' post-September 11 denial of lawful combatant immunity to members of FTOs in a manner that is consistent with America's obligations under the GPW. *See Cook v. United States*, 288 U.S. 102, 120, 53 S. Ct. 305, 77 L. Ed. 641 (1933) ("A treaty will not be deemed to have been abrogated or modified by a later statute, unless such purpose on the part of Congress has been clearly expressed."). Such a construction is made relatively straightforward by considering GPW art. 4(a)(2)'s four-factor test, particularly its final factor (conducting operations in accordance with the laws and customs of war). The practice of terrorism as defined by 18 U.S.C. ß 2331 is inconsistent with the laws and customs of war, which demand adherence to the principle of distinction, which "requires belligerents to distinguish between civilian and military objects in attacks." […] Thus, it is legally impossible under United States' interpretation of international law for members of organizations found by the American Executive to be FTOs to be granted combatant immunity. Accordingly, if Pazara fought for an FTO, defendants are not entitled to the lawful combatant immunity defense.

[27] Defendants have proffered evidence that the organizations to which Pazara belonged were not FTOs, and they argue that each of the *Lindh* factors weighs in favor of a finding that Pazara fought as a lawful combatant. The FSA and JMA had commanders, […] the government produced photos of Pazara wearing a uniform and carrying a gun openly, […]the group carried arms openly and lived in barracks, […] and the FSA committed, at least nominally, to follow the laws of war. […]

[28] Furthermore, defendants proffered evidence from their investigation that Pazara's Bosnian unit was used largely for guard duty and was known to spend time on Facebook or cooking. […] On September 24, 2014, President Obama declared JMA a "specially designated global terrorist," nine months after Pazara assertedly left the group, and after the majority of the dates of the alleged conspiracy set out in the indictment.

[…]

[29] However, the undersigned recommends that defendants be permitted to submit the lawful combatant immunity affirmative defense at trial. The substantial factual disputes presented to the Court rest upon the identity of the group for which Pazara actually fought, when he did so, and whether it was a foreign terrorist organization, questions of fact that are properly reserved for a jury. Defendants have produced reports that would enable a trier of fact to determine for whom Pazara fought and whether this organization was an FTO.

[…]

B. Memorandum and order of Judge Catherine D. Perry, United States District Court Judge

[**Source:** *United States of America v. Ramiz Zijad Hodzic, Sedina Unkic Hodzic, Nihad Rosic, Mehida Medy Salkicevic, And Armin Harcevic*, United States District Court for the Eastern District of Missouri, Eastern Division, No. 4:15 CR 49 CDP, 5 February 2019, available at https://dig.abclocal.go.com, foot notes omitted]

[…]

Second Motions to Dismiss – Lawful Combatant Immunity

[1] Both sides have objected to Judge Noce's recommendations on the lawful combatant motions. Judge Noce concluded that the indictment should not be dismissed, but that defendants should be allowed to present evidence at trial on their defense of lawful combatant immunity. Judge Noce disagreed with the government's position that defendants were not entitled to assert this defense at all. Both sides have objected to the Report and Recommendation. Defendants object that they are entitled to an evidentiary hearing and dismissal of the indictment. The United States objects that, as a matter of law, defendants may not assert the defense at all.

[2] Judge Noce's factual findings are correct and are largely undisputed by the parties, so I will adopt them. With regard to his legal conclusions, however, after careful consideration, I disagree with the result reached and so will not adopt the conclusion that defendants may attempt to prove this defense at trial. Instead, I agree with the government that defendants are not entitled to assert the defense of lawful combatant immunity. I conclude that lawful combatant immunity cannot apply to actions of combatants who were involved in a non-international armed conflict. To the extent that pre-Geneva Convention cases recognized a common law lawful combatant defense, that body of law has been superseded by the Geneva Conventions. At the time that Abdullah Ramo Pazara fought in the Syrian civil war (2013 and 2014), which is the same time defendants here are alleged to have provided support to terrorism, the Syrian civil war was a non-international armed conflict. As such, Pazara did not qualify as a lawful combatant, and defendants here may not assert combat immunity as a defense. I will therefore deny the motions to dismiss in their entirety and will not allow defendants to present at trial any evidence or arguments about this defense or about their alleged mistaken belief that it might apply.

[3] The Fourth Circuit Court of Appeals recently considered and rejected the same argument made here in the case of United States v. Hamidullin, […] the Defendant Hamidullin was charged with providing and conspiring to provide material support to terrorists in violation of 18 U.S.C. § 2339A, the same as defendants here. He argued, the same as defendants here, that he was entitled to combatant immunity.

[4] Hamidullin was affiliated with the Taliban and Haqqani Network and was captured in Afghanistan in 2009. The Court of Appeals reviewed the doctrine of combatant immunity and noted that it is codified in the Third Geneva Convention. […] The Court held that "Article 2 of each of the Geneva Conventions renders the full protections of the Conventions, including combatant immunity, applicable only in international armed conflicts between signatories of the Conventions."

[5] To be entitled to combatant immunity, the Fourth Circuit explained,

. . . the Third Geneva Convention requires that a combatant (1) be captured during an international armed conflict, Third Geneva Convention, art. 2, and (2) be a lawful combatant – in other words, the combatant must belong to one of the Article 4 categories defining POW's, id. art 4. . . . Article 4(A)(2) provides that members of militias belonging to a party to the conflict are lawful combatants entitled to POW status so long as they are commanded by a person responsible for subordinates, carry a "fixed distinctive sign," carry arms openly, and operate in accordance with the laws of war. Id. art. 4(A)(2).

[5] […] The Court then concluded that the conflict in Afghanistan was not an international armed conflict and that therefore Hamidullin was not entitled to combatant immunity:

[…]

[6] Judge Noce's reliance on pre-Geneva Convention case law, including United States v. Palmer, 16 U.S. 610 (1818), The Ambrose Light, 25 F. 408 (S.D.N.Y. 1885), and Ford v. Surget, 97 U.S. 594 (1878), to recognize the common law principle of combatant immunity was therefore misplaced. The careful distinctions made in the Convention between the protections that apply in international armed conflicts between signatories to the Conventions and those fighting in non-international conflicts means that the Civil War cases and others relied on by Judge Noce no longer apply to this situation. Additionally, while it is clear that the government can always choose not to prosecute a party who fights and kills people in a civil war, there is nothing in the law that says the government cannot prosecute such a person if it believes that person has committed crimes such as murder or conspiracy to murder.

[7] For the above reasons, I conclude that the defendants in this case are not entitled to combatant immunity. Their assertion of this defense fails, and they may not assert it as a defense at trial. I will deny the motions to dismiss in their entirety, and will not allow at trial evidence or arguments that Pazara's actions are protected by lawful combatant immunity.

[…]

Discussion

I. Classification of the situation

1. *(Document A, paras. [11]-[12])* Do you agree with the classification of the situation in Syria made by Judge Noce? What about the classification of Judge Perry? If so, what are the applicable laws? Does APII apply? Why or why not? (GCI-IV, Art. 2, 3; P II, Art. 1)

II. Recognition of belligerency

2. *(Document A, paras. 4, 13-16)*

a. Does the declaration of the US amount to recognition of a government? How can this be determined? Would a recognition of the entity for which the defendants fought as the government of Syria turn the conflict into an IAC?

b. Can the declaration of the US amount to recognition of belligerency under IHL? What needs to be fulfilled for an act to be a recognition of belligerency? Does IHL have any say in the matter? Do you agree with the analysis of Judge Noce on the recognition of belligerency?

3. *(Document A, paras. 17-18)*

a. What is the effect of recognition of belligerency for the applicable law?

b. Does it change the classification of the conflict between the Free Syrian Army and the Syrian forces?

c. Does it have an implication on the status of the US with regard to the parties to the conflict?

d. Do you agree with judge Noce in that common article 3 is only a 'compulsory minimum'? Is there anything in Article 3 common that suggest the application of IHL of IACs? (GC I-IV, Art. 3; ICJ, Nicaragua v. United States)

III. Combatant Immunity

4. What is combatant immunity? Is it included anywhere in IHL treaties? (P I, Art. 43)

5. Who is entitled to combatant immunity? Which criteria must be fulfilled for a person to benefit from it? What is the effect of combatant immunity? (P I, Art. 43)

6. *(Document B, para. 4)*

a. Do you agree with Judge Perry's statement that that combatant immunity cannot be claimed in a NIAC? Why/why not?

b. Do you agree with Judge Perry's statement that customary rules of belligerency are superseded by the Geneva Conventions? Did the rules of recognition of belligerency fall into desuetude?

7. Can an individual be beneficiary of combatant immunity in case of a recognition of belligerency? Are there conditions the individual must fulfil? (P I, Art. 43; P I, Art. 44)