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Engaging for Peace: What Are the Legal Limits to Working With Terrorists?

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Summary

The U.S. Supreme Court recently decided that a federal antiterrorism law constitutionally prohibits extensive domestic and foreign conduct undertaken in support of terrorist organizations, irrespective of whether the conduct was intended to assist an organization's terrorist designs. This decision has left many international actors uncertain as to whether their routine activities, particularly in conflict situations such as Afghanistan, could result in criminal prosecution or a civil suit under U.S. law. The uncertain scope of domestic liability is exacerbated by a lack of precision in international counterterrorism law. Various international measures call on states to prohibit a broad range of support activities for terrorist organizations, without requiring exemptions or immunities for humanitarian, development, or peacemaking. Viewed collectively, U.S. and international law indicate a general need for greater clarity in this area, both to isolate those that should be prosecuted for material support and to protect and guide the conduct of public and private actors that engage with terrorist organizations to promote peace and development.

Introduction

The U.S. Supreme Court's recent decision in *Holder v. Humanitarian Law Project* (*HLP*) has prompted a closer examination of the limits to engagement with foreign terrorist organizations (FTOs) under contemporary U.S. and international law.

The Court concluded that the Antiterrorism and Effective Death Penalty Act's (Anti-Terrorism Act or ATA)[1] proscription of material support is constitutional as applied to the particular peacemaking and education activities contemplated by the plaintiffs in the *HLP* case.

The *HLP* decision has been controversial because of the liability risks it indicates for those seeking to engage with FTOs for peaceful purposes. The decision sanctioned the ATA's criminalization of certain conduct irrespective of whether it was intended to further an FTO's terrorist goals or some other, more laudable objective. Knowledge that the recipient of prohibited support is an FTO or engages in terrorist activity is sufficient.[2] This raises serious questions about the legal limits of international peacekeepers', mediators', and development actors' engagement with FTOs.

In addition, the *HLP* decision indirectly raises questions as to the scope of material support prohibitions under international law. A set of 13 international terrorism conventions (the Terrorism Conventions) call on UN member states to prohibit certain terrorism support, and the UN Security Council has taken various measures to cut off resources from the Taliban and other organizations allegedly supporting or engaging in terrorism. Consideration of these international measures is instructive as to

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what limits to engagement with terrorist organizations exist internationally and whether the *HLP* decision can be reconciled with international law.

1. Limits Under U.S. Law

Potential Risk Exposure Under ATA and HLP Decision

The *HLP* decision is expressly limited to the particular peacemaking, education, and advocacy activities contemplated by the plaintiffs in that case, and the Court itself acknowledged that future applications of the ATA to other conduct may not necessarily pass constitutional muster.[3] As a result, despite its potentially far-reaching implications, important questions remain as to the ATA's scope.

Yet, the significance of the *HLP* decision should not be understated. Since 9/11, the ATA has become a primary prosecutorial tool in U.S. counterterrorism efforts.[4] Broadly speaking, the ATA contains three types of criminal liability for material support of terrorism: Section 2339A proscribes such support where the accused knows or intends that it will be used to carry out a terrorism offense, section 2339B assigns criminal liability to individuals and organizations that knowingly provide material support or resources to terrorist organizations, and lastly, section 2339C prohibits the indirect or direct provision of funds with the intention or knowledge that such funds be used to carry out a terrorism offense.[5]

The prohibited conduct and showing of intent required under sections 2339A and C are fairly straightforward. Both sections require a federal prosecutor to prove that the accused provided material support or funds with the intention that they be used to assist a terrorism offense or that the individual or organization knew that the funds would be used, at least in part, for such purposes. It is the prohibition contained in section 2339B, whose interpretation was the subject of the *HLP* case, where substantial questions arise as to the necessary state of mind and the precise conduct prohibited.

Under section 2339B, the ATA criminalizes the provision of material support or resources to an FTO where the accused merely knew that the recipient was a terrorist organization – regardless of their intent as to how those resources should be used. This knowledge requirement was disputed in the *HLP* case and remains unsettled in the courts. In a recent trial of the Holy Land Foundation and its top officials under the ATA, the federal district court did not require a showing that the accused knew they were providing support to a terrorist organization.[6] A finding that the accused knowingly provided funds to the recipient and that the recipient was controlled by an FTO was sufficient, regardless of whether the accused knew of this control. This issue, which is currently on appeal to the U.S. Court of Appeals for the Fifth Circuit, illustrates the interpretive controversies that persist and the risk exposure to individuals and organizations that results. Under that district court's interpretation of the knowledge requirement, even due diligence by an organization as to whether a specific recipient of support was an FTO would not be sufficient to prevent a liability risk if the accused provided material support or resources to an organization that turned out to be controlled by an FTO.

Precisely which conduct is prohibited by the ATA has been controversial since the law's inception in the 1990s.[7] The statute presently defines "material support or resources" to include any property, service, monetary instrument, training, expert advice or assistance, personnel, or transportation.[8] Only

the provision of medicine and religious materials are definitively identified as lawful exceptions.

Most relevant to the *HLP* case was the ATA's proscription of "training," "expert advice or assistance," and "service[s]." The ATA defines unlawful "training" as the instruction of any "specific skill;" banned "expert advice or assistance" refers to any counsel based on "scientific, technical, or other specialized knowledge;" and the Court indicated that any advocacy coordinated with FTOs constitutes an unlawful "service."[9] In light of these definitions, the Court found that the ATA constitutionally proscribed the following conduct at issue in the *HLP* case: training FTO members to use international law to resolve disputes peacefully, teaching FTO members to petition the United Nations and other international bodies for relief, and engaging in political advocacy in coordination with or at the direction of an FTO.[10] The Court found that the ATA, when applied to these particular activities, provides fair notice to a person of ordinary intelligence of what is prohibited.[11]

The Court expressly declined to address hypothetical applications of the ATA. Most notably for the purposes of actors currently engaged in Afghanistan, the Court declined to consider whether assisting a known FTO with the negotiation of a peace agreement would constitute unlawful material support.[12] As a result, although it is clear that training an FTO on how to negotiate for peace is unlawful, it remains unclear whether the mere coordination or facilitation of peace processes would run afoul of the ATA. In fact, apart from the conduct at issue in the *HLP* case, it is difficult to state with precision what other forms of engagement might violate the statute.

Nevertheless, the Court's reasoning in the *HLP* decision is instructive for potential applications of the ATA to engagement with the Taliban or other FTOs.[13] The Court based its decision in part on the notion that material support lends legitimacy to an FTO, which in turn makes it easier for the group to persist, to recruit, and to raise funds. In addition, the Court was persuaded by the fungibility of FTO resources—material support frees up other resources that the FTO may put toward terrorist activities.

Read in conjunction with the *HLP* decision's underpinnings, the ATA indicates that a slew of activities currently undertaken by foreign governmental actors, private nongovernmental organizations (NGOs), and even the UN Assistance Mission in Afghanistan (UNAMA) could risk prosecution, absent immunity from suit (addressed below). As international policy moves steadily toward the pursuit of a negotiated settlement to the conflict in Afghanistan, many of these actors will be called to engage with key Afghan stakeholders, including members of the Taliban and other actors designated as terrorist organizations under U.S. law or listed under resolutions adopted by the UN Security Council.

After the *HLP* case, such a policy of engagement raises real questions for these actors concerning their potential exposure under the ATA to prosecution or other legal liability. Although prosecuting material support rightfully remains a valuable tool in counterterrorism efforts, the precise scope of conduct that would violate U.S. law is unclear. For example, the provision of "lunch money" or other stipends to Taliban members at a peace conference or Track II negotiation seemingly would be proscribed. Transport to and from such a meeting would be prohibited.[14] Without further clarification by Congress or the Court as to what distinguishes a "specific skill" from "general knowledge" for the purposes of unlawful "training," any technical assistance to the Taliban, such as

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skills training provided to lower-level Taliban pursuant to an internationally supported demobilization, disarmament, and reintegration program, presumably could be prosecuted. Indeed, under the *HLP* decision, it is difficult to imagine what assistance or provision of funds would not free up Taliban resources for other illicit purposes or in some sense legitimate the group and thereby fall afoul of the ATA. Given the potential breadth of the ATA's scope *ratione materiae*, the question of its scope *ratione personae* becomes even more salient.

To Whom Does the ATA Apply?

That conduct takes place outside the United States does not shield actors from prosecution. The ATA provides jurisdiction to U.S. courts in cases where the alleged violation was committed by U.S. nationals or permanent residents or where the offense occurs in the United States or affects U.S. interstate or foreign commerce.[15] Any material support in aid of a terrorist organization whose offenses directly or indirectly impact the United States or its commercial interests also may be subject to prosecution. Even if the allegedly unlawful conduct takes place entirely outside the U.S. territory and has no impact on the United States or its interests, the ATA allows the U.S. government to prosecute any individual who is later brought into or found on U.S. territory.[16] The ATA thus plainly grants U.S. courts extraterritorial jurisdiction over U.S. and non-U.S. nationals operating abroad.

None of this suggests that a federal prosecutor is likely to prosecute a UNAMA or foreign government official or another similarly situated actor working for peace. A number of immunities and prudential considerations would likely preclude such a result. Most relevant to the UNAMA example, UN personnel enjoy broad immunity under the UN Charter and the Convention on the Privileges and Immunities of the United Nations. The convention provides UN representatives and officials with immunity from all legal action for any activity undertaken in their official capacities.[17]

In addition, with respect to foreign governmental actors, it is generally accepted by the U.S. government that criminal jurisdiction over foreign governmental activity should be exercised sparingly and only where there is strong justification for doing so.[18] Any federal prosecutor seeking to prosecute under section 2339B must receive the Attorney General Office's approval,[19] and given the varied diplomatic and prudential considerations, such approval is likely to be given cautiously. Only in rare circumstances, such as the alleged involvement of Libyan officials in the Lockerbie bombing and General Manuel Noriega's role in the international drug trade, is the prosecution of foreign government officials likely to occur.

Prosecution of a member of the U.S. military or a private contractor for the U.S. military is also unlikely, albeit possible. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA) provides that any member of the U.S. military and anyone employed by or accompanying the military may be prosecuted for conduct outside the United States that would constitute an offense punishable by imprisonment of more than one year if committed domestically.[20] In other words, the MEJA indicates that U.S. soldiers or military contractors[21] who provide support to the Taliban could theoretically be prosecuted under the ATA. Whether their prosecution is likely, recent reports indicating that U.S. private security contractors routinely pay Taliban leaders protection money for military supply routes in Taliban-controlled areas of Afghanistan illustrate the risk exposure that arises under the ATA.[22] If a security contractor is found to have paid off a Taliban

leader or a member of a designated terrorist organization knowingly, such conduct would likely constitute criminally proscribed material support.

Nonmilitary contractors in Afghanistan, as well as private, not-for-profit NGOs engaged in peacebuilding and development work are similarly exposed. Although the MEJA is expressly limited to military contractors and efforts to enact legislation that would extend extraterritorial jurisdiction to the conduct of nonmilitary, governmental contractors have not succeeded,[23] such contractors likely remain subject to the broad extraterritorial reach of the ATA. As interpreted by the *HLP* decision, any private contractor or NGO that provides resources to a terrorist organization could be subject to prosecution, irrespective of whether the funds were provided for protection and access or as part of aid or development projects.

Civil Liability Under the ATA

Section 2333 of the ATA provides a private right of action to any American who has been injured by an act of international terrorism overseas. Federal courts have indicated that the same conduct proscribed by section 2339, namely the provision of material support to a terrorist organization, may constitute an act of international terrorism for the purposes of civil liability.[24] Given the inherent limits of criminal prosecutions, civil actions likely represent the most effective route to compensation for many terrorism victims and thus pose a significant risk for those who engage with FTOs.

U.S. and foreign governmental officials are immune from suit under section 2333 for acts taken in their official capacities.[25] With regard to private individuals and organizations, however, the results of litigation provide some insight into the scope of potential liability. First, a showing of intentional misconduct or recklessness likely is required to impose civil liability under the ATA.[26] If a plaintiff can show that a defendant made a material contribution, financial or otherwise, with awareness or reckless disregard of the fact that the recipient was a designated terrorist organization, there is no need for any additional showing that the defendant's conduct caused any terrorist act.[27] Similar to the criminal statute, earmarking resources or support for an FTO's nonterrorist activities also will likely not preclude civil liability.[28] A plaintiff must show only that the defendant provided material support to a terrorist organization whose acts caused his or her injury.[29]

2. Limits Under International Law

It is instructive to consider the *HLP* decision and the ATA in light of international counterterrorism law. The international community has an integral role to play in setting boundaries for the collective response to terrorist threats. This section contextualizes the *HLP* decision internationally and examines whether any unifying theories or trends of secondary liability have emerged that might help clarify for humanitarian, peacemaking, and development actors where the legal limits of interaction with terrorist organizations lie under international law.

UN Security Council Counterterrorism Resolutions

The conduct of al-Qaida and the Taliban has prompted the UN Security Council to invoke its binding Chapter VII powers to call on states-parties to prohibit certain forms of support to those terrorist organizations. In 1999 and 2000, the council required that all UN members and any persons within their territories stop making any financial resources available to the Taliban, except for limited humanitarian reasons.[30] Security Council

Resolution 1267 and subsequent related resolutions established the Al-Qaida and Taliban Sanctions Committee and required that all UN members take measures to ensure that no financial resources are made available to either organization. The resolutions call on all UN member to freeze all funds and other financial resources intended to benefit the Taliban or al-Qaida directly or indirectly.

Next, in the aftermath of 9/11, the Security Council cast an even wider net, beyond just the Taliban and al-Qaida and beyond only financial support. Security Council Resolution 1373 called on states to comprehensively prohibit any support whatsoever, whether financial or otherwise, to the commission of terrorist acts and to entities or persons involved in terrorism.[31] Going beyond Resolution 1267, Resolution 1373 requires that UN members prohibit any person or entity from making any financial or economic resource available to terrorists or terrorist organizations.[32] When read in context, this proscription likely does not require states to prohibit under criminal law the provision of economic or financial resources unless the resources are intended to be used or it is known that they will be used to carry out terrorist acts.[33] Yet, Resolution 1373 does not prevent states from imposing such broad criminal sanctions and, at minimum, requires all UN members to prohibit under civil law the provision of any financial or economic resource, even if the support is entirely unrelated to any terrorist purpose.

Eight years after Resolution 1373's adoption, Resolution 1904 expounded on the prohibitions of Resolutions 1267 and 1373. In addition to reaffirming those resolutions' prohibitions described above, Resolution 1904 indicates that any individual, group, or entity that supports the acts or activities of the Taliban is to be considered "associated" with the Taliban.[34] If applied to humanitarian, peacemaking, and reconstruction activities in Afghanistan, Resolution 1904, read together with Resolutions 1267 and 1373, could hamstring UNAMA and similarly situated international actors.

Again, this analysis is not intended to suggest that UNAMA itself is in any danger of being exposed to liability. Given that UNAMA's very mandate is a product of Security Council action, such a result would be patently absurd. Nevertheless, the fact that Security Council language that is binding on all UN members is trending in this direction without recognition of functional immunities, and could be applied to any individual or organization through domestic implementing legislation worldwide, is important to acknowledge. The Security Council's resolutions may significantly limit the room to maneuver for a range of private and public humanitarian, development, and peacemaking actors by exposing them to real or imagined risks of liability and reducing the willingness of donors and political backers to provide support.

Terrorism Conventions

Each of the 13 Terrorism Conventions developed under UN auspices require states-parties to punish certain terrorist conduct in their respective domestic laws. The conventions do little, however, to particularize the liability of those that might have directly or indirectly assisted the commission of those acts. Where the Terrorism Conventions do address secondary liability, it is largely accomplice liability,[35] and early Terrorism Conventions did so with little if any elaboration on the contours of such liability.[36] This failure to particularize effectively has left states-parties with wide latitude as to how secondary liability is addressed in their respective municipal laws.

Only in some of the more recent Terrorism Conventions has secondary accomplice liability

been fleshed out. For example, both the Convention for the Suppression of Terrorist Bombings (1997) (Terrorist Bombing Convention) and the Convention for the Suppression of Acts of Nuclear Terrorism (2005) assign liability to a person who "[i]n any other way contributes to the commission of" terrorism offenses.[37] This catchall "contribution" provision is limited to those contributions that are made with the intentional aim of furthering the criminal purpose of the group or are made with the knowledge of the group's intention to commit a terrorist offense. As discussed further below, although it is unlikely that any humanitarian or development organization would intend to further the terrorist activity of the Taliban, the knowledge provision is more troubling. It is quite plausible that an international actor, such as a humanitarian, peacemaking, or development actor, could contribute resources to the Taliban while knowing that the Taliban plans to commit a wholly unrelated terrorist act.

The Convention for the Suppression of the Financing of Terrorism (Terrorism Financing Convention), unlike the other Terrorism Conventions, concerns itself almost entirely with indirect and secondary liability for terrorist acts.[38] The convention requires in great detail that states-parties criminalize the provision or collection of funds with the intention or knowledge that those funds will be used to carry out terrorist offenses.[39] As noted above, it is safe to presume that no UNAMA personnel acting within the scope of their duties would intend for any funds provided to the Taliban as part of any peace process or reintegration effort to be used to carry out terrorist acts. Similar to the Terrorist Bombing Convention, the crux of the issue would be whether knowledge that any such funds would be used by the Taliban, even if only in part, to carry out terrorist acts could be imputed to the person engaging the Taliban. This state of mind likely would be difficult to prove in a court of law, but not impossible. Given adequately broad operations in Afghanistan and familiarity with the Taliban, a prosecutor could argue that an international actor was actually or constructively aware of the Taliban's practices with respect to any funds received, no matter how nominal.[40] In other words, if the Taliban routinely commingles all of the funds they receive and the accused knew or should have known of this practice, even funds for transport or incidentals during a peace conference theoretically could constitute an offense under a national law enacted pursuant to this convention.

International Criminal Law

Whereas the Terrorism Conventions direct states-parties to criminalize certain conduct in their respective domestic laws, the Rome Statute of the International Criminal Court (ICC) defines what conduct amounts to an international crime. The Rome Statute defines the exclusive set of international crimes within the jurisdiction of the ICC to be genocide, crimes against humanity, war crimes, and aggression. Terrorism, although included in drafts of the Rome Statute, was specifically excepted from the final version and is not definitively an international crime.

Nevertheless, when a terrorist act is part of a widespread attack on civilians or occurs during armed conflict, terrorism offenses could amount to international war crimes or crimes against humanity. If a particular terrorist act were considered to be an international crime, several secondary modes of co-perpetration, including aiding and abetting, joint commission, joint criminal enterprise, and "contribution to a group crime," would become relevant under the Rome Statute and/or customary international law. Yet, all but the last of those concepts of liability involve some showing of criminal purpose on behalf of

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the accused; only a person that can be shown to have intended to assist the Taliban or another actor engaging in terrorism could be found liable.

It is thus solely the Rome Statute's "contribution to a group crime" mode of co-perpetration that likely exposes actors to any meaningful liability risk. That theory provides that a person is individually criminally responsible if he or she "[i]n any other way contributes to the commission or attempted commission of [an international] crime by a group of persons acting with a common [criminal] purpose."[41] Such a contribution can be criminal if it is intentional or made with the knowledge of the intention of the group to commit the international crime. Again, although it is unlikely that a peacekeeping or development actor would intend for its assistance to further the commission of an international crime, it is not inconceivable that some actors operating in Afghanistan or analogous situations could provide assistance to the Taliban or a designated terrorist organization while being aware of its intent to commit such a crime. To be found liable under the Rome Statute, the actor would not need to have intended for his or her contribution to assist the commission of the crime.

International Humanitarian Law

The developments in counterterrorism law described above have raised important questions as to the legality of activities undertaken by humanitarian relief organizations in situations of armed conflict such as Afghanistan. It is a widely accepted principle of international humanitarian law that warring parties will permit humanitarian organizations to access injured soldiers and civilians.[42] The International Committee for the Red Cross (ICRC), with its unique international mandate to provide assistance to conflict victims, enjoys widely recognized judicial immunity for its work,[43] and other impartial humanitarian organizations likely enjoy somewhat similar protections.[44]

Indeed, relevant UN Security Council resolutions and the ATA recognize certain humanitarian exemptions. The Al-Qaida and Taliban Sanctions Committee is authorized to permit the distribution of certain resources to the Taliban on the basis of humanitarian need.[45] In addition, the Terrorism Financing Convention indicates that it should not be read to affect international humanitarian law. Certain humanitarian organizations may arguably enjoy the immunity from prosecution described above under any national laws implementing the convention. Finally, as noted above, the ATA permits the distribution of medicine.

Nevertheless, despite these important exemptions relating to humanitarian resources, neither the ATA nor the relevant Security Council resolutions address humanitarian actors' full range of conduct in conflict situations.[46] For example, as part of relief efforts in Afghanistan, humanitarian organizations inevitably provide services and perhaps "training" or "expert advice or assistance" that goes well beyond the singular exemption of medicine under the ATA. Similarly, the relevant Security Council resolutions do not call on states-parties to accord any special status to humanitarian actors working with injured members of the Taliban or other terrorist organizations in situations of armed conflict. Although the Security Council has provided that funds and resources necessary for humanitarian purposes are to be exempted from its al-Qaida and Taliban sanctions regime, there has been no affirmation to date of functional immunities for the on-the-ground services and assistance provided by humanitarian actors.

To a troubling extent, the status of

humanitarian actors under U.S. and international law remains an open question. Precisely which organizations, if any, are shielded from prosecution for providing relief to terrorist groups engaged in armed conflict is unclear. Insofar as the ICRC and other humanitarian organizations in fact are immune for certain conduct, the permissible scope of such conduct is unknown.

3. Policy Recommendations

After the *HLP* case, there is little doubt that the ATA will be a thorn in the side of individuals and organizations that engage in peacemaking and educational activities with terrorist organizations and are not shielded by functional immunities. Even if prosecutions or lawsuits are rare, there will likely be a chilling effect—certain individuals and organizations will be understandably reluctant to risk liability. Evidently, the precise contours of civil and criminal liability under domestic and international law continues to evolve and will continue to be shaped by future constitutional challenges in the United States and policy discussions at the international level.

Viewed in isolation, the ATA as interpreted by the *HLP* decision justifiably could be a source of further criticism of U.S. counterterrorism policy. Yet, considered in the light of international law, the *HLP* decision begins to look less like an anomalous outlier and more like a global clarion call. The *HLP* decision, the ATA, and international counterterrorism measures collectively indicate a need for greater clarity, nuance, and precision when assigning secondary liability for terrorism.

One of the principal purposes of a legal rule, whether domestic or international, is its capacity to guide conduct and thereby achieve compliance. Further clarification of the ATA would be addressed most appropriately by Congress; the courts also will have a role. Although the Supreme Court has indicated that certain ATA definitions are not unconstitutionally vague, further legal determinacy as to the knowledge requirement and the types of conduct prohibited is necessary.

Opportunities will also arise for greater legal and linguistic precision internationally. Future extensions of UNAMA's mandate or of the mandates of other international missions tasked with engaging with organizations that some UN member states consider "terrorist" would offer the Security Council the opportunity to decisively reaffirm the functional immunities that apply to such engagement. As to secondary liability for terrorism generally, a unifying theory of liability that addresses ambiguities arising from the Terrorism Conventions and relevant Security Council resolutions could be included in any comprehensive terrorism convention that emerges from the United Nations. Of primary importance is clarification regarding the necessary showing of intent and the specific categories of supporting conduct to be permissibly targeted by states.

Another potential solution may involve the development of formal exemption procedures for engagement by certain organizations with terrorist groups under the ATA and international law. In the United States, the Office of Foreign Assets Control administers various economic sanctions that require broad prohibitions on transactions with designated FTOs and states. To mitigate the sweeping consequences of these regulations, specific procedures were promulgated by which NGOs involved in humanitarian or religious activities may apply for exemptions. Likewise, as noted previously, the al-Qaida and Taliban sanctions regime administered by the United Nations provides for certain, limited humanitarian exemptions. To account for the valuable work that many international actors, including but not limited

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to humanitarian organizations, provide on the ground in conflict situations, exemption procedures under the ATA and additional procedures at the international level would be useful to consider.

These recommendations are not intended to question the efficacy of criminalizing material support of terrorist organizations. To the contrary, such prohibitions have a valuable role to play in addressing terrorist threats. Instead, this report has sought to highlight that domestic and international standards in this area remain unclear and that greater legal precision is warranted to ensure an appropriate balance between the isolation and engagement in terrorism prevention strategies. Efforts to clarify would promote the effective prosecution of those in breach and guide the conduct of those who wish to comply.

Notes

[1] The U.S. criminal material support statute was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120005, 108 Stat. 2022 (1994), and codified at 18 U.S.C. § 2339A. The statutory section at issue in the *HLP* decision, 18 U.S.C. § 2339B, was added in the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, §§ 323, 303, 110 Stat. 1255, 1250 (AEDPA), and amended by the USA PATRIOT Act, Pub. L. No. 107-56, §§ 810(c), (d), 811(d), 115 Stat. 380, 381 (2001), and the USA PATRIOT Act Improvement and Reauthorization Act, Pub. L. No. 109-177, § 104, 120 Stat. 195 (2006). As discussed further below, the civil corollary of the criminal material support statute arises from the Antiterrorism Act of 1990, which is codified at 18 U.S.C. §§ 2331-2338. See Antiterrorism Act of 1990, Pub. L. 101-519, § 132, 104 Stat. 2250 (1990). For ease of reference, this report will refer to the civil and criminal statutes, 18 U.S.C. §§ 2331-2339, collectively as the Anti-Terrorism Act or the ATA. See, e.g., People's Mojahedin Org. of Iran v. U.S. Dep't of State, 327 F.2d 1238 (D.C. Cir. 2003) (referring to the Antiterrorism and Effective Death Penalty Act of 1996 alternatively as the AEDPA or the Anti-Terrorism Act).

[2] See *Holder v. Humanitarian Law Project*, 561 U.S. ___, slip op. at 6–7 (21 June 2010); 18 U.S.C. § 2339B.

[3] *Humanitarian Law Project*, 561 U.S. ___, slip op. at 34.

[4] Charles Doyle, "Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B," *CRS Report for Congress*, R41333, 19 July 2010, p. 1.

[5] See 18 U.S.C. §§ 2339A–C.

[6] "Amicus Brief of Charities, Foundations, Conflict Resolution Groups, and Constitutional Rights Organizations in Support of Defendants and Urging Reversal of Convictions of Counts 2-10," *United States v. Mohammad El-Mezain*, Case No. 09-10560, at 1–2 (5th Cir., 26 October 2010).

[7] Compare *U.S. v. Marzook*, 383 F.Supp. 2d 1056 (N.D. Ill. 2005) and *U.S. v. Assi*, 414 F.Supp. 2d 707 (E.D. Mich. 2006) with *Humanitarian Law Project v. Reno*, 9 F.Supp. 2d 1176 (C.D. Cal. 1998) and *Weiss v. National Westminster Bank PLC*, 453 F.Supp. 2d 609, 624–625 (E.D.N.Y. 2006). See Doyle, "Terrorist Material Support," pp. 2–3.

[8] 18 U.S.C. § 2339A(b)(1).

[9] See 18 U.S.C. § 2333A.

[10] *Humanitarian Law Project*, 561 U.S. ___, slip op. at 9.

[11] Ibid., p. 3 (citing *U.S. v. Williams*, 553 U.S. 285, 304).

[12] Ibid., p. 17.

[13] Although the Taliban has not been designated an FTO by the U.S. government, engagement with Taliban members likely still would fall under the scope of section 2339B. In addition to proscribing knowing support of

an FTO, the ATA proscribes knowing support of an organization that "has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1). Given the Taliban's status under UN Security Council Resolution 1267 and its known terrorism links, it would be plausible to argue that an accused international actor knew that the Taliban has engaged in terrorism.

[14] *See* Dexter Filkins, "Taliban Elite, Aided by NATO, Join Talks for Afghan Peace," *New York Times*, 19 October 2010, p. A1.

[15] 18 U.S.C. § 2339B(d)(1).

[16] 18 U.S.C. § 2339B(d)(1)(C).

[17] "Convention on the Privileges and Immunities of the United Nations," 17 September 1946, paras. 11, 18, 22.

[18] See *Restatement Third of Foreign Relations Law*, § 403.

[19] See "Notification, Consultation, and Approval Requirements for International Terrorism Matters," *United States Attorneys' Manual*, May 2010, § 9-2.136, http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.136.

[20] *Military Extraterritorial Jurisdiction Act*, Public Law 106-523, 114 Stat. 2488 (2000).

[21] A contractor subject to the MEJA is defined as anyone employed as a civilian employee of the Department of Defense, including a subcontractor at any tier, residing outside the United States in connection with such employment, except for nationals or residents of the host nations. Ibid., § 3267.

[22] U.S. House Oversight and Government Reform Subcommittee on National Security and Foreign Affairs, "Warlord, Inc.: Extortion and Corruption Along the Supply Chain in Afghanistan," June 2010; Aram Roston, "Congressional Investigation Confirms: U.S. Military Funds Afghan Warlords," *Nation*, 21 June 2010, http://www.thenation.com/article/36493/congressional-investigation-confirms-us-military-funds-afghan-warlords.

[23] H.R. 4567, known as the *Civilian Extraterritorial Jurisdiction Act*, was not passed into law during the last congressional session. David Isenberg, "Contractors and the Civilian Extraterritorial Jurisdiction Act," *Huffington Post*, 2 February 2010, http://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil_b_446298.html.

[24] See *Weiss*, 453 F.Supp. 2d at 613 ("[V]iolations of [§ 2339B and § 2339C] are recognized as international terrorism under § 2333."); *Boim v. Quranic Literacy Institute*, 291 F.3d 1000, 1015 (7th Cir. 2002) ("If the [plaintiffs] could show that [the defendants] violated either Section 2339A or 2339B, that conduct would certainly be sufficient to meet the definition of 'international terrorism' under sections 2333 and 2331."); *Goldberg v. UBS AG*, 690 F.Supp. 2d 92, 114 (E.D.N.Y., 5 March 2010) ("Following the Seventh Circuit's lead, numerous authorities have similarly interpreted [international terrorism]").

[25] See 18 U.S.C. § 2337.

[26] See *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685, 693–694 (7th Cir. 2008).

[27] See ibid.; *Abecassis v. Wyatt*, 704 F.Supp. 2d 623, 647 (S.D. Tex. 2010).

[28] *Abecassis*, 704 F.Supp. at 698; *Hussain v. Mukasey*, 518 F.3d 534, 538–539 (7th Cir. 2008).

[29] See *Goldberg v. UBS AG*, 660 F.Supp. 2d 410, 430 (E.D.N.Y. 2009). Section 2333 has been interpreted by courts to require a showing of proximate causation. However, courts have found that to require a showing that the very money or support provided proximately caused the terrorist act would render § 2333 powerless and conflicts with the legislative history of the ATA. Ibid. Because of this seeming conflict with traditional scope-of-liability restrictions in tort law, it remains to be seen whether the prevailing approach, whereby a donor in 1995 could be liable for a terrorist act that occurred in 2045, will ultimately carry the day. See *Boim*, 549 F.3d at 724 (J. Wood, dissenting in part).

[30] See UN Security Council, S/RES/1267, 15 October 1999; UN Security Council, S/RES/1333, 19 December 2000.

[31] UN Security Council, S/RES/1373, 28 September 2001, paras. 1, 2(d) (deciding that states shall prohibit the provision of any financial or economic resource to terrorist groups and ensure that those who support terrorist acts are brought to justice).

[32] Ibid., para. 1(d).

[33] Compare ibid., para. 1(b) (states shall "criminalize" certain financial support) with para. 1(d) (states shall "prohibit" making any resources available to those who participate in terrorist acts).

[34] UN Security Council, S/RES/1904, 17 December 2009, para. 2(d) (reaffirming "that acts or activities indicating that an individual, group, undertaking, or entity is associated with Al-Qaida, Usama bin Laden or the Taliban include … supporting acts or activities of Al-Qaida, Usama bin laden or the Taliban, or any cell, affiliate, splinter group or derivative thereof").

[35] Accomplice liability traditionally exists in common law jurisdictions where someone does or omits to do something with the intentional purpose of aiding and abetting a primary offender to commit a crime. *Black's Law Dictionary*, 7th ed. (2001) (defining an accomplice as a "person who knowingly, voluntarily, and intentionally unites with the principal offender in committing a crime and thereby becomes punishable for it").

[36] See, e.g., "Convention for the Suppression of Unlawful Seizure of Aircraft," 860 U.N.T.S. 105, 14 October 1971, art. 1 (assigning liability to any person who is an accomplice of a person who performs or attempts to unlawfully seize an aircraft); UN General Assembly, "International Convention Against the Taking of Hostages," A/34/46 (1979), art. 2 (indicating that "[a]ny person who … participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention"); "Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation," 27 I.L.M. 668 (1988), art. 3(2) (proscribing conduct that "abets the commission of any of the offenses set forth … perpetrated by any person or is otherwise an accomplice of a person who commits such an offense").

[37] See, e.g., UN General Assembly, "International Convention for the Convention for the Suppression of Terrorist Bombings," A/52/49 (1998), art. 2(3); UN General Assembly, "International Convention for the Suppression of Acts of Nuclear Terrorism," A/RES/59/290 (2005), art. 2.

[38] See "International Convention for the Suppression of the Financing of Terrorism," 39 I.L.M. 270 (2000) (hereinafter Terrorism Financing Convention).

[39] Ibid., art. 2 (proscribing the provision of funds with the "intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out" terrorist acts).

[40] "Constructive knowledge" is a legal term used to indicate that an individual using reasonable care or diligence should have known a given fact, and thus such knowledge is imputed to him or her by operation of law. *Black's Law Dictionary*, 7th ed. (2001).

[41] "Rome Statute of the International Criminal Court," 2187 U.N.T.S. 90, 1 July 2002, art. 25 (d).

[42] See "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts," 8 June 1977 (Protocol I), 1125 U.N.T.S.3, 7 December 1978 (hereinafter Protocol I); "Geneva Convention Relative to the Treatment of Prisoners of War," 75 U.N.T.S. 135, 21 October 1950, arts. 3, 9, 125 (hereinafter Third Geneva Convention); "Geneva Convention Relative to the Protection of Civilian Persons in Time of War," 75 U.N.T.S. 287, 21 October 1950, arts. 3, 10, 142 (hereinafter Fourth Geneva Convention).

[43] Gabor Rona, "The ICRC's Status: In a Class of Its Own," 17 February 2004, http://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm.

[44] Common Article 3 of the four Geneva Conventions of 1949 provides that other "impartial" humanitarian organizations, similar to the ICRC, also may offer relief services to parties to an armed conflict and civilians. See,

e.g., Third Geneva Convention, art. 3; Fourth Geneva Convention, art. 10; Protocol I, arts. 5, 9, 49, 81.

[45] See UN Security Council Resolution 1267; UN Security Council, S/RES/1452, 20 December 2002, para. 1(a) (providing that assets or economic resources necessary for foodstuffs, medicines, and medical treatment are to be exempted from the sanctions regime).

[46] Notably, the Terrorism Financing Convention indicates that its provisions do not affect the rights, obligations, and responsibilities of states under international humanitarian law. *See* Terrorism Financing Convention, para. 1.