THE CURRENT STATUS OF U.S. "MATERIAL SUPPORT" LAWS
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On April 24, 1996, Following the Oklahoma City bombing in 1995, Congress enacted the Antiterrorism and Effective Death Penalty Act (AEDPA), which prohibited "material support" of designated "Foreign Terrorist Organizations." While Congress pressed the U.S. State Department to name the "foreign terrorist organizations," following the enactment of the AEDPA, the State Department announced the designated organizations only after one year. The Liberation Tigers of Tamil Eelam, was, on October 8, 1997, among the thirty organizations designated "foreign terrorist organizations."

The criteria for designation are:

1) The organization is a foreign organization;
2) The organization engages in terrorist activity; and
3) The terrorist activity of the organization threatens the security of United States nationals or the national security of the United States.

The term "terrorist activities" is defined in the Immigration and Nationality Act as activity that is:

> unlawful … where it is committed (or which, if committed in the United States, would be unlawful under [state or federal law]), and which involves any of the following:
>
> (I) The hijacking or sabotage of any conveyance (including an aircraft, vessel, or vehicle).
>
> (II) The seizing or detaining, and threatening to kill, injure, or continue to detain, another individual in order to compel a third person (including a governmental organization) to do or abstain from doing any act as an explicit or implicit condition for the release of the individual seized or detained.
>
> (III) A violent attack upon an internationally protected person … or upon the liberty of such a person.
>
> (IV) An assassination.
>
> (V) The use of any—
>
> (a) biological agent, chemical agent, or nuclear weapon or device, or
>
> (b) explosive or firearm (other than for mere personal monetary gain),
>
> with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property.
>
> (VI) a threat, attempt, or conspiracy to do any of the foregoing.
>
> 8 U.S.C. § 1182(a)(3)(B)(ii).

However, according to the statute, if done for monetary gain, the above activities do not constitute terrorist activities. 8 U.S.C. §1189(c)(2).

As demonstrated above, the definition of "terrorist activities" is a broad one. Under the definition, writing graffiti by the Dalai Lama on a wall in Tibet against the Chinese occupation would be considered terrorist activity. In Matter of S-K-, 23 I&N Dec. 936 (BIA 2006), the Board of Immigration Appeals stated that, according to the statutory language, the motive of the organization is not relevant. However, following that, the Secretary of Homeland Security exempted eight organizations: the Alzados; the Arakan Liberation Party; the Chin National Liberation Front and the Chin National Army; the Chin National League for Democracy; the Karen National Union and the Karen National Liberation Army; the Karenni National Progressive Party; the Kayan New Land Party; and the Mustangs.

In Canadian legislation, terrorist activity is defined as encompassing ten United Nations Conventions pertaining to terrorism and a catch-all clause that encompasses the use of violence that results in death, serious harm, or substantial damage to property to further a political, religious, or ideological cause. However, the legislation exempts " and act or omission that is committed during an armed conflict, and that, at the time and in the place of its commission, is in accordance with international customary law or convention international law applicable to the conflict." Thus, according to the Canadian legislation, war, legitimate self-defense, and the legitimate use of force for the realization of self-determination cannot be considered "terrorist activities." Since the definition is based on customary international law and conventional international law, it can be argued that attacks on not-combatants will not fall within this exemption.

The term "national security" is defined as:

> the national defense, foreign relations, or economic interest of the United States.

The legal consequences of the designation are as follows:

> 1) The prohibition of "material support" to designated organizations;
> 2) The freezing of the property of the designated organization; and
> 3) Denial of entry to the representatives and some members of the designated organization.

It should be noted that the listed organizations are not banned organizations. They are only subject to the above-mentioned legal restrictions. However, in the U.K., the listed organizations are proscribed organizations, and offenses related to the listing include membership, support for and funding of proscribed organizations.

In Canada, Articles 83.02 and 83.05 prohibit Canadians from financing terrorist activity or providing property or services for purposes of terrorism. (The title of Article 83.03 is "Providing, making available, etc. property or service for terrorist purposes" [emphasis added]. However, 83.03(b) states that someone who provides the service, property, or financial or other related support "knowing that in whole or part they will be used by or will benefit a terrorist group [emphasis added] is guilty of an indictable offense." Given

that, it is not clear whether the scope of the law covers only participation in or contribution to terrorist activity, or any activity by a terrorist group.)

Challenging Designation

The AEDPA, while allowing the designated organizations to challenge the designations within thirty days in the U.S. Court of Appeals for the District of Columbia, prohibited any individual from challenging the designation in any criminal prosecution against him or her. The Court can set aside the designation if it finds that the designation is:

> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity; or
> (C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right; or
> (D) lacking substantial support in the administrative record taken as a whole or in classified information submitted to the Court.

Following their designation as "foreign terrorist organizations" in 1997, the LTTE and the People's Mojahedin Organization of Iran (MEK) challenged their designations in the D.C. Court of Appeals. The LTTE argued that it was not a foreign organization but a *de facto* government; and that its activities were not "terrorist activities" but legitimate armed resistance to save the Tamils from the genocidal attacks of the Sri Lankan government and means, as a last resort, for the Tamils to realize their right to self-determination. The LTTE also argued that its activities did not pose a threat to the national security of the United States. Moreover, the LTTE argued that it had been deprived of due process guaranteed in the Fifth Amendment to the U.S. Constitution. The LTTE argued that a copy of the entire administrative record and classified information should be turned over to the LTTE. Alternatively, if the entire administrative record and classified information could not be turned over to the LTTE, the LTTE requested the Court to permit the LTTE's counsel to review it. The LTTE argued that granting this request would enable the LTTE to place events in proper perspective and to test the trustworthiness of the contents of the record and classified information. The LTTE also argued that the AEDPA interweaves the powers and functions of the political branches with those of the judicial branch by imposing on the judiciary the review of the record in violation of procedures requiring the exercise of judicial power, and directing the judiciary to accept and decide the proceeding on that basis. In other words, the political branches were asking the Court to rubber-stamp a political decision. The LTTE further argued that the legitimacy of the judicial branch "ultimately depends on its reputation for impartiality. … That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action." *Mistretta v. U.S.,* 488 U.S. 361, 407 (1989).

In its decision, the D.C. Circuit Court stated, with respect to the LTTE's argument that it is a *de facto* government, "Who is the sovereign, *de jure* or *de facto*, of a territory, is not

a judicial, but a political question, the determination of which by the legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens, and subjects of that government." The Court concluded by saying, "Here, the Secretary determined that the LTTE was a foreign terrorist organization and, in the words of the statute, there is 'substantial support' for her finding in the materials she has furnished us as an 'administrative record.'" With respect to the issue of whether the LTTE engaged in "terrorist activities," the Court said, "any one of the incidents attributed to the LTTE would have sufficed under the statute." In other words, just one incident is enough to satisfy the definition of terrorist activity. It is also pointed out that in administrative law jurisprudence, the substantial evidence test is employed by the Courts when the parties have ample opportunity to develop the record and to confront and cross-examine the witnesses to ensure the reliability and trustworthiness of the contents of the record. However, in the process of designation there is no such opportunity for the parties concerned. The Court said that the

> designation may be improper because the Secretary's judgment that the organization threatens our national security is completely irrational, and devoid of any support. Or her findings about national security may be exactly correct. We are forbidden from saying. That we cannot pronounce on the question, does not mean that we must assume the Secretary was right. It means we cannot make any assumptions one way or the other.

With respect to the LTTE's due process argument, the Court said that since the LTTE, a foreign entity, did not have any property or liberty interest in the U.S., the due process guaranteed by the Fifth Amendment was not applicable. The Court concluded by addressing the quality of the evidence, stating:

> We reach no judgment whatsoever regarding whether the material before the Secretary is or is not true. As we wrote earlier, the record consists entirely of hearsay, none of it was ever subjected to adversary testing, and there was no opportunity for counter-evidence by the organizations affected. As we see it, our only function is to decide if the Secretary, on the face of things, had enough information before her to come to the conclusion that the organizations were foreign and engaged in terrorism. Her conclusion might be mistaken, but that depends on the quality of the information in the reports she received—something we have no way of judging.

As the statute says, the designation can be set aside if the Court views the Secretary's decision as "arbitrary, capricious, and an abuse of discretion." The Secretary need not prove that the organization is a terrorist organization beyond a reasonable doubt or by preponderance of evidence. Any student of jurisprudence knows that "abuse of discretion" is the lowest standard of scrutiny employed by courts. It also demonstrates that all the Court was not determining whether the designated organizations were in fact terrorist organizations, but whether, when the Secretary designated these organizations as terrorist organizations, she did not abuse her discretion.

In a subsequent, related proceeding, National Council of Resistance of Iran v. Dept. of State, 251 F.3d 192 (2001), when a domestic organization was also listed as a front organization for the MEK, the Court held that the Fifth Amendment was applicable. The Court held

> The Secretary must afford to the entities under consideration notice that the designation is impending. Upon an adequate showing to the court, the Secretary may provide this notice after the designation where earlier notification would impinge upon the security and other foreign policy goals of the United States.

In a dicta, the Court also said, "While not within our current order, we expect that the Secretary will afford due process rights to these and other similarly situated entities in the course of future designations." However, in subsequent designations, the concerned organizations were not provided with prior notice and a hearing.

Recently, the Court of First Instance of the European Communities, in *Organization des Modjahedines du Peuple d'Iran v. Council of European Union*, addressed the terrorist listing by the European Union. In support of its claim, the Organization des Modjahedines du Peuple d'Iran alleged infringement of the right to a fair hearing; infringement of the right to effective judicial protection; infringement of the presumption of innocence; and a manifest error of assessment. It also argued that the listing was an infringement of the right to revolt against tyrannical oppression, and of the principle of non-discrimination. The Court concluded that the contested decision did not contain a sufficient statement of reasons, and that it was adopted in the course of a procedure during which the applicants right to a fair hearing was not observed. The Court also said that it was not, "at this stage of the procedure, in a position to review the lawfulness of that decision." The Court also noted the absence to date of universally accepted definitions of the concepts of terrorism and terrorist acts.

The Preclusion of Collateral Attack on Designation

The statute precludes a collateral attack on the validity of the designation by any individual in any criminal proceeding. Supporters of the MEK who were criminally prosecuted for providing monetary contributions to the MEK challenged this provision. In U.S. v. Rahmani, 209 F. Supp. 2d 1045, the District Court held that 8 U.S.C. Section 1189 was facially invalid because an organization designated a "foreign terrorist organization" under 8 U.S.C. Section 1189 was precluded from challenging the facts contained in the record or presenting evidence to rebut the proposition that it was a terrorist organization.

The Court further held that the organizations that the defendants were alleged to have supported, having been designated "foreign terrorist organization" in violation of due process, could not serve as a predicate in a prosecution for violation of 18 U.S.C. Section 2339(B).

The defendants initially argued that under the Supreme Court's holding in U.S. v. Mendoza-Lopez, 481 U.S. 829, 95 L. Ed. 2d 772, 107 S. Ct. 2148 (1987), the indictment should be dismissed. In Mendoza-Lopez, the Supreme Court precluded the government from using a prior deportation against a defendant if it was the result of a due process violation and this violation was prejudicial. The defendants argued that under Mendoza-Lopez, the indictment should be dismissed because the MEK's designation violated due process, and thus the designation could not be used to provide a predicate to the charged offense.

The government, citing NCRI v. Dept. of State, 251 F.3d 192 C.D.C. Cir. 2001, argued that the same results obtained after the due process defects were purportedly cured. However, with respect to the LTTE's designation, since there was no cure of the due process violation similar to the ones pertaining to the MEK, and since there was no decision after the cure of the due process violation confirming the earlier decision, it can be argued that Mendoza-Lopez remains a valid defense to prosecution based on the LTTE's designation as a "foreign terrorist organization," which was made in violation of due process.

The District Court concluded that since Section 1189(a)(3)(A) and Section 1189(b)(2) precluded the designated organization from challenging the facts contained in the administrative record or presenting evidence to rebut the proposition that it is a terrorist organization, they were violations of due process and thus unconstitutional. The District Court further found that it was a facially unconstitutional restriction on judicial review of the designation for Congress to assign such review exclusively to the D.C. Circuit.

Following the District Court's ruling, the government appealed to the U.S. Court of Appeals for the Ninth Circuit. The defendants argued that the preclusion of collaterally attacking the designation as a "foreign terrorist organization" denied them their constitutional rights. In U.S. v. Rahmani, sub nom. U.S. v. Afshari, 426 F.3d 1150, 1152 (9th Cir. 2005), the Court held that "a criminal proceeding may go forward, even if the predicate was in some way unconstitutional, so long as sufficient opportunity for judicial review of the predicate exists." The Court concluded that such opportunity exists for the designated organization within thirty days of the designation. The Court, citing a Fourth Circuit decision, U.S. v. Hameed, 381 F.3d 316, 331 (4th Cir. 2004 (en banc), held that "the fact of an organization's designation as a terrorist organization is an element of the offense of providing material support (Sec. 2339B), but the validity of the designation is not. The Court distinguished U.S. v. Mendoza-Lopez ("where a determination made in an administrative proceeding is to play a critical role in the subsequent imposition of a criminal sanction, there must be *some* meaningful review of the administrative proceedings") and U.S. v. Bozarov, 974 F.2d 1037 (9th Cir. 1992) (the provision of "not subject to judicial review" results in no arbiter of the constitutionality of the Act, thus the defendant has standing to challenge the constitutionality in a criminal proceeding) on the ground that the designation process explicitly provides judicial review for the designated organization by the D.C. Circuit.

The defendants also argued that the MEK was not a terrorist organization and that they had a right under the First Amendment to contribute funds to it. The Court dismissed this

argument on the ground that the money sent to a designated organization is not equivalent to speech, but more like a donation of bombs and ammunition. The Court, while acknowledging that some monetary contributions receive First Amendment protection as speech, stated that not contributions receive such protection. The Court noted that the indictment charged the defendants with sending money to the designated organizations, not with providing instruction or advocacy. Additionally, the Court held that deference was due to the executive branch in the area of national security.

The defendants sought an *en banc* hearing, which was denied by the Ninth Circuit. However, in U.S. v. Afshari, 2006 U.S. App. LEXIS 10588 (9th Cir. 2006), five dissenting judges criticized the panel's decision, stating that the "prosecution in this case runs contrary to two of our defining traditions – that of free and open expression and that of justice and fair play." With respect to the defendants' argument that the MEK was not a terrorist organization, the dissent noted that the "crime isn't defined as providing support to an organization that *is* terrorist, only to one that is *designated* as such …" With respect to the defendants' First Amendment argument, the dissent characterized the designation as a prior restraint on speech, and, citing Freedman v. Maryland, 380 U.S. 51 (1965) and McKinny v. Alabama, 424 U.S. 669 (1976), stated, "only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression[;] thus only a procedure requiring judicial determination suffices to impose a valid final restraint." The dissent concluded that, "the procedure for designating a foreign terrorist organization has all the deficiencies identified by the Supreme Court in Freedman and then some."

The dissent also noted that "McKinney involved a criminal defendant charged with selling a magazine that had previously been declared obscene in a separate *in rem* action. The Supreme Court held that the defendant had a right to argue at his own trial that the magazine was not actually obscene and thus was protected by the First Amendment … McKinney thus stands for the proposition that a criminal defendant has an individual right to challenge the exclusion of what would otherwise be protected speech from the protection of the First Amendment."

Regarding the judicial review provision that informed the heart of the panel's decision in upholding the constitutionality of the designation statutory scheme, the dissent noted that the only entity that can seek judicial review of the designation lacks due process rights (since it is a "foreign" entity), and thus could not bring any kind of meaningful challenge. The dissent concluded its opinion by raising a question: "how can a procedure that was judicially determined to violate due process be an adequate substitute for the type of direct challenge that McKinney requires?"

The Prohibition on Providing "Material Support" to Designated Organizations

The AEDPA originally defined "material support or resources" as:

> currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.

Following the designation of the LTTE as a "foreign terrorist organization," five Tamil organizations—Ilankai Thamil Sangam, Tamils of Northern California, Federation of Tamil Sangams of North America, the Tamil Welfare and Human Rights Committee, World Tamil Coordinating Committee, and Dr. Nagalingam Jeyalingam (and the Humanitarian Law Project and former Judge Ralph Fertig) filed a Complaint in the U.S. District Court for the Central District of California, stating that they wanted to provide support for the lawful activities of the LTTE, and seeking a summary judgment and an injunction to prohibit the enforcement of the criminal ban on the provision of "material support" to the LTTE.

In the initial ruling (Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal 1998) ("District Court HLP I"), with respect to the Plaintiffs' argument that the prohibition imposes vicarious criminal liability without requiring proof of specific intent to further the terrorist activities of foreign terrorist organizations, and punishing moral innocence, the Court acknowledged the Supreme Court's holding, during the McCarthy era, that "[i]n our jurisprudence guilt is personal" and that "[m]ere membership without more, in an organization engaged in illegal advocacy [is] insufficient to satisfy personal guilt (Scale v. U.S., 367 U.S. 203, 224-225 [1961]). However, the Court distinguished between membership and conduct and held that Congress intended to criminalize "material support" of designated organizations irrespective of the donor's intent. On the other hand, the Court noted that, the "AEDPA does not criminalize mere association with foreign terrorist organizations."

With respect to the Plaintiffs' argument that the terms "training" and "personnel" were impermissibly vague and encompassed activities protected under the First Amendment to the Constitution, the Court held that "training" as an undefined term was impermissibly vague because it easily encompassed protected activities, such as teaching how to seek redress before the United Nations. With respect to the term "personnel," the Court held that it was impermissibly vague because it "broadly encompasses the type of human resources which Plaintiffs seek to provide including the distribution of LTTE literature and informational materials and working directly with PKK members at peace conferences and other meetings." Thus, the District Court issued a preliminary injunction against the application of the terms "training" and personnel in the material support provision against the five Tamil organizations and the Humanitarian Law Project and Dr. Jayalingam and former Judge Fertig.

Following the District Court's decision, both parties appealed to the U.S. Court of Appeals for the Ninth Circuit. On March 3, 2000, the Ninth Circuit affirmed the District Court's order (Humanitarian Law Project v. Reno, 205 F.3d 1130 [9th Cir. 2000] ["HLP I"]). The Ninth Circuit affirmed the District Court's decision.

Following the Ninth Circuit's decision, the District Court issued a permanent injunction on October 2, 2001, which was upheld by the Ninth Circuit on December 5, 2003 (Humanitarian Law Project v. U.S. Dept. of Justice, 352 F.3d 382 [9th Cir. 2003] ["HLP II"]). In addition to upholding the District Court's decision that "training" and "personnel" were impermissibly vague, the Ninth Circuit also held that the "AEDPA requires that the donors of material support have knowledge that the recipient either had been designated as a foreign terrorist organization or engaged in terrorist activities."

Following September 11, 2001, Congress enacted the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act, which amended the AEDPA to add "expert advice or assistance" to the description of "material support" of a designated organization (18 U.S.C. Sec. 2339A(b); 2339B(9)(4)). After the enactment of the USA PATRIOT Act, the Plaintiffs filed a second Complaint with the District Court on August 27, 2003. The Plaintiffs argued that the prohibition on expert advice and assistance violated their First and Fifth Amendment rights, and that the term was vague and overbroad. The government conceded that advocacy and associated activities were protected by the First Amendment and not prohibited under the USA PATRIOT Act. The District Court found that the term "expert advice or assistance" was undefined and impermissibly vague and could be construed to include activities protected under the First Amendment. The Court issued an injunction preventing the government from enforcing the "expert advice or assistance" provision against the Plaintiffs (Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185 [C.D. Cal. 2004] ["District Court – HLP II"]). Both parties appealed to the Ninth Circuit.

With respect to the HLP II decision, both parties sought *en banc* hearing. The Ninth Circuit voted to hear the case *en banc* (before thirteen judges). However, on December 17, 2004, three days after the oral argument in *en banc* hearing, Congress enacted the Intelligence Reform and Terrorism Prevention Act (IRTPA), partly in response to the Court's rulings in HLP litigation, amending the terms "training," "personnel," and "expert advice or assistance," and adding the term "service" to the description of "material support" of a designated terrorist organization. The IRTPA defines "material support or resources" as:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials. 18 U.S.C. § 2339B(a)(1)

The Act defines the term "training" as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." 18 U.S.C. § 2339A(b)(2). The statute defines the term "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. §2339A(b)(3). It defines "personnel" as an individual who

> has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control. 18 U.S.C. § 2339B(h)

The statute also amended the definition of "material support or resources" to include "service." Congress added a caveat to the statute, which states: "[n]othing in [Section 2339B] shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States."

Finally, the 2004 Act created a licensing authority by providing an exception to criminal liability where the Secretary and Attorney General give advance approval to the provision of otherwise illegal "personnel," "training," and "expert advice or assistance."

> No person may be prosecuted under this section in connection with the term 'personnel', 'training', or 'expert advice or assistance' if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act. 18 U.S.C. §2339B(j)

On December 21, 2004, the Ninth Circuit *en banc* panel declined to decide the case, vacated its HLP II decision, and remanded to the District Court in view of IRTPA. However, the Ninth Circuit affirmed the District Court's October 2, 2001 holding enjoining the government from enforcing the terms "training" and "personnel" against the Plaintiffs. The District Court's injunction against the enforcement of the ban on "expert advice or assistance" was also in force until its subsequent ruling on July 25, 2005.

Upon the remand from the Ninth Circuit of both cases, pertaining to the AEDPA definition and the USA PATRIOT Act definition, the District Court issued a decision on July 25, 2005 (Humanitarian Law Project v. Gonzales, 380 F. Supp. 2d 1134 [C.D. Cal 2005]) in light of IRTPA. In the new action, the Plaintiffs (minus the Northern California Tamil Association, which dropped out of the law suit) argued that they "wish[ed] to provide material support to the lawful humanitarian, and political activities" of the PKK and LTTE. The Plaintiffs wanted to provide the following aid to the PKK and the LTTE:

(1) "engage in political advocacy" on their behalf;

(2) contribute cash, clothing, food, and educational materials to those groups;

(3) provide them "with training and written publications on how to engage in political advocacy on their own behalf and on how to use international law to seek redress for human rights violations";

(4) "write and distribute publications" supporting those groups;

(5) "advocate for freedom of political prisoners";

(6) "assist" those groups "at peace conferences and other meetings";

(7) "provide lodging" to members of those groups;

(8) "advis[e]" the groups "on recent developments in international human rights law, the procedures for seeking review by the newly established International Criminal Court, peacemaking negations skills, and advocacy of [their] rights … before the Human Rights Subcommission of the United Nations and legislative bodies throughout the world, including the United States congress";

(9) give "expert medical advice and assistance," including "expert advice on how to improve the delivery of health care" to the organizations;

(10) provide "expertise in the fields of politics, law, and economic development" as well as expertise in "information technology"; and

(11) provide "expert advice or assistance" in the fields of "Tamil language, literature, arts, cultural heritage, and history."

Again, the plaintiffs also argued that the imposition of vicarious liability, absent specific intent to further illegal activities violates the due process guaranteed by the Fifth Amendment.

In its decision, the Court again dismissed the Plaintiffs' argument that to prove violation of the "material support or resources" provision, the government had to show that the Plaintiffs had specific intent to further the organization's unlawful terrorist activities. However, the Court stated that "the AEDPA does not criminalize mere membership, association or expression of sympathy with foreign terrorist organizations. Instead, the AEDPA permits membership and affiliation with foreign terrorist organizations, but prohibits the conduct of providing material support to an organization that one knows is a designated foreign terrorist organization, or is engaged in terrorist activities." The Court further stated that 'as previously noted Plaintiffs remain free to affiliate with and advocate on behalf of foreign terrorist organizations." (It is noted that in Australia, according to the press, membership in a "terrorist organization" is an offense.)

The District Court agreed with the Plaintiffs, holding that "the IR TPA amendment leaves the term 'training' impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations." The Court cited

the previous Ninth Circuit opinion in this regard. The Ninth Circuit had stated: "Again it is easy to imagine protected expression that falls within the bounds of this term." In the District Court proceedings, the government argued that AEDPA prohibits the Plaintiffs from providing "advice or training on how to engage in human rights advocacy on their own behalf and on how to use international law to seek redress for human rights violations." The government's position was that any aid mentioned in the complaint, irrespective of the expressive or non-expressive content, given directly to the designated groups, is prohibited under the "material support" provision. The District Court noted that the government's position was in direct contrast to the Ninth Circuit's holding, which recognized that such activities are protected under the First Amendment right to free speech and association (Humanitarian Law Project, 205 F.3d at 1137-38).

Regarding the IRTPA's amendment of the definition of "expert advice or assistance," the Court held that the "specialized knowledge" portion of the definition "remains impermissibly vague because 'specialized knowledge' includes the same protected activities that 'training' covers such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations," and enjoined the government from enforcing the term "specialized knowledge" against the Plaintiffs. However, the Court pointed out that its enjoining the enforcement of this prohibition against the Plaintiffs was limited to the "specialized knowledge" portion of the definition, not the portions regarding "scientific [or] technical … knowledge," which, the Court found, were not vague. The Court also erroneously noted that the Plaintiffs did not challenge the "expert advice or assistance" clause.

With respect to "service" in the amended definition of "material support or resources," the government argued that any activity done "for the benefit" of the designated organization would violate the ban on "services." The Plaintiffs argued that the government's position contradicted its earlier argument that the Plaintiffs could freely engage in "human rights and political advocacy **on behalf of**" a designated organization. The Court noted that there was no "readily apparent distinction between taking action on 'behalf of another' and 'for the benefit of another,'" and held that since protected expression falls within the bounds of the term "service," the government would be enjoined from enforcing the prohibition of "service" against the Plaintiffs.

The IR TPA amended the term "personnel" to one or more individuals who work under a designated organization's direction or control or who "organize, manage, supervise or otherwise direct the operation of that organization." 18 U.S.C. Sec. 2339B(h). The statute further states that "individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." The Court held that the terms "direction and control" cure the vagueness problem identified by the Court earlier. Thus, anybody who works under the "direction or control" of the designated organization violates the Statute. But this does not prohibit an individual from working, independent of the designated organization, to promote its goals and objectives.

Following the District Court's decision of July 25, 2006, both parties appealed to the Ninth Circuit. The Ninth Circuit heard oral argument on May 1, 2007. The Plaintiffs, in

addition to the specific intent argument, reiterated their argument that the terms "training," "personnel," "service," and "expert advice or assistance" (including the scientific and technical portion of "expert advice or assistance") were unconstitutionally vague. The Plaintiffs also challenged the licensing authority of the Secretary of State, arguing that it grants the Secretary unfettered discretion to license speech. The government took the position that any act given directly to the designated organizations is prohibited. (The government argued that any independent aid that indirectly benefits the designated organizations is allowed.) The Court took the case under advisement.

Membership, Affiliation, and Political Support

As the amended definition of "material support or resources" in the IR TPA states, "nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States." The government, throughout the proceedings, has cited the legislative history and stated "Indeed, Congress made it clear … [t]that there is no proscription on one's right to think, speak, or opine in concert with, or on behalf of [a foreign terrorist] organization." It further stated, "The AEDPA does not prohibit plaintiffs from advocating on behalf of the Turkish Kurds or Sri Lankan Tamils (or the PKK and LTTE), or from associating with others in furtherance of their advocacy goals." However, in its brief, the government also stated: "The AEDPA does not prohibit plaintiffs from advocating any cause or from providing humanitarian aid to the Turkish Kurds or Sri Lankan Tamils. It also prohibits them from using terrorist groups as their instrument to accomplish their stated goals."

Even in its most recent brief, the government stated:

> The basic protection of free association afforded individuals under the First Amendment remains in place, even under the statutory prohibition, because it does not prohibit 'one's right to think, speak or opine in concert with or on behalf of such an organization.' (Those inside the U.S. will continue to be free to advocate, think and profess the attitudes and philosophies of the foreign organizations.

The Ninth Circuit, in Humanitarian Law Project v. Ashcroft, 352 F.3d 382 (9th Cir. 2003), stated that Section 2339B

> does not prohibit being a member of one of the designated groups or vigorously promoting or supporting the political goals of the group. Plaintiffs are even free to praise the groups for using terrorism as a means of achieving their ends. What AEDPA prohibits is the act of giving material support, and there is no constitutional right to facilitate terrorism by giving terrorists the weapons and explosives with which to carry out their grisly mission.

Similarly, the Seventh Circuit, in Boin v. Quaranic Literacy Institute et al., 291 F.3d 1000, 1026-27 (7th Cir. 2002) stated that Section 2339B did not impose liability "on the

basis of membership alone or because a person espouses the views of an organization that engages in illegal activities," adding that individuals could "with impunity become members of Hamas, praise Hamas for its use of terrorism, and vigorously advocate the goals and philosophies of Hamas."

Likewise, the Fourth Circuit in U.S. v. Hammoud, 381 F.3d 316, 329 (4th Cir. 2004) stated that Section 2339B

> does not prohibit mere association; it prohibits the conduct of providing material support to a designated FTO … Hammoud is free to advocate in favor of Hizballah or its political objectives … Section 2339B does not target such advocacy.

Along similar lines, the New York District Court stated in U.S. v. Sattar, 272 F. Supp. 2d 348, 357-58 (SDNY 2003):

> the ban does not restrict an organization's or an individual's ability to freely express a particular ideology or political philosophy. Those inside the U.S. will continue to be free to advocate, think and profess the attitudes and philosophies of foreign terrorist organizations. They are simply not allowed to send material support or resources to those groups or their subsidiary groups overseas

Based on the above, it can be said that a citizen's right to be a member of or affiliated or associated with a designated organization, or to support the political philosophy of a designated organization, are not curtailed by the "material support" provision. However, the Plaintiffs argued before the Ninth Circuit that it was meaningless to say that people can associate with or be members of a group but that it is a crime to do anything to assist the group in any way, and that this was essentially was the law did. Thus, the Plaintiffs contended that the right to freedom of association guaranteed by the Constitution and long preserved by the Courts was rendered meaningless by the fact that members of a group risked prosecution under the "material support" provision or the IEDA or EO 13224 if they did anything to further that group's objectives. The Ninth Circuit has not ruled on this issue, which is currently pending.

As former U.S. Ambassador to Sri Lanka, Hon. Jeffrey Lunstead, noted in a recent study entitled *The United States' Role in Sri Lanka's Peace Process*, there is no legal prohibition on communication with a designated organization. In fact, the U.S. State Department has met with officials of FARC despite the fact that FARC remains on the list of designated organizations.

Executive Order 13224

Besides the AEDPA, the 1977 International Emergency Economic Power Act ("IEEPA") allows the executive branch to designate entities and individuals as "terrorists" with legal consequences. The IEEPA authorizes the President to declare a national emergency "to

deal with any unusual and extraordinary threat. …" Under the IEEPA, the President can designate entities and individuals and freeze their assets.

After September 11, 2001, the President invoked his authority under the IEEPA and issued Executive Order ("EO") 13224, which named twenty-four groups and individuals as specially designated global terrorists (SDGTs). Through EO 13224, the President authorized the Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, to designate additional SDGTs. The Secretary of the Treasury, in consultation with the Secretary of State and the Attorney General, can also designate an individual or group as a SDGT if the individual or group in question is "owned or controlled by or … acting for or on behalf of" other SDGTs, or if the individual or group has assisted, sponsored, or provided "financial, material or technological support for or financial or other services to or in support of" acts of terrorism by SDGTs, or if the individual or group is "otherwise associated with" an SDGT. The legal consequence of designation by the Secretary of the Treasury, like that of designation by the President, is the freezing of property. It should be noted that, unlike designation under the AEDPA, designation under 13224 does not have criminal sanction.

The LTTE was not included in the President's list. Hamas was also left out of the list. When Israel raised the issue of the exclusion of Hamas from the list of SDGTs, the Secretary of the Treasury incorporated all of the organizations listed as Foreign Terrorist Organizations (FTOs) into the list of SDGTs. Thus, the LTTE was placed on the SDGT list.

The Plaintiffs, minus the Northern California Tamil Association, filed a Complaint in the Los Angeles District Court, stating that they sought:

> to aid the PKK and LTTE in the training and advocacy as well as to provide legal services in aid of setting up institutions for providing humanitarian aid and in negotiating a peace agreement; … to provide humanitarian aid directly to the PKK and LTTE; … to provide engineering services and technological support to help rebuild the infrastructure in tsunami-afflicted areas; and … to provide psychiatric counseling for survivors of the tsunami.

The Plaintiffs argued: that EO 13224's ban on "services" was unconstitutionally vague since it failed to identify the conduct to which the ban applied; that the ban on "services' was overly broad because it encompassed a substantial amount of protected speech; that the term "specially designated terrorist group" was vague, giving the President unfettered discretion to determine which individuals and groups fit this description; that the President's designation authority was vague; that EO 13224's ban on being "otherwise associated with" a terrorist group was vague and overly broad, as it punished individuals and groups for exercising their first amendment rights of expression and association.

The Court rendered a decision on November 21, 2006 (Humanitarian Law Project v. U.S. Dept. of Treasury, 463 F. Supp. 21 1049 [C.D. Cal. 2006]). The Court held that, unlike the term "service" in the ITRPA, which included "training" and "expert advice or

assistance" (terms which were found to be too vague), the term "service" in EO 13224 was defined in the accompanying regulations. The Court cited the example given in the definition of "provision of services" in the regulations. That is:

> U.S. persons may not, except as authorized by or pursuant to this part, provide legal, accounting, financial, brokering, freight forwarding, transportation, public relations, educational, or other services to a person whose property or interests in property are blocked pursuant to §594.201(a).

Thus, the Court held that the term was not too vague. Therefore, as the law stands today, if an individual provides education, legal training in human rights advocacy and peacemaking, or technological support to help rebuild infrastructure in tsunami-affected areas, that individual cannot be criminally prosecuted for providing "material support" to a terrorist organization, but can be designated as a SDGGT; and his or her assets can be frozen. (It is pointed out that EO 13224's regulations allow the Office of Foreign Assets Control ["OFAC"] to grant license to engage in the aforementioned activities.)

However, the Court also stated that "the EO's ban on 'services' does not apply to Plaintiffs' effort to independently support the PKK or the LTTE in the political process. Nothing in the EO regulations' definition of 'services' prohibits independent political activity; instead the regulations prohibit plaintiffs from providing 'services' to an SDGT. This prohibition would not, for example, prohibit Plaintiffs from vocally supporting the activities of the PKK or the LTTE." In its brief, the government conceded that the EO's ban on "services" did not prohibit independent activity or advocacy.

With respect to the term "otherwise associated with," the Court noted that this term was not defined. Due to the absence of definable criteria, the Court held that the term "otherwise associated with" was unconstitutionally vague.

The Court further stated:

> [I]t is axiomatic that the Constitution forbids punishing a person for mere association. The First Amendment protects a citizen's right to associate with a political organization even if that organization includes ties with groups that advocate illegal conduct or engage in illegal acts. The power of the Government to penalize association is narrowly circumscribed.

The Court concluded that the term "otherwise associated with" impinged upon activity protected by the First amendment, and thus was unconstitutionally broad.

Thus, a citizen can associate with the LTTE. Mere association with the LTTE cannot be a basis for designation as an SDGT.

With respect to the President's designation authority, the Court found that it was unconstitutionally vague. Since the LTTE was designated by the Secretary of the Treasury, not by the President, the above finding had no impact on the Plaintiffs.

Following the Court's decision on November 21, 2006, the Government filed a Motion for Reconsideration on January 3-, 2007, arguing that following the Court's decision, OFAC has issued a new regulation defining "otherwise associated with," which cures the Constitutional deficiency, and that the Plaintiffs lack standing to challenge the President's designation of twenty-seven individuals and groups as SDGTs.

The term "otherwise associated with" is now defined as "own[ing] or control[ing] an SDGT or … attempt[ing] or … conspir[ing] to provide financial, material or technological support or ... provid[ing] financial or other services to" an SDGT. The Court held that the new definition is not vague. The Court also stated that the new definition does not prohibit mere association; thus, it is not overly broad and is constitutional.

The Court also reversed its earlier position and held that since the Plaintiffs were not designated as SDGTs by the President and did not demonstrate the risk of being designated, they lacked legal standing to challenge the President's designating authority. However, it should be noted that, while the Court held that the President's designating authority was not before the Court, it did not reverse its decision that the President's designation authority was unconstitutionally vague.

The Plaintiffs have appealed the decision to the Ninth Circuit.

Conclusion

As the law stands today, although the Plaintiffs cannot be criminally prosecuted for providing "training," "services," or "expert advice or assistance from specialized knowledge" under the "material support" provision in the IRTPA, they can be prosecuted under IEEPA and EO 13224. Thus, the District Court's decision in HLP v. Dept. of Treasury removed any real protection provided by the injunction in HLP v. Gonzales. The Plaintiffs cannot be criminally prosecuted for being members or associates of the designated organizations or for supporting their political philosophies.