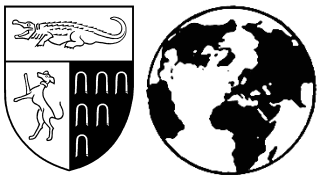
THE YALE JOURNAL OF INTERNATIONAL LAW ONLINE



Material Support of Peace? The On-the-Ground Consequences of U.S. and International Material Support of Terrorism Laws and the Need for Greater Legal Precision

Noah Bialostozky†

I. INTRODUCTION

Domestic and international efforts to stem the flow of resources to designated terrorist organizations (DTOs) have resulted in significant legal uncertainties for those who engage with such organizations to promote peace. Both U.S. and international material support of terrorism measures fail to account for the on-the-ground realities of humanitarian and peacemaking work, and thereby create undue liability risks for a variety of public and private actors in conflict situations such as Afghanistan.

In *Holder v. Humanitarian Law Project* (*HLP*),[1] the U.S. Supreme Court recently held that the Anti-Terrorism Act's (ATA)[2] proscription of material

---

† Noah Bialostozky, a New York-based attorney, has worked on international law, counterterrorism, and human rights matters for numerous organizations, including the Center on Global Counterterrorism Cooperation (CGCC), White & Case LLP, the Open Society Institute, the United Nations Development Programme, and The Hague Academy of International Law. This Essay arises from his work for the CGCC in the fall of 2010. The Author would like to extend special thanks to James Cockayne, Alistair Millar, and Jason Ipe at the CGCC for their invaluable assistance in the development of this Essay. The views expressed herein are attributable exclusively to the Author.

1. No. 08-1498, slip op. at 6-7 (June 21, 2010).
2. The U.S. criminal material support statute was originally enacted as part of the Violent Crime Control and Law Enforcement Act of 1994, Pub.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 (codified as amended 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 (AEDPA), Pub. L. No. 104-132, §§ 303, 323, 110 Stat. 1214, and amended by the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Pub. L. No. 108-458, § 6603, 118 Stat. 3638, the Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001 (USA PATRIOT Act), Pub. L. No. 107-56, §§ 810(c)-(d), 811(d), 115 Stat. 272, and the USA PATRIOT Act Improvement and Reauthorization Act of 2005, Pub. L. No. 109-177, § 104, 120 Stat. 192 (2006). The civil corollary of the criminal material support statute arises from the Antiterrorism Act of 1990, Pub. L. 101-519, § 132, 104 Stat. 2240, and is codified at 18 U.S.C. §§ 2331-2338. For ease of reference, this Essay 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

support is constitutional as applied to the particular peacemaking and education activities contemplated by the *HLP* plaintiffs. The decision sanctioned the ATA's criminalization of certain conduct regardless of whether it is intended to further a DTO's terrorist designs or some other more laudable objective; knowledge that the recipient is a DTO or engages in terrorist activity is sufficient to trigger liability.[3]

Despite the Court's holding, the *HLP* decision has left many international actors uncertain as to whether their routine humanitarian, development, or peacemaking activities, particularly in conflict situations such as Afghanistan, could result in criminal prosecution or a civil suit under U.S. law. Indeed, the decision raises serious questions about the legal limits of international actors' engagement with DTOs. Precisely which organizations, if any, are shielded from prosecution for engaging with terrorist groups to promote peace is unclear. And insofar as certain humanitarian or peacemaking organizations are immune from prosecution for certain conduct, the scope of such permissible conduct is unknown.

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 to terrorist organizations, without requiring exemptions or immunities for humanitarian, development, or peacekeeping actors. A set of thirteen international terrorism conventions call on U.N. member states to prohibit certain terrorism support, and the U.N. Security Council has taken various measures to cut off resources from the Taliban and other DTOs.[4] These U.N. measures are instructive as to the international limits to engagement with terrorist organizations and shed light on how *HLP* may be reconciled with international law.

The analysis and recommendations contained in this Essay are not intended to question the propriety of criminalizing material support of terrorist organizations. To the contrary, such prohibitions have a valuable role to play in addressing terrorist threats. This Essay instead seeks 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 isolation and engagement in terrorism prevention strategies. Efforts to clarify the legal standards would promote the effective prosecution of those in breach and guide the conduct of those who wish to comply.

II. LIMITS UNDER U.S. LAW

A. *The HLP Decision*

The Supreme Court's recent decision came at the end of twelve years of complicated litigation in which the *HLP* plaintiffs mounted several constitutional

v. U.S. Dep't of State, 327 F.3d 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).

3. *See* 18 U.S.C. § 2339B(a)(1) (2006); *Humanitarian Law Project*, slip op. at 6-7.

4. A complete listing of and links to the full text of the terrorism conventions can be found at *U.N. Action To Counter Terrorism*, UNITED NATIONS, http://www.un.org/terrorism/instruments.shtml (last visited Apr. 13, 2011).

challenges to the ATA. The ATA makes it a federal crime to "knowingly provid[e] material support or resources to a foreign terrorist organization."[5] "[M]aterial support or resources" are defined to include "expert advice or assistance," "training," and "personnel."[6] The *HLP* plaintiffs first challenged the ATA's constitutionality in 1998, arguing that certain material support provisions were unconstitutional under the First and Fifth Amendments.[7] The plaintiffs sought declaratory and injunctive relief to allow them to resume certain activities—without fear of prosecution under the ATA—in support of two organizations that the U.S. government had recently designated as "terrorist."[8] The work with DTOs contemplated by the *HLP* plaintiffs included assistance at a peace conference, training in the use of international law to seek redress for human rights violations, political advocacy, and writing and distributing publications.[9] The district court and the Court of Appeals for the Ninth Circuit found the ATA's proscription of "training" and "personnel" to be impermissibly vague and issued a permanent injunction barring enforcement of those material support provisions against the plaintiffs.[10]

The *HLP* plaintiffs' victory was short lived, however, as Congress in 2004 amended the statutory definitions of "training," "personnel," and "expert advice and assistance," and added "service[s]" to the list of proscribed conduct under the ATA.[11] Faced with renewed uncertainty as to the scope of the ATA, the *HLP* plaintiffs brought another constitutional challenge, this time arguing that four types of proscribed material support—"training," "expert advice or assistance," "service," and "personnel"—were unconstitutionally vague. The district and appellate courts again agreed, in part, finding the challenged terms to be unconstitutional under the First Amendment, and enjoining the U.S. government from enforcing those provisions against the *HLP* plaintiffs.[12]

On June 21, 2010, the Supreme Court reversed the Ninth Circuit's ruling and held the ATA to be constitutional as applied to the particular activities at issue in *HLP*. The Court determined that the ATA provides fair notice to a person of ordinary intelligence of what conduct is proscribed, and that the *HLP* plaintiffs'

---

5. 18 U.S.C. § 2339B(a)(1) (2006).
6. 18 U.S.C. § 2339A(b)(1) (2006).
7. *See* Humanitarian Law Project v. Reno (*HLP District Court I*), 9 F. Supp. 2d 1176 (C.D. Cal. 1998). For more background on the *HLP* plaintiffs' original challenge to the ATA, as well as its complicated procedural history, see Humanitarian Law Project v. Gonzales (*HLP District Court II*), 380 F. Supp. 2d 1136, 1136-39 (C.D. Cal. 2005).
8. The Secretary of State is authorized to designate as "terrorist" any foreign group that engages in "terrorist activity" that threatens "national security." 8 U.S.C. § 1189(a)(1) (2006). The two organizations that the *HLP* plaintiffs intended to work with, the Liberation Tigers of Tamil Eelam (LTTE) of Sri Lanka and the Kurdish Workers' Party (PKK) of Turkey, were designated as terrorist organizations in 1997. *See Humanitarian Law Project*, slip op. at 3; Designation of Foreign Terrorist Organizations, 62 Fed. Reg. 52650 (Oct. 8, 1997).
9. *HLP District Court I*, 9 F. Supp. 2d at 1182.
10. *See id.* at 1204-05; Humanitarian Law Project v. U.S. Dep't of State, 382 F.3d 1154 (9th Cir. 2004) (en banc); Humanitarian Law Project v. U.S. Dep't of Justice, 353 F.3d 382 (9th Cir. 2003), *vacated*, 393 F.3d 902 (9th Cir. 2004).
11. IRTPA, Pub. L. No. 108-458, § 6603, 118 Stat. 3638 (2004).
12. Holder v. Humanitarian Law Project (*HLP Circuit Court II*), 552 F.3d 916, 933 (9th Cir. 2009); *HLP District Court II*, 380 F. Supp. 2d at 1155-56.

proposed activities constitute "expert advice or assistance" or "training" of a DTO, as defined in the ATA.[13] The Court also concluded that advocacy coordinated with a DTO (as opposed to independent advocacy) constitutes a prohibited "service."[14]

B. *Potential Risk Exposure Under the ATA after HLP*

The *HLP* decision is expressly limited to the particular peacemaking, education, and advocacy activities contemplated by the plaintiffs in that case, and the Court acknowledged that future applications of the ATA to other conduct may not necessarily pass constitutional muster.[15] As a result, despite the decision's potentially far-reaching implications, important questions remain as to the ATA's scope.

The significance of *HLP* should not be understated, however. Since September 11, 2001, the ATA has become a primary prosecutorial tool in U.S. counterterrorism efforts.[16] Broadly speaking, the ATA contains three types of criminal liability for material support of terrorism: § 2339A proscribes support where the accused knows or intends that the support will be used to carry out a terrorism offense; § 2339B assigns criminal liability to individuals and organizations that knowingly provide material support or resources to terrorist organizations; and lastly, § 2339C prohibits the indirect or direct provision of funds with the intent or knowledge that such funds will be used to carry out a terrorism offense.[17]

The prohibited conduct and showing of intent required under § 2339A and § 2339C are fairly straightforward. Both sections require a federal prosecutor to prove that the accused provided material support or funds with the intent that they be used to assist a terrorism offense, or that the individual or organization knew that the support provided would be used, at least in part, for such purposes.

By contrast, the prohibition contained in § 2339B—the interpretation of which was the subject of *HLP*—raises significant questions about the state of mind and the precise conduct that constitute the offense. Section 2339B criminalizes the provision of material support or resources to a DTO where the accused merely knew that the recipient was a terrorist organization. This knowledge requirement was disputed in *HLP* and remains unsettled in the courts. For example, in a recent trial of the Holy Land Foundation and its top officials under the ATA, the district court did not require a showing that the accused knew they were providing support to a terrorist organization.[18] A finding that the accused knowingly provided funds to the recipient, and that the recipient was controlled by a DTO was sufficient, whether the accused knew of this control or

13. Holder v. Humanitarian Law Project, No. 08-1498, slip op. at 13 (June 21, 2010).
14. *Id.* at 19.
15. *Id.* at 34.
16. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B, at 1 (2010).
17. *See* 18 U.S.C. §§ 2339A-C (2006).
18. Amicus Brief of Charities, Founds., Conflict Resolution Grps., and Constitutional Rights Orgs. in Support of Defendants and Urging Reversal of Convictions of Counts 2-10, at 1-2, United States v. Mohammad El-Mezain, No. 09-10560 (5th Cir. Oct. 26, 2010).

not. This question, which is currently on appeal to the 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 if an organizations performs due diligence as to whether a specific recipient of support is a DTO, such action would not be sufficient to prevent liability if the organization provides material support or resources to an organization that turns out to be controlled by a DTO.

The scope of the ATA's actus reus requirement has also been controversial since the law's inception in the 1990s.[19] The statute now broadly defines "material support or resources" to include any property, service, monetary instrument, training, expert advice or assistance, personnel, or transportation.[20] Only the provision of medicine and religious materials are definitively identified as lawful exceptions. As noted above, the ATA's proscription of "training," "expert advice or assistance," and "service[s]" was most relevant to *HLP*. The ATA defines unlawful "training" as the instruction of any "specific skill;" "expert advice or assistance" refers to any counsel based on "scientific, technical, or other specialized knowledge;"[21] and the *HLP* Court indicated that any advocacy coordinated with DTOs constitutes an unlawful "service."[22] In light of these definitions, the Supreme Court found that the ATA constitutionally proscribed the following conduct at issue in *HLP*: training DTO members to use international law to resolve disputes peacefully, teaching DTO 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 a DTO.[23]

The *HLP* 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 DTO with the negotiation of a peace agreement would constitute unlawful material support.[24] Although it is clear that training a DTO on how to negotiate for peace is unlawful, it remains unclear whether the mere coordination or facilitation of peace

19. *Compare* United States v. Assi, 414 F. Supp. 2d 707, 716-19 (E.D. Mich. 2006) (holding that § 2339B is not impermissibly vague as it does not reach a substantial amount of constitutionally protected conduct), United States v. Marzook, 383 F. Supp. 2d 1056 (N.D. Ill. 2005) (same), *and* United States v. Lindh, 212 F. Supp. 2d 541, 574 (E.D. Va. 2002) ("The Ninth Circuit's vagueness holding in *Humanitarian Law Project* is neither persuasive nor controlling."), *with HLP Circuit Court II*, 552 F.3d 916, 928-32 (9th Cir. 2009) (finding the ATA's proscription of material support "training," "expert advice and assistance," and "service[s]" to be void for vagueness, but its prohibition on the provision of "personnel" to be constitutional); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1137-38 (9th Cir. 2000) (finding the ATA's prohibitions on "training" and "personnel" to be unconstitutionally vague), *and* United States v. Sattar, 272 F. Supp. 2d 348, 359 (S.D.N.Y. 2003) ("It is not clear from § 2339B what behavior constitutes an impermissible provision of personnel to [a DTO]."). *See also* DOYLE, *supra* note 16, at 5-6 ("The precise scope of the term 'material support or resources' for purposes of Section 2339B proved controversial almost from the beginning.").

20. 18 U.S.C. § 2339A(b)(1) (2006).

21. *Id.* § 2339A.

22. *See* Holder v. Humanitarian Law Project, No. 08-1498, slip op. at 18-19 (June 21, 2010).

23. *Id.* at 9.

24. *Id.* at 17.

processes would run afoul of the ATA. In fact, apart from the conduct at issue in *HLP*, it is difficult to state with any precision what other forms of engagement might violate the statute.

Nevertheless, the Court's reasoning in *HLP* is instructive for potential applications of the ATA to engagement with the Taliban or other DTOs.[25] The Court based its decision, in part, on the notion that material support lends legitimacy to a DTO, 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 DTO resources—material support frees up other resources that the DTO may put toward terrorist activities.

The on-the-ground operations of public and private actors in the ongoing conflict in Afghanistan exemplify the liability risks that exist for humanitarian, development, and peacemaking actors who routinely work with controversial groups around the world. Read in conjunction with the *HLP* decision's underpinnings, the ATA indicates that a slew of activities currently undertaken by foreign governmental actors, private NGOs, and even the U.N. Assistance Mission in Afghanistan (UNAMA), *could* risk prosecution—absent immunity from suit. As international policy moves steadily towards the pursuit of a negotiated settlement to the conflict in Afghanistan, many of these organizations will be called upon 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 Security Council.[26]

After *HLP*, such a policy of engagement raises real questions for these actors concerning their potential exposure under the ATA to prosecution and civil liability. For example, the provision of "lunch money" or other stipends to Taliban members at a peace conference or Track II negotiation[27] would seemingly be proscribed. Transport to and from such a meeting would be prohibited.[28] And without further clarification by Congress or the Court as to what distinguishes a

25. Although the Taliban has not been designated a DTO by the U.S. government, engagement with Taliban members would likely still fall under the scope of § 2339B. In addition to proscribing knowing support of a DTO, the ATA proscribes knowing support of an organization that "has engaged or engages in terrorism." 18 U.S.C. § 2339B(a)(1) (2006). Given the Taliban's status under U.N. Security Council Resolution 1267, and its known terrorism links, it would be relatively easy to argue that an accused international actor knew that the Taliban has engaged in terrorism.

26. The Al-Qaida and Taliban Sanctions Committee, created by Security Council Resolution 1267, maintains a consolidated list of individuals, groups, undertakings, and entities associated with al Qaida, Usama bin Laden, and the Taliban. *See* United Nations, Security Council Comm. Established Pursuant to Resolution 1267 (1999) Concerning al Qaida and the Taliban and Assoc. Individuals and Entities, The Consolidated List Established and Maintained by the 1267 Committee with Respect to al Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them (Mar. 24, 2011), http://www.un.org/sc/committees/1267/consolidatedlist.htm.

27. Track II diplomacy, as distinguished from Track I negotiations between government officials, is an unofficial process whereby private actors seek to engage stakeholders in informal talks on sensitive issues. *See* Aisha Ahmad, *Talking to the Enemy: Track II and its Significance for Afghanistan*, INST. OF POL'Y STUD. (2008), http://www.ips.org.pk/international-relation/the-muslim-world/227.html.

28. *See* Dexter Filkins, *Taliban Elite, Aided by NATO, Join Talks for Afghan Peace*, N.Y. TIMES, Oct. 19, 2010, at A1.

"specific skill" from "general knowledge" for the purposes of unlawful "training," any technical assistance to the Taliban—such as skills training provided to lower-level Taliban pursuant to an internationally supported demobilization, disarmament, and reintegration (DDR) program[29]—could also presumably be prosecuted. Indeed, under *HLP*, 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 run 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.

C. *To Whom Does the ATA Apply?*

Both domestic and extraterritorial conduct undertaken by U.S. or foreign nationals can be subject to litigation under the ATA. The ATA provides jurisdiction if a U.S. national committed the alleged violation, or if the offense occurs in the United States or affects U.S. interstate or foreign commerce.[30] Any material support in aid of a terrorist organization whose offenses directly or indirectly impact the United States or its commercial interests may also be subject to prosecution. And even if the allegedly unlawful conduct occurs entirely outside the United States and has no impact on the United States or its interests, the ATA allows the United States to prosecute any individual who is later brought into or found in the United States.[31]

Despite this far-reaching jurisdiction, a federal prosecutor is not 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. U.N. personnel enjoy broad immunity under both the U.N. Charter and the Convention on the Privileges and Immunities of the United Nations.[32] In addition, it is generally accepted by the U.S. government that criminal jurisdiction over foreign governmental actors should be exercised

---

29. DDR programs in Afghanistan provide vocational skills training to thousands of former soldiers and Taliban members in the hopes of reintegrating them into a variety of sectors of the civilian economy. Reintegration efforts for 63,380 former officers and soldiers of the Afghan Military Forces were initiated by the United Nations in 2003. In 2005, the focus shifted to the internationally-supported Disarmament of Illegal Armed Groups program, which has sought to reintegrate an estimated thirty-six thousand low-level Taliban fighters into the Afghan economy. DDR efforts have included vocational training aimed at transitioning Afghans back into education, government, agriculture, and small business jobs, among others. *See 10 Things You Need To Know About DDR in Afghanistan*, AFGHANISTAN'S NEW BEGINNING PROGRAMME (May 4, 2010), http://www.anbp.af.undp.org/homepage/index.php?option=com_content&view=article&id=19&Itemid=68; *DDR Fact Sheet*, AFGHANISTAN'S NEW BEGINNING PROGRAMME (May 4, 2010), http://www.anbp.af.undp.org/homepage/index.php?option=com_content&view=article&id=17&Itemid=67; *Country Programme: Afghanistan*, UNITED NATIONS DISARMAMENT, DEMOBILIZATION, AND REINTEGRATION RESOURCE CENTRE, http://www.unddr.org/countryprogrammes.php?c=121 (last visited Apr. 13, 2011).

30. 18 U.S.C. § 2339B(d)(1) (2006).

31. *Id.* § 2339B(d)(1)(C).

32. The Convention provides U.N. representatives and officials with immunity from all legal action for any activity undertaken in their official capacities. Convention on the Privileges and Immunities of the United Nations ¶¶ 11, 18, 22, *adopted* Feb. 13, 1946, 1 U.N.T.S. 15.

sparingly and only where there is strong justification for doing so.[33] Any federal prosecutor seeking to prosecute under § 2339B must receive the Attorney General Office's approval,[34] and given the varied diplomatic and prudential considerations, such approval is likely to be given cautiously where foreign government officials are involved. Only in rare circumstances, such as the alleged involvement of Libyan officials in the Lockerbie bombing, is the prosecution of foreign government officials likely to occur.[35]

Prosecution of a member of the U.S. military or its private contractors 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.[36] In other words, U.S. soldiers or military contractors[37] who provide support to the Taliban could theoretically be prosecuted under the ATA. Whether or not 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.[38] If a security contractor knowingly paid off a Taliban leader or a member of a DTO, such conduct would likely constitute proscribed material support.

Non-military contractors in Afghanistan, as well as private, not-for-profit NGOs engaged in peacebuilding and development work, are similarly exposed. Though the MEJA is expressly limited to military contractors, and efforts to enact legislation that would extend extraterritorial jurisdiction to the conduct of non-military governmental contractors have not yet succeeded,[39] such contractors likely remain subject to the broad extraterritorial reach of the ATA. As interpreted by *HLP*, any private contractor or NGO that provides resources to a terrorist organization could be subject to prosecution, irrespective of whether the funds

33. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

34. *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.136 (1997), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/2mcrm.htm#9-2.136.

35. Another example of a prosecution of a foreign official was the U.S. prosecution of General Manuel Noriega for his alleged involvement in the international drug trade. *See* United States v. Noriega, 746 F. Supp. 1506 (S.D. Fla. 1990).

36. *See* Military Extraterritorial Jurisdiction Act of 2000 § 2(a), 18 U.S.C. § 3261 (2006).

37. 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. 18 U.S.C. § 3267 (2006).

38. *See, e.g.*, MAJORITY STAFF OF H. SUBCOMM. ON NAT'L SEC. & FOREIGN AFFAIRS, 11TH CONG. WARLORD, INC.: EXTORTION AND CORRUPTION ALONG THE SUPPLY CHAIN IN AFGHANISTAN 31-35 (Comm. Print 2010); Aram Roston, *Congressional Investigation Confirms: US Military Funds Afghan Warlords*, NATION (June 21, 2010), http://www.thenation.com/article/36493/congressional-investigation-confirms-us-military-funds-afghan-warlords.

39. H.R. 4567, known as the Civilian Extraterritorial Jurisdiction Act, remains under consideration in congressional committees and has not been passed into law. *See* David Isenberg, *Contractors and the Civilian Extraterritorial Jurisdiction Act*, HUFFINGTON POST (Feb. 2, 2010), http://www.huffingtonpost.com/david-isenberg/contractors-and-the-civil_b_446298.html.

were provided for protection and access or as part of aid or development projects.

D. *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 § 2339—namely, the provision of material support to a terrorist organization—may constitute an act of international terrorism for the purposes of civil liability.[40] Given the inherent limits of criminal prosecutions, including the comparatively steep evidentiary burden and sizeable costs faced by the government, 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 DTOs.

U.S. and foreign governmental officials are immune from suit under § 2333 for acts taken in their official capacities.[41] With regard to private individuals and organizations, litigation to date provides some insight into the scope of potential liability. First, a showing of intentional misconduct or recklessness is likely required to impose civil liability under the ATA.[42] "If a plaintiff can show that a defendant made a material contribution, financial or otherwise, with awareness of or deliberate indifference to 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.[43] As is true under the criminal statute, earmarking resources or support for a DTO's non-terrorist activities will likely not preclude civil liability.[44] A plaintiff must only show that the defendant provided material support to a terrorist organization whose acts caused his or her injuries.[45]

III. LIMITS UNDER INTERNATIONAL LAW

It is also instructive to consider *HLP* and the ATA in light of international counterterrorism law, as the international community has an integral role to play

40. *See* Boim v. Quranic Literacy Inst., 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. 2010) ("Following the Seventh Circuit's lead, numerous authorities have similarly interpreted section 2331(1)."); Weiss v. Nat'l Westminster Bank PLC, 453 F. Supp. 2d 609, 613 (E.D.N.Y. 2006) ("Violations of 18 U.S.C. § 2339B and § 2339C are recognized as international terrorism under § 2333.").

41. *See* 18 U.S.C. § 2337 (2006).

42. *See* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 693-94 (7th Cir. 2008).

43. Abecassis v. Wyatt, 704 F. Supp. 2d 623, 647 (S.D. Tex. 2010).

44. Hussain v. Mukasey, 518 F.3d 534, 538-39 (7th Cir. 2008).

45. *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 would conflict with the legislative history of the ATA. *Id.* 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 (Wood, J., dissenting in part).

in setting boundaries for the collective response to terrorist threats. This Part contextualizes *HLP* internationally and examines whether any unifying theories or trends of secondary liability have emerged which might help to clarify for humanitarian, mediation, and development actors where the legal limits of interaction with terrorist organizations lie under international law.

A. *U.N. Security Council Counterterrorism Resolutions*

Over the last two decades, the Security Council has taken an active role in efforts to stem the flow of resources to terrorist organizations. Al Qaida and the Taliban's conduct in Afghanistan prompted the Security Council to invoke its binding Chapter VII powers to call on member states to prohibit certain forms of support to those terrorist organizations. In 1999 and 2000, Security Council Resolutions 1267 and 1333 required that all member states, and any persons within their territories, stop making any financial resources available to the Taliban and al Qaida, except for limited humanitarian reasons.[46] Next, in the aftermath of September 11, 2001, 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.[47] Resolution 1373 requires that U.N. members prohibit *any* person or entity from making *any* "funds, financial assets, or economic resources"[48] available to terrorists or terrorist organizations.[49]

---

46. *See* S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); S.C. Res. 1333, U.N. Doc. S/RES/1333 (Dec. 19, 2000). Security Council Resolution 1267 and subsequent related resolutions established the Al-Qaida and Taliban Sanctions Committee and required that all U.N. members take measures to ensure that no financial resources are made available to either organization. The resolutions call on all UN member states to freeze all funds and other financial resources intended to directly or indirectly benefit the Taliban and/or al Qaida.

47. *See* S.C. Res. 1373, ¶¶ 1, 2(d), U.N. Doc. S/RES/1373 (Sept. 28, 2001) (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).

48. The terms "funds," "financial assets," and "economic resources" are not defined by Resolution 1373, a fact which in and of itself illustrates the need for greater legal precision in this area. Nevertheless, reference to legislation implementing the Resolution illustrates the types of property implicated by the U.N. requirement. "Funds" and "financial assets" have been interpreted to refer to monetary resources of every kind, including cash, claims on money, balances, debt obligations, and securities. *See* Council Regulation 881/2002, art. 1(1), 2002 O.J. (L 139) 1, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:139:0009:0022:EN:PDF. And the phrase "economic resources" has been read to indicate "assets of every kind, whether tangible or intangible, movable or immovable." *Id*. art. 1(2); The Terrorism (United Nations Measures) Order, 2006, S.I. 2006/2657 (U.K.), *available at* http://www.legislation.gov.uk/uksi/2006/2657/article/2/made.

49. S.C. Res. 1373, *supra* note 47, ¶ 1(d). When read in context, this proscription likely does not require states to criminally prohibit 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. *Compare id.* ¶ 1(b) (deciding that states shall "[c]riminalize" certain financial support), *with id.* ¶ 1(d) (deciding that states shall "[p]rohibit" making any resources available to those who participate in terrorist acts). Yet Resolution 1373 does not prevent states from imposing such broad criminal sanctions, and, at minimum, requires all U.N. members to prohibit the provision of any financial or economic resource through the civil law, even if the support is entirely unrelated to any terrorist purpose. *See* S.C. Res. 1373, *supra* note 47, ¶

If such a sweeping prohibition were applied to humanitarian, peacemaking, and reconstruction activities in Afghanistan, domestic legislation implementing these Resolutions could hamstring the UNAMA and similarly-situated international actors.

Again, UNAMA itself is not in any danger of being exposed to liability. Given that UNAMA's very mandate is a product of Security Council action, UNAMA liability would be patently absurd. But the fact that resolutions that are binding on all U.N. members are trending in this direction without recognition of functional immunities, and could thus be applied to any individual or organization worldwide irrespective of any humanitarian or peacemaking objective, is important to acknowledge. Similar to language of the ATA, the Security Council's broad language 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.[50]

B. *Terrorism Conventions*

Each of the thirteen terrorism conventions developed under the auspices of the United Nations require states parties to punish certain terrorist conduct through their domestic laws. The conventions do little, however, to particularize the liability of those that may have directly or indirectly assisted the commission of those acts. Where the terrorism conventions do address secondary liability, it is largely accomplice liability,[51] and early terrorism conventions did so with little, if any, elaboration on the contours of such liability.[52] This failure to particularize has, in effect, left states parties with wide latitude as to how secondary liability is addressed in their respective municipal laws.

Secondary accomplice liability has been fleshed out only in some of the more recent terrorism conventions. For example, both the Convention for the

---

1(d).

50. Humanitarian giving, charitable aid, and peacebuilding programs have all suffered as a result of material support laws and other counterterrorism measures. *The Impact of Counterterrorism Measures on Charities and Donors After 9/11*, CHARITY & SECURITY NETWORK, (Aug. 16, 2010) http://www.charityandsecurity.org/background/The_Impact_of_Counterterrorism_Measures_on_Charities_and_Donors_After_9/11.

51. 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. *See* BLACK'S LAW DICTIONARY 16 (7th ed. 1999) (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.").

52. *See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation art. 3(2), Mar. 10, 1988, 1678 U.N.T.S. 221 (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."); International Convention Against the Taking of Hostages art. 1.2, Dec. 17, 1979, 1316 U.N.T.S. 205 (providing 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 Seizure of Aircraft art. 1(b), Dec. 16, 1970, 860 U.N.T.S. 105 (assigning liability to any person who is an accomplice of a person who unlawfully seizes or attempts to unlawfully seize an aircraft).

Suppression of Terrorist Bombings of 1997 (Terrorist Bombing Convention) and the Convention for the Suppression of Acts of Nuclear Terrorism of 2005 assign liability to a person who "[i]n any other way contributes to the commission of" terrorism offenses.[53] This catch-all "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. While 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 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, does concern itself almost entirely with indirect and secondary liability for terrorist acts.[54] The Convention requires in great detail that states parties criminalize the provision or collection of funds with the intention or knowledge that those funds be used to carry out terrorist offenses.[55] As noted above, it is safe to assume that no humanitarian or peacemaking 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. As with the Terrorist Bombing Convention, the crux of the issue would thus 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 would likely be difficult—but not impossible—to prove in court. If an NGO had sufficiently 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.[56] In other words, if the Taliban routinely commingles all of the funds it receives, and the person knew or should have known of this practice, even funds for transport or incidentals during a peace conference could theoretically constitute an offense under a national law enacted pursuant to this Convention.

C. *International Humanitarian Law*

The developments in counterterrorism law described above have raised particular questions as to the legality of activities undertaken by humanitarian

53. International Convention for the Suppression of Acts of Nuclear Terrorism art. 2.4(c), Apr. 13, 2005, 2445 U.N.T.S. 89; International Convention for the Suppression of Terrorist Bombings art. 2(3), Dec. 15, 1997, 2149 U.N.T.S. 256.

54. *See* International Convention for the Suppression of the Financing of Terrorism, Jan. 10, 2000, 39 I.L.M. 270 [hereinafter Terrorism Financing Convention].

55. *Id.* 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].").

56. 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. *See* BLACK'S LAW DICTIONARY 876 (7th ed. 1999) (defining constructive knowledge as "[k]nowledge that one using reasonable care or diligence should have, and therefore is attributed by law to a given person").

relief organizations in situations of armed conflict like Afghanistan. It is a widely accepted principle of international humanitarian law that warring parties will permit humanitarian organizations to access injured soldiers and civilians.[57] The International Committee for the Red Cross, with its unique international mandate to provide assistance to conflict victims, thus enjoys widely recognized judicial immunity for its work,[58] and other impartial humanitarian organizations enjoy similar de jure or de facto protections.[59]

Indeed, relevant U.N. Security Council resolutions and the ATA recognize certain humanitarian exemptions. The Security Council authorizes a sanctions committee to permit the distribution of certain resources to the Taliban on grounds of humanitarian need.[60] In addition, the Terrorism Financing Convention indicates that it should not be read to affect international humanitarian law; certain humanitarian organizations thus arguably enjoy immunity from prosecution 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.[61] 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 U.N. Security Council resolutions do not call on member states to accord any special

---

57. *See* Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]; Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 9, 12, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War arts. 3, 10, 142, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

58. Gabor Rona, *The ICRC's Status: In a Class of its Own*, INT'L COMM. FOR THE RED CROSS (Feb. 17, 2004), http://www.icrc.org/eng/resources/documents/misc/5w9fjy.htm.

59. Common Article 3 of the four Geneva Conventions of 1949 provides that other "impartial" humanitarian organizations, similar to the ICRC, may also offer relief services to parties to an armed conflict and civilians. *See, e.g.*, Third Geneva Convention, *supra* note 57, art. 3; *see also* Fourth Geneva Convention, *supra* note 57, art. 10; Protocol I, *supra* note 57, arts. 5, 9, 49, 81. Reference to the ICRC is specifically included in the Geneva Conventions both to accord the organization special authorization to carry out humanitarian activities and to help define what is meant by the term "impartial humanitarian organization." The ICRC Commentary to the Third Geneva Convention provides that to be "impartial," an organization must be neutral and independent of any government or political party, and must be concerned with an individual's humanity regardless of his or her association with any government, military or professional unit. INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE CONVENTION (III) RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 41-42, 107-109 (Jean de Preux ed., 1960) *available at* http://www.icrc.org/ihl.nsf/COM/375-590012?OpenDocument.

60. *See* S.C. Res. 1452, ¶ 1(a), U.N. Doc. S/RES/1452 (Dec. 20, 2002) (providing that assets or economic resources necessary for foodstuffs, medicines, and medical treatment are to be exempted from the al Qaida and Taliban sanctions regime established pursuant to Security Council Resolution 1267).

61. Notably, the Terrorism Financing Convention does indicate that its provisions do not affect the rights, obligations, and responsibilities of states under international humanitarian law. *See* Terrorism Financing Convention, *supra* note 54, art. 21.

status to humanitarian actors working with injured members of the Taliban or other terrorist organizations in situations of armed conflict. While 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 thus remains an open question. As nontraditional armed conflicts grow increasingly common, reforms that indicate the precise organizations and types of relief that are shielded from material support prosecution should be strongly considered.

IV. PROPOSED REFORMS

After *HLP*, 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 controversial organizations, and are not shielded by functional immunities. Even if prosecutions or lawsuits are rare, the possibility will likely continue to have a chilling effect—certain individuals and organizations will be understandably reluctant to risk liability. It is also evident that the precise contours of both civil and criminal liability under domestic and international law continue to evolve and will be shaped by future constitutional challenges in the United States and policy debates at the international level. One of the principal purposes of a legal rule, whether domestic or international, is to guide conduct and thereby achieve compliance. Further clarification of the ATA would be most appropriately addressed by Congress, and the courts will also have a role to play. While 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 U.N. 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, any comprehensive terrorism convention that emerges from the United Nations could include a unifying theory of liability that addresses ambiguities arising from the existing terrorism conventions and relevant Security Council resolutions. Clarifying the necessary showing of intent and the specific categories of support that are proscribed is of primary importance.

Another potential solution could 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 (OFAC) administers various economic sanctions that require broad prohibitions on transactions with DTOs and certain states. To mitigate the sweeping consequences of these regulations, specific procedures were promulgated by which nongovernmental organizations 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 provide on the ground in conflict situations, exemption procedures under the ATA and additional procedures at the international level would be useful to consider. Of course, the administration of such exemption criteria at the international level may prove difficult, and any licensing would need to be vigilantly safeguarded from abuse. Yet, for humanitarian and peacemaking activities in nontraditional situations of armed conflict to remain viable, the OFAC model would provide a helpful starting point for considering international reform.

V. CONCLUSION

Viewed in isolation, the ATA as interpreted by *HLP* is justifiably a cause of further criticism of American counterterrorism policy. Yet, considered in the light of international law, *HLP* begins to look less like an anomalous outlier, and more like a global clarion call. *HLP*, the ATA, and international counterterrorism measures collectively indicate a need for greater clarity, nuance, and precision when assigning secondary liability for terrorism. Such domestic and international reform would help to isolate those that should be prosecuted for material support, and guide the conduct of public and private actors that engage with controversial organizations to promote laudable objectives.