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COMMENTS

CONSTRUCTION OF A TERRORIST UNDER THE MATERIAL SUPPORT STATUTE, 18 U.S.C. § 2339B

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The material support statute, 18 U.S.C. § 2339B, provides the government with a powerful tool to prosecute any individual it believes is providing material support to a foreign terrorist organization (FTO)—even if the individual does not intend to facilitate any terrorist acts. This law poses a problem for humanitarian aid groups that seek to provide much-needed assistance to those who often live amongst alleged "terrorists" or under a de facto FTO-led regime. Further exacerbating this problem, no appellate-level courts have ever defined how to determine whether an individual is part of an FTO under § 2339B. Without this definition, humanitarian organizations are often discouraged from providing aid widely for fear of inadvertently providing aid to an FTO, thereby risking prosecution under the statute.

With little to no guidance from the courts, a district court in United States v. Jama *attempted to provide the answer to the FTO question, but the test it created is flawed. Instead of looking to analogous legal doctrines, it set forth a*

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vague, non-exclusive seven-factor test that misinterpreted aspects of § 2339B's language and granted too much discretion to the judiciary.

Instead of following the test from Jama, *the proper test should incorporate principles from international humanitarian law and the U.S. government's terrorist sanctioning regimes. First, the individual should either be "owned or controlled by, or . . . act for or on behalf of," an FTO; or "assist in, sponsor, or provide financial, material, or technological support for, or financial or other services to or in support of" the FTO. Second, the individual must be directly participating in the furtherance of the FTO's goals at the time the individual receives the material support. A test based on these two factors clarifies who should be part of an FTO under § 2339B and balances the importance of personal conduct and actions on behalf of an FTO with an understanding of the variety of organizational structures found within FTOs.*

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INTRODUCTION

In the spring of 2017, the threat of famine loomed large over Somalia, an east African country facing its worst drought in close to forty years.[1] At least half the country, 6.2 million people, faced the prospect of acute food shortage.[2] The situation was dire: in March, the Somali government estimated that at least 110 individuals had died of hunger in just a two-day period in a single region, and the United Nations was calling for urgent aid.[3] Yet in addition to staring down the threat of starvation, many of those in the most serious danger—about 2 million people—also lived under the shadow of al-Shabaab, an al-Qaeda affiliate that the United States had designated as a foreign terrorist organization (FTO).[4] Instead of rushing to distribute aid to all of those in need within the country, U.S. humanitarian aid groups hesitated to reach those 2 million people living in close proximity to al-Shabaab.[5]

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1. *See* Jason Burke, *Anti-Terrorism Laws Have "Chilling Effect" on Vital Aid Deliveries to Somalia*, GUARDIAN (Apr. 26, 2017, 2:00 AM), https://www.theguardian.com/global-development/2017/apr/26/anti-terrorism-laws-have-chilling-effect-on-vital-aid-deliveries-to-somalia.

2. *Id.*

3. *See* Colin Dwyer, *Drought Threatens to Drive Famine in Somalia as Hunger Kills More than 100*, NPR (Mar. 5, 2017, 10:07 AM), https://www.npr.org/sections/thetwo-way/2017/03/05/518624610/drought-threatens-to-drive-famine-in-somalia-as-hunger-kills-more-than-100.

4. *See* Burke, *supra* note 1.

5. *Id.* (naming the necessary payment of "taxes" at road blocks run by armed groups and "negotiations with local community and clan elders, of whom some are likely to be connected to the insurgents" as possible complications to reaching individuals without also coming into contact with al-Shabaab).

If they did so, the aid groups claimed they feared being exposed to potential prosecution under U.S. counterterrorism laws, the most potent of which are referred to as the "material support" statutes.[6]

The material support statutes, 18 U.S.C. §§ 2339A and 2339B,[7] have been at the core of the U.S. Justice Department's terrorism prosecution efforts since the September 11, 2001, terrorist attacks.[8] These statutes are two of several federal anti-terrorism statutes covering a broad array of crimes, from "arson"[9] to "use of weapons of mass destruction,"[10] that Congress designed to fight terrorist activity at its source and to give law enforcement multiple opportunities to arrest those seeking to facilitate terrorist acts.[11] Sections 2339A and 2339B in particular are among the most frequently prosecuted federal anti-terrorism statutes[12]—from the 9/11 attack to December 2015, the government charged 318 individuals and successfully convicted 263

6. *Id.*

7. 18 U.S.C. §§ 2339A, 2339B (2012).

8. *A Review of the Material Support to Terrorism Prohibition Improvements Act: Hearing Before the Subcomm. on Terrorism, Tech. and Homeland Sec. of the S. Comm. on the Judiciary*, 109th Cong. 2 (2005) [hereinafter *Hearing on Material Support to Terrorism*] (statement of Barry Sabin, Chief, Counterterrorism Section, U.S. Dep't of Justice); *see also* David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 723 (2009) ("Although rarely enforced before 9/11, [§ 2339B] has since become a principal tool in the Justice Department's 'terrorism' prosecutions.").

9. 18 U.S.C. § 81.

10. § 2332a.

11. *See Hearing on Material Support to Terrorism*, *supra* note 8, at 2 (statement of Barry Sabin, Chief, Counterterrorism Section, U.S. Dep't of Justice) (explaining that Congress wrote the material support statutes with the recognition that "there are important components of the terrorist infrastructure that stop short of actual attacks"); Nicole Hong, *"Material Support" Statute Is Front and Center in Antiterror Push*, WALL ST. J. (May 27, 2015, 7:25 PM), http://www.wsj.com/articles/material-support-statute-is-front-and-center-in-antiterror-push-1432719002 (describing § 2339B as a statute Congress wrote with "broad wording . . . to help law enforcement catch people who facilitate terrorist activity in any way"). For further discussion of §§ 2339A and 2339B's statutory language, see discussion *infra* Section I.B.

12. *See* U.S. DEP'T OF JUSTICE, COUNTERTERRORISM WHITE PAPER 3, 14 (2006), http://trac.syr.edu/tracreports/terrorism/169/include/terrorism.whitepaper.pdf ("The material support statutes have been a cornerstone of our success in terrorism financing cases as well as in a wide range of other cases addressing all types of support to terrorism. Our effective use of these statutes has allowed us to intervene at the early stages of terrorist planning, before a terrorist act occurs."); CTR. ON LAW & SEC., TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2011 13–14 (2001) [hereinafter TERRORIST TRIAL REPORT CARD], http://www.lawandsecurity.org/wp-content/uploads/2011/09/TTRC-Ten-Year-Issue.pdf (citing § 2339B as the first and § 2339A as the second most commonly charged terrorism crimes since 2009).

under these statutes.[13] The statutes serve two separate purposes: (1) § 2339A prohibits providing "material support" to facilitate a terrorist activity,[14] and (2) § 2339B prohibits providing "material support" to an FTO.[15]

Section 2339B, the farther reaching of the statutes, imposes criminal liability on individuals who "knowingly provide[] material support or resources to a foreign terrorist organization, or attempt[] or conspire[] to do so."[16] Congress created the law in recognition of the "fungibility," or interchangeable nature, of the support an individual provides to an FTO.[17] In the mid-1990s, there was substantial public concern that money or other support an individual gave to an FTO, even if given to solely support religious or social services, would free up other funds that could then be spent promoting terrorist activities.[18] To assuage this concern, Congress purposefully drafted § 2339B to prohibit any and all support to an FTO, no matter how the individual intended the FTO to use the support.

Despite the rich congressional history and abundance of § 2339B criminal cases, no appellate-level court has ever specifically addressed the elements necessary for a court to deem the individual receiving the support to be part of an FTO—a fact that the federal district court in *United States v. Jama*[19] found particularly frustrating. In the 2016 district court case, the defendants—individuals accused of providing material support to al-Shabaab, an FTO operating in east Africa—asserted that the individuals receiving the "material support" were not in fact associated with the FTO at all, and therefore, the government could not prosecute them under the statute.[20] The district court itself, in discussing the history of § 2339B jurisprudence, acknowledged that there was "surprisingly little case law" to serve as guidance in answering

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13. *See* HUMAN RIGHTS FIRST, FEDERAL COURTS CONTINUE TO TAKE LEAD IN COUNTERTERRORISM PROSECUTIONS (2017), http://www.humanrightsfirst.org/sites/default/files/Federal-Courts-Continue-to-Take-Lead-in-CT-Prosecutions.pdf. From 2007 to 2010, criminal prosecutions against individuals suspected of providing "material support" to terrorist organizations jumped from 11.6 percent to 69.4 percent. *See, e.g.*, TERRORIST TRIAL REPORT CARD, *supra* note 12, at 19.

14. 18 U.S.C. § 2339A.

15. § 2339B.

16. § 2339B(a)(1).

17. H.R. REP. NO. 104-383, at 81 (1995).

18. *See infra* Section I.A (discussing the motivation for closing the economic loophole of § 2339A and the associated impetus behind enacting § 2339B).

19. 217 F. Supp. 3d. 882 (E.D. Va. 2016).

20. *Id.* at 890.

the question.[21] The dearth of precedent forced the court to create a test from scratch—and with poor results. Deciding that an individual is part of an FTO when the individual engages in "significant activity" on behalf of the FTO, the court relied on an inappropriately broad seven-factor test that considered everything from self-identification with an FTO to how the support benefitted an FTO.[22]

Notwithstanding the *Jama* test, the lack of a clear judicial definition of who is part of an FTO under § 2339B has been especially troubling for humanitarian aid groups. The distinction between an unaffiliated individual and a member of an FTO is particularly blurred for those on the fringes of society, for those who live among alleged "terrorists," and for those who live under a de facto regime led by "terrorists"—the individuals that aid groups most often assist.[23]

Consider Lebanon, where Hezbollah, a Shiite militant group the U.S. government classifies as an FTO, can be the most efficient vehicle for distributing aid to Lebanese towns and villages in the south of the country.[24] In a 2006 battle between Israel and Hezbollah, international relief agencies receiving financing from the U.S. government struggled to dole out food and medicine to villagers living on the front lines without running afoul of § 2339B.[25] While the non-governmental organizations (NGOs) made efforts to funnel aid appropriately and legally, many in the area acknowledged that coordination with Hezbollah was almost impossible to avoid if they wanted to distribute aid as widely as needed.[26]

To escape getting caught in § 2339B's web, humanitarian aid groups must receive more guidance when determining whether the

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21. *Id.*

22. *Id.* at 892.

23. *See* SARA PANTULIANO ET AL., OVERSEAS DEV. INST., COUNTER-TERRORISM AND HUMANITARIAN ACTION: TENSIONS, IMPACT AND WAYS FORWARD 3 (2011) (comparing the counterterrorism laws of several nations and describing the U.S. material support statutes as "by far the law with the greatest potential adverse impact on humanitarian organisations").

24. *See* Robert F. Worth & Hassan M. Fattah, *Aiding Civilians, Without Helping Hezbollah*, N.Y. TIMES (Aug. 23, 2006), http://www.nytimes.com/2006/08/23/world/africa/23iht-aid.2571304.html ("Though Hezbollah is only one of many social service groups in Lebanon, its reputation for delivering services honestly is unmatched, making it that much harder to circumvent.").

25. *Id.* Though the effort to distribute humanitarian supplies was slowed, the government did not prosecute any U.S. aid groups for violating § 2339B.

26. *Id.* (quoting an aid worker as saying, "We clearly cannot and would not have any contact with Hezbollah's military wing, or its social services arm . . . . But can we work with people elected under its political banner? That is a gray area.").

individuals they assist are part of an FTO. It is often critical that humanitarian supplies reach individuals as swiftly and efficiently as possible, and clarity from the courts would answer many questions NGOs have about common scenarios they face. Indeed, the lack of clarity and the broad scope of § 2339B have created a type of "chilling effect" on humanitarian aid groups, many times muffling their advocacy and stymieing their support.[27] Aid groups fear prosecution for accidentally providing aid to an individual with ties to an FTO, which has even led some to reconsider providing humanitarian assistance at all.[28] This is particularly concerning for aid groups active in war-torn areas—precisely where aid is often most needed.[29]

This Comment argues that the test developed by the district court in *Jama* is flawed because it failed to consider domestic and international doctrines that have already decided issues analogous to § 2339B's FTO question. Instead of focusing on a "significant activity" test, the proper test should incorporate principles and lessons from international humanitarian law and terrorist sanctioning regimes to provide much-needed clarity on who is part of an FTO under § 2339B. Part I provides the background and congressional history of § 2339B, including the atmosphere within the United States when Congress enacted the statute in 1996. Part II considers the negative impact that § 2339B has had on humanitarian aid operations globally. Part III analyzes the test created by the *Jama* court, and Part IV then critiques the *Jama* test and considers how other tests from domestic and international law could apply in the § 2339B context. This Comment concludes by providing a recommendation for a new test that courts could employ, with a

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27. *See generally* Sam Adelsberg et al., *The Chilling Effect of the "Material Support" Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms*, 4 HARV. NAT'L SECURITY J. 282, 282–83 (2013) (describing a 2011 incident in east Africa when U.S. aid organizations were hesitant to provide relief to famine victims because they were in areas controlled by a militant group and feared prosecution for providing famine aid in those areas).

28. *See infra* Part II (describing several instances in which fear of prosecution under a material support statute has either prevented an NGO from providing aid to individuals or forced an NGO to cancel a potential aid program).

29. *See, e.g.*, Adelsberg et al., *supra* note 27, at 283, 296–97 (describing a situation where "a tsunami hit Sri Lanka in 2004[and] aid was reportedly hampered in regions controlled by the [Liberation Tigers of Tamil Eelam] because organizations knew that any provision of humanitarian aid within those regions would expose them to criminal liability," and thus the provisions of medical supplies "failed to address the increasingly pressing needs of the affected populations for food, clothing, water, and sanitation").

particular eye toward smoothing encounters between humanitarian organizations and U.S. counterterrorism laws.

I. § 2339B AND CONGRESS'S EFFORT TO ERADICATE TERRORIST FINANCING

On April 19, 1995, a truck filled with explosives detonated in front of the Alfred P. Murrah Federal Building in Oklahoma City, Oklahoma, killing 168 individuals and injuring hundreds more.[30] The blast was the deadliest act of domestic terrorism committed on U.S. soil and served as a catalyst for broad-sweeping legislative proposals intended to ensure that such an act would never occur again.[31] Congress enacted one such proposal—the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)[32]—on the one-year anniversary of the bombing and included within it one of the most far-reaching federal anti-terrorism statutes in the United States: 18 U.S.C. § 2339B.[33] While different anti-terrorism legislative proposals had been in the works over the years,[34] § 2339B's approach to mens rea marked a departure from previously enacted anti-terrorism laws.[35] Instead of requiring that a defendant providing material support to an FTO had *intent* to facilitate a terrorist act, § 2339B only required proof

30. *See* Pierre Thomas, *McVeigh Friend Takes Plea Deal*, WASH. POST (Aug. 9, 1995), http://www.washingtonpost.com/wp-srv/national/longterm/oklahoma/stories/ok080995.htm.

31. *See* Katharine Q. Seelye, *House Committee Passes Anti-Terrorism Measure*, N.Y. TIMES (June 21, 1995), http://www.nytimes.com/1995/06/21/us/house-committee-passes-anti-terrorism-measure.html (noting that the bill was under consideration for several months, but the terrorist attack added urgency).

32. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at scattered sections in 8, 18, 22, 28, & 42 U.S.C.). AEDPA's goal is to "deter terrorism, provide justice for victims, provide for an effective death penalty, and for other purposes." *Id.* at 1214. Upon signing AEDPA, President Bill Clinton stated, "It stands as a tribute to the victims of terrorism and to the men and women in law enforcement who dedicate their lives to protecting all of us from the scourge of terrorist activity." Presidential Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 WEEKLY COMP. PRES. DOC. 719, 721 (Apr. 29, 1996).

33. 18 U.S.C. § 2339B (2012).

34. *See, e.g.*, Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention*, 42 HARV. J. LEGIS. 1, 4–21 (2005) (outlining the multitude of anti-terrorism laws proposed in Congress in the 1980s and 1990s).

35. *See id.* at 18 (distinguishing between § 2339B and § 2339A based on § 2339B's broad language, which "would seem on its face to prohibit the provision of the same kinds of aid under any circumstances irrespective of the provider's intent or belief about how the recipient will use it").

that the defendant had *knowledge* that the organization was an FTO.[36] Congress made this change in response to fears that previous anti-terrorism statutes had left open a gap that allowed individuals to lawfully make a charitable donation to an FTO, which the FTO could then use for terrorism purposes instead. Though Congress enacted § 2339B with broad language to ensure it closed this gap, it has since amended and clarified the statute several times to avoid vagueness challenges. As it stands now, the U.S. Secretary of State still has broad authority to designate organizations as FTOs, but the ability of courts to interpret § 2339B has narrowed in a few key respects.

A. § 2339B: Background & Purpose

A primary congressional motivation in enacting § 2339B without the intent requirement was to address concerns about an economic loophole that § 2339A left open. Congress enacted § 2339A only two years prior to § 2339B as part of the Violent Crime Control and Law Enforcement Act of 1994,[37] a lengthy bill of legislative crime-control reforms.[38] In the wake of the 1993 World Trade Center bombing,[39] § 2339A criminalized providing "material support"[40] for the

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36. § 2339B(a)(1).

37. Pub. L. No. 103-322, 108 Stat. 1796 (1994) (codified as amended at 34 U.S.C. §§ 12101–12643 (2012)).

38. *See* CHARLES DOYLE, CONG. RESEARCH SERV., R41333, TERRORIST MATERIAL SUPPORT: AN OVERVIEW OF 18 U.S.C. 2339A AND 2339B 1 n.3 (2010) (describing the bill as a "[355-]page amalgam of legislative proposals consisting of [33] separate titles which included Cop on the Beat grants, the Violence Against Women Act, revival of the death penalty as a federal sentencing alternative, a ban on assault weapons, DNA identification, and crime victims' rights").

39. On February 26, 1993, a group of terrorists with close ties to Khaled Sheikh Mohammed, considered the mastermind of 9/11, drove a van packed with explosives into the World Trade Center's underground garage; the ensuing blast killed six and injured hundreds more. *See* Benjamin Weiser, *The Trade Center Verdict: The Overview; "Mastermind" and Driver Found Guilty in 1993 Plot to Blow Up Trade Center*, N.Y. TIMES (Nov. 13, 1997), http://www.nytimes.com/1997/11/13/nyregion/trade-center-verdict-overview-mastermind-driver-found-guilty-1993-plot-blow-up.html.

40. The definition of "material support or resources" has remained a point of controversy since its inclusion in the law and, following a flurry of lawsuits questioning the constitutionality of the phrase, was amended to address vagueness concerns. *See Aiding Terrorists: An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 128–30 (2004) (statement of Robert M. Chesney, Assistant Professor of Law, Wake Forest University School of Law). The current definition of "material support" is

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging,

commission of specific violent crimes by terrorists when the individual providing support knew or intended that the material support would be used "in preparation for, or in carrying out" an act of terrorism.[41] Section 2339A's critics complained that the statute left open a loophole that allowed terrorist groups to potentially raise money in the United States under the guise of charity.[42] In other words, under § 2339A, an individual could legally donate money to a terrorist organization so long as the donor believed the money would be spent on a terrorist organization's political or social services instead of on acts of terrorism.[43]

One year after § 2339A's passage, the overall devastation, loss of life, and public shock following the Oklahoma City bombing generated a renewed surge of public interest in congressional proposals on anti-terrorism laws[44] and reinforced criticisms of the loophole in § 2339A. Within minutes of the bombing, media reports widely speculated that it was the work of Muslim extremists,[45] despite the arrest of the

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> training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel ([one] or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

§ 2339A(b)(1).

41. § 2339A(a). The list of designated offenses covers any of the federal terrorism crimes, including domestic terrorist acts. *Id.*

42. *See* H.R. REP. NO. 104-383, at 43 (1995) ("Many of these organizations operate under the cloak of a humanitarian or charitable exercise, or are wrapped in the blanket of religion. They use the mantle of religion to protect themselves from scrutiny, and thus operate largely without fear of recrimination."); *see also* Chesney, *supra* note 34, at 13 (describing criticism of § 2339A, such as the difficulty of proving that resources given to charity or religious groups were in fact being funneled to terrorist organizations).

43. *See* Chesney, *supra* note 34, at 13.

44. *Id.* at 15; *see, e.g.*, Katharine Q. Seelye, *House Committee Passes Anti-Terrorism Measure*, N.Y. TIMES (June 21, 1995), http://www.nytimes.com/1995/06/21/us/house-committee-passes-anti-terrorism-measure.html ("Although the package had been in the works for several months, the April 19 bombing in Oklahoma City [gave] the bill added urgency."); *see also* 142 CONG. REC. 7972 (1996) (statement of Hon. Don Young) (commenting that AEDPA was simply "a knee-jerk reaction to a most heinous crime").

45. *See, e.g.*, Yaser Ali, Comment, *Shariah and Citizenship—How Islamophobia Is Creating a Second-Class Citizenry in America*, 100 CALIF. L. REV. 1027, 1041 (2012) ("[T]he Arab terrorist stereotype was so entrenched that even after Timothy McVeigh . . . had been arrested . . . CNN's Wolf Blitzer reported 'there is still a possibility that there could have been some sort of connection to Middle East terrorism . . . .'"); Jim Naureckas, *The Oklahoma City Bombing: The Jihad That Wasn't*, FAIR (July 1, 1995),

bomber, Timothy McVeigh—a white, Christian male—just ninety minutes after the attack.[46] The public immediately focused its scrutiny onto Islamic communities within the United States, fiercely questioning and targeting Muslim non-profits and mosques as possible sources of financial support for the bombing.[47] Fabricated though it was, this exact scenario seemed to confirm § 2339A critics' warnings.

In response to the outcry, Congress enacted § 2339B.[48] The statute's remedy to the supposed loophole extended criminal liability by outlawing provisions of "material support" to FTOs without requiring that the defendant have additional intent that those funds be used to further terrorism in any way.[49] As the House committee report explained at the time, § 2339B

> recognizes the fungibility of financial resources and other types of material support. Allowing an individual to supply funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization's treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can then be spent on terrorist activities.[50]

Since 9/11, the U.S. government has used § 2339B's broad reach to prosecute many of the most prominent and well-known terrorism cases.[51]

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http://fair.org/extra/the-oklahoma-city-bombing (compiling examples of news reports that assumed ties between the Oklahoma bombing and Islamic terrorism).

46. *See* Hailey Branson-Potts, *After Oklahoma City Bombing, McVeigh's Arrest Almost Went Unnoticed*, L.A. TIMES (Apr. 19, 2015, 3:00 AM), http://www.latimes.com/nation/la-na-oklahoma-city-bombing-20150419-story.html.

47. *See, e.g.*, Todd J. Gillman, *FBI Looks into Islamic Fund Raising: Muslim Officials Deny Supporting Terrorism*, DALLAS MORNING NEWS, Nov. 18, 1994, at 29A, 1994 WLNR 5016732.

48. *See* Chesney, *supra* note 34, at 17 (noting that § 2339B was enacted in haste to meet the deadline of the one-year anniversary of the bombing). Even before the passage of § 2339B, President Clinton used his executive authority to narrow § 2339A's gap by imposing sanctions under the International Emergency Economic Powers Act, 50 U.S.C. § 1705 (2012), targeting terrorist organizations and their members. Chesney, *supra* note 34, at 13.

49. 18 U.S.C. § 2339B (2012); *see also infra* Section I.C (defining "foreign terrorist organization" as a foreign organization that engages in terrorist activity, which threatens the security of the United States).

50. H.R. REP. NO. 104-383, at 81 (1995).

51. *See* Benjamin J. Priester, *Who Is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1266 (discussing § 2339B prosecutions of the "Lackawanna Six," an alleged al-Qaeda "sleeper cell" in upstate New York, and John Walker Lindh, called the "American Taliban" for his alleged involvement with the Taliban in Afghanistan).

B. § 2339B: Statutory Language

Section 2339B has faced several challenges to its constitutionality since its enactment—including criticisms that certain elements were overbroad and vague—and Congress has adjusted its language to address these and other concerns.[52] In its current form, § 2339B reads:

> Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization . . . , that the organization has engaged or engages in terrorist activity . . . , or that the organization has engaged or engages in terrorism . . . .[53]

The definition of "material support" is expansive and includes providing training, financial services, expert advice or assistance, and personnel.[54] Terms within "material support" have also been defined to add more clarity, including a separate, more refined definition of what it means to provide "personnel."[55] With this expansive definition of "material support," the prosecution can obtain a conviction under § 2339B based on actions as far ranging as "raising $300 for Al Shabaab" to "attempting to provide anti-aircraft missiles for Al Qaeda."[56]

Elimination of the requirement that a defendant intend to further terrorist activities means that a judge or jury need only find two things to convict a defendant under § 2339B: (1) the accused knowingly attempted to provide or provided "material support" to an FTO;[57] and

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52. For example, the USA PATRIOT ACT of 2001 amended the section by increasing the maximum sentence lengths and adding "expert advice or assistance" to the definition of "material support." *See, e.g.*, DOYLE, *supra* note 38, at 2; *see also supra* note 40 (discussing the controversy surrounding the term "material support" and whether its terms were overly vague).

53. § 2339B(a)(1).

54. § 2339A(b)(1); *see also supra* note 40 (discussing the definition of "material support").

55. *See infra* notes 138–39 and accompanying text (defining "personnel" as individuals who "work under that terrorist organization's direction or control or . . . organize, manage, supervise, or otherwise direct the operation of that organization").

56. TERRORIST TRIAL REPORT CARD, *supra* note 12, at 20; *see also* Adam Liptak, *The Year in Ideas; Material Support*, N.Y. TIMES MAG. (Dec. 15, 2002), http://www.nytimes.com/2002/12/15/magazine/the-year-in-ideas-material-support.html ("[P]rosecutors have realized that the provision is written so broadly that almost any kind of support can be defined as illegal.").

57. § 2339B(a)(1); *see also* United States v. Al Kassar, 660 F.3d 108, 129 (2d Cir. 2011) (dismissing the defendants' invitation to read a scienter requirement of "specific

(2) the accused knew that the beneficiary of the support was either engaged in terrorism or was an FTO.[58]

C. FTO Designation Process

Because a necessary element of a § 2339B charge is that the defendant provided material support to an FTO or an organization engaged in "terrorism" or "terrorist activities," confirming the organization's status is a critical first step in prosecution.[59] Congress has given the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney General, the power to designate foreign organizations as FTOs under section 219 of the Immigration and Nationality Act (INA).[60] To do this, the Secretary of State compiles an administrative record containing classified and non-classified materials to demonstrate that the foreign organization meets the statutory criteria.[61]

There are three statutory criteria for FTO designation. First, there must be "substantial support"[62] in the Secretary of State's administrative record that the group is indeed a "foreign

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intent" into § 2339B because Congress "chose knowledge about the organization's connection to terrorism, not specific intent to further the organizations terrorist activity" (quoting Holder v. Humanitarian Law Project, 561 U.S. 1, 2 (2010))).

58. § 2339B(a)(1); *see also* United States v. Omar, 786 F.3d 1104, 1113 (8th Cir. 2015) (noting that the government's burden to prove material support to an FTO includes knowledge that an individual was dealing with an organization that is "engaged or engages in terrorist activity," or knowledge that the organization "engaged or engages in terrorism").

59. Critically, a § 2339B defendant also cannot assert as a defense that the Secretary of State improperly designated the organization as an FTO. *See* 8 U.S.C. § 1189(a)(8) (2012) ("If a designation under this subsection has become effective under paragraph (2)(B) a defendant in a criminal action or an alien in a removal proceeding shall not be permitted to raise any question concerning the validity of the issuance of such designation as a defense or an objection at any trial or hearing."); *see also Aiding Terrorists—An Examination of the Material Support Statute: Hearing Before the S. Comm. on the Judiciary*, 108th Cong. 3 (2004) (testimony of David Cole, Professor of Law, Georgetown Univ. Law Ctr.) [hereinafter Testimony of David Cole], http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1014&context=cong ("Section 2339B, if construed not to require that kind of specific intent to further the terrorist activity of the group, imposes guilt by association, in violation of the First Amendment, and in violation of the Fifth Amendment.").

60. 8 U.S.C. § 1189.

61. § 1189(a)(3)(B).

62. *See* People's Mojahedin Org. of Iran v. U.S. Dep't of State, 182 F.3d 17, 24 (D.C. Cir. 1999) (holding that the administrative record contained "substantial support" that a Sri Lankan separatist group was an FTO because of evidence that it engaged in bombing and killing to further their political goals).

organization."[63] Second, the organization must "engage[] in terrorist activity . . . or terrorism . . . , or retain[] the capability and intent to engage in terrorist activity or terrorism."[64] Third, the organization's terrorist activity must threaten the "security of [U.S.] nationals or the national security of the [United States]" as a whole.[65]

FTO designation has significant legal ramifications. Under § 2339B, any individual who "knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so," faces up to twenty years in prison or, if death results from the FTO's use of the material support, life imprisonment.[66] Additionally, once the designation takes effect, FTO members may not travel to the United States or may be removable from the United States if they are already in the country.[67] American financial institutions must also take control over any funds they know have ties to an FTO and report the funds to the U.S. Treasury's Office of Foreign Assets Control.[68]

The Secretary of State also determines if there exists a statutory exemption for an FTO to receive certain types of support. Section 2339B carves out two exceptions for those providing medicine or religious materials;[69] however, it includes no explicit exception for humanitarian

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63. § 1189(a)(1)(A). The Secretary of State likely narrowly interprets the term "foreign organization." *See* Joshua A. Ellis, Comment, *Designation of Foreign Terrorist Organizations Under the AEDPA: The* National Council *Court Erred in Requiring Pre-Designation Process*, 2002 BYU L. REV. 675, 678. For example, in *Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192 (D.C. Cir. 2001), the U.S. government conceded that a group organized under the laws of the District of Columbia could not be an FTO. *Id.* at 201–02; Brief for Respondents at 28, Nat'l Council of Resistance of Iran v. Dep't of State, 251 F.3d 192 (Nos. 99-1438, 99-1439), 2000 WL 35576228, at *28; *see also* Ellis, *supra*, at 679 (highlighting the U.S. Code's failure to define "foreign organization" but noting that the Secretary of State interprets the term "foreign organization narrowly).

64. § 1189(a)(1)(B). Section 212 (a)(3)(B) of the INA defines "terrorist activity" as any unlawful activity that involves such activities as assassinations, the use of biological weapons, and violent attacks. 8 U.S.C. § 1182(a)(3)(B)(iii)(I)–(IV). To "engage" in the defined terrorist activity, an individual must "commit or . . . incite to commit" a terrorist activity, "prepare or plan a terrorist activity," solicit funds or individuals for an organization, or "commit an act that the actor knows, or reasonably should know, affords material support." § 1182 (a)(3)(B)(iv)(I)–(VI).

65. § 1189(a)(1)(C). Under the statute, "national security" encompasses the "national defense, foreign relations, or economic interests of the United States." § 1189(d)(2).

66. 18 U.S.C. § 2339B(a)(1) (2012).

67. 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV)–(V), 1227(a)(1)(A).

68. § 1189(a)(2)(C).

69. 18 U.S.C. § 2339A(b) (excluding "medicine" and "religious materials" from the definition of "material support").

resources broadly.[70] Instead, the Secretary of State may approve exemptions for humanitarian aid in the form of "training," "personnel," and "expert advice or assistance" in situations where aid will not be used to carry out terrorist activity.[71] No humanitarian aid exemption appears to have been approved by the Secretary of State in the more than twenty years since § 2339B's enactment.[72] However, the Secretary of State did extend a type of "good faith" exemption in August 2011 to U.S. aid groups providing aid to famine victims in Somalia.[73]

II. § 2339B'S IMPACT ON HUMANITARIAN AID GROUPS

Since Congress enacted § 2339B, many charitable organizations have decried its counterterrorism measures and its adverse effects on humanitarian aid.[74] In regions where FTOs operate, U.S. anti-terrorism laws often dissuade humanitarian organizations from providing aid for fear of unintentionally helping an individual with ties

70. *See supra* note 40 (noting that the only exceptions within "material support" are either "medicine or religious materials").

71. 18 U.S.C. § 2339B(j) ("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 . . . .").

72. *See* GUINANE ET AL., CHARITY & SEC. NETWORK, SAFEGUARDING HUMANITARIANISM IN ARMED CONFLICT: A CALL FOR RECONCILING INTERNATIONAL LEGAL OBLIGATIONS AND COUNTERTERRORISM MEASURES IN THE UNITED STATES 18 (2012), http://www.charityandsecurity.org/sites/default/files/Safeguarding%20Humanitarianism%20Final.pdf (noting in reference to the humanitarian exemption that, "[t]o our knowledge, this power has not been invoked").

73. *Background Briefing on Somalia and Delivery of Humanitarian Assistance*, U.S. DEP'T ST. (Aug. 2, 2011), https://2009-2017.state.gov/p/af/rls/spbr/2011/169479.htm.

74. *See generally* Adelsberg et al., *supra* note 27, at 293 (detailing the "chilling effects" the material support statutes have had on humanitarian assistance abroad, including leading some organizations to reconsider providing humanitarian aid). A majority of these criticisms concern the overarching reach of the "material support" definition, especially in the wake of the Supreme Court's holding in *Holder v. Humanitarian Law Project*. *See* Holder v. Humanitarian Law Project, 561 U.S. 1, 16 (2010) (examining the definition of "material support" and holding that it was not unconstitutionally vague, did not constitute an abridgement of the First Amendment right to free speech, and did not impermissibly intrude on the right of free association). These concerns equally apply to the lack of clarification on who courts deem to be part of an FTO.

to an FTO.[75] In many areas, the designated FTOs are not merely "terrorist groups"—they are also the de facto government of the territory or region, providing services that include health care, education, business, and law enforcement.[76] This creates a nearly impossible situation when disaster strikes, and humanitarian aid organizations face the dilemma of either providing life-saving aid and risking prosecution under U.S. counterterrorism laws or doing nothing at all.

In the aftermath of the 2004 tsunami that ravaged southeast Asia, close to 40,000 Sri Lankans lost their lives.[77] Amid the destruction, aid agencies could not effectively operate in northeastern Sri Lanka for fear of prosecution for interacting with the Liberation Tigers of Tamil Eelam (LTTE), a separatist group that sought the creation of an independent Tamil state.[78] A designated FTO, the LTTE engaged in terrorist tactics throughout its history, including notoriously "pioneering" the use of suicide bomb jackets.[79] Yet the LTTE also served as the de-facto government for northeastern Sri Lanka and provided many of the social services in the area.[80] Because of the group's prevalence in the region, reaching people in the northeast ultimately required aid groups to operate in areas controlled by the FTO.[81] After the tsunami struck Sri Lanka, the anti-terrorism laws arguably prevented much-needed aid from reaching millions of

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75. *See* GUINANE ET AL., *supra* note 72, at 55 (explaining that while not all contact with an FTO is prohibited, the severe penalties for providing aid to FTOs dissuade aid organizations in certain contexts).

76. *See, e.g.*, Justin A. Fraterman, *Criminalizing Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?*, 46 N.Y.U. J. INT'L L. & POL. 399, 402 (2014) (describing the situation where an FTO operated as the de facto government of northeastern Sri Lanka during the country's civil war).

77. Charles Haviland, *Sri Lanka Recovers Seven Years After Its Tsunami*, BBC NEWS (Mar. 22, 2011), http://www.bbc.com/news/world-south-asia-12806874.

78. *Implementation of the USA PATRIOT ACT: Prohibition of Material Support Under Sections 805 of the USA Patriot Act and 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004: Hearing Before the Subcomm. on Crime, Terrorism, & Homeland Sec. of the H. Comm. on the Judiciary*, 109th Cong. 25–28 (2005) (statement of Ahilan Arulanantham).

79. *See* Preeti Bhattacharji, *Liberation Tigers of Tamil Eelam (aka Tamil Tigers) (Sri Lanka, Separatists)*, COUNCIL ON FOREIGN REL. (May 20, 2009), http://www.cfr.org/ separatist-terrorism/liberation-tigers-tamil-eelam-aka-tamil-tigers-sri-lanka-separatists/p9242 (crediting hundreds of suicide attacks and more than 70,000 deaths to the LTTE).

80. *See generally* Fraterman, *supra* note 76, at 402 (listing the services the LTTE provided to the local populace in northeastern Sri Lanka, including health and law enforcement services).

81. *Id.* at 402–03 (noting that millions of affected individuals were likely unable to receive aid).

people in the disaster zone because the U.S. aid organizations did not want to risk criminal prosecution and asset seizure.[82] Some aid groups reportedly either scaled back their provisions in LTTE-controlled regions or limited their provisions to only medical care, which § 2339B excepts from coverage.[83]

Though disaster situations exacerbate § 2339B's obstacles to humanitarian aid distribution, the statute also affects long-term development work. During a 2009 hunger crisis in Somalia, for example, the U.S. Agency for International Development (USAID) provided funds for NGOs to drill wells in severely affected areas; however, USAID also proposed that NGOs monitor whether al-Shabaab members drank from those wells and then report on al-Shabaab's use of the wells to the U.S. government.[84] The proposed requirement was impossible for the NGOs to implement—al-Shabaab is an FTO battling the Somali government for control of the country, and it is a prominent force in many rural areas[85]—so the NGOs could not proceed.[86]

Thus, without any guidance from courts or Congress on what legal showing is sufficient to deem individuals part of an FTO, well-intentioned donors and charitable organizations seeking to distribute aid are left to their best guess. All too often, the result of this lack of guidance is either failure to distribute emergency aid to certain regions or elimination of a long-term development project.

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82. *See* AHILAN T. ARULANANTHAM, AM. CONSTITUTIONAL SOC'Y FOR LAW & POLICY, "A HUNGRY CHILD KNOWS NO POLITICS:" A PROPOSAL FOR REFORM OF THE LAWS GOVERNING HUMANITARIAN RELIEF AND "MATERIAL SUPPORT" OF TERRORISM 2–6 (2008), http://www.acslaw.org/files/Arulanantham%20Issue%20Brief.pdf. *See generally* Fraterman, *supra* note 76, at 402 (discussing the difficulties the material support statutes created for charitable organizations in the aftermath of the tsunami).

83. *See* Adelsberg et al., *supra* note 27, at 297 (noting that the medical care failed to address more pressing concerns such as lack of food and water).

84. *See* GUINANE ET AL., *supra* note 72, at 56 (describing the monitoring request as an "extreme measure[]" by the U.S. government).

85. *See Who Are Somalia's al-Shabaab?*, BBC NEWS (Dec. 9, 2016), http://www.bbc.com/news/world-africa-15336689 (reporting that al-Shabaab has carried out terrorist attacks in Somalia and Kenya and is still a threat despite being pushed out of most of the territory it once controlled).

86. *See* GUINANE ET AL., *supra* note 72, at 56 ("This broad reading of the material support law denied civilians in an entire village a basic necessity, based solely on the listed group's presence in the region.").

III. WHO IS A "TERRORIST"?

Answering the question of who is considered a terrorist is complex, and even though the answer is crucial, several aspects of § 2339B remain hotly contested.[87] Will delivering tsunami aid to the brother of an LTTE member in Sri Lanka put a humanitarian organization in jeopardy, even if the brother has never directly taken part in a terrorist act? Does providing food and water to an individual starving during a famine equate to providing aid to the organization as a whole?[88] What avenues for delivering aid are available to charitable organizations operating in territories where the de facto government is an FTO? Donors and charitable organizations must have guidance on who is tied to a designated FTO and who is not, especially considering the threat of hefty sentences, including life imprisonment,[89] and the far-reaching adverse effects on aid delivery.[90]

The district court in *Jama* directly addressed the issue of what comprises sufficient ties to an FTO under § 2339B.[91] However, given the swift dismissal the court gave to the parties' counterarguments,[92]

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87. *See* Testimony of David Cole, *supra* note 59, at 2–3 (arguing that material support statutes "impose guilt by association," are "vague and overbroad," and give "the executive branch unfettered discretion in labeling political groups as terrorist groups"). *See generally* Fraterman, *supra* note 76, at 417–18 (noting the difficulties that come with requiring aid workers to know if their aid is going to an FTO).

88. The Seventh Circuit and Second Circuit have construed the term "medicine," excepted in § 2339B, differently. *Compare* United States v. Farhane, 634 F.3d 127, 143 (2d Cir. 2011) ("[T]he medicine exception . . . shields only those who provide *substances* qualifying as medicine to terrorist organizations. Other medical support, such as volunteering to serve as an on-call doctor for a terrorist organization, constitutes a provision of personnel and/or scientific assistance proscribed by law."), *with* Boim v. Holy Land Found. for Relief & Dev., 549 F.3d 685, 699 (7th Cir. 2008) (en banc) (holding that "medicine" should be broadly construed to include the provision of medical services).

89. Pub. L. No. 114-23, § 704, 129 Stat. 268, 300 (2015) (amending 18 U.S.C. § 2339B(a)(1)).

90. *See supra* Part II (discussing § 2339B's implications on humanitarian aid delivery).

91. United States v. Jama, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016) (articulating a seven-factor test to determine what constitutions sufficient ties under § 2339B).

92. Defendants contended that they were not under the "command and control" of the FTO, that they were not members of the FTO, that the FTO was different from "domestic criminal organizations," and that a definition regarding who is part of an FTO must accommodate the First Amendment. *Id.* at 891. In its analysis, the Court addressed these counterarguments and found the parties' in violation of § 2339B. *Id.* at 891, 893, 895.

the court's flawed reading of § 2339B's congressional history,[93] and its failure to adequately understand the nuances of terrorist activity,[94] it is prudent to consider other laws and sanctioning regimes that have answered analogous questions. These comparative structures—from domestic law, international law, the United Nations, and the U.S. State Department—provide alternative models to help answer the complex question of who belongs to an FTO.

A. The Jama *Court's Opinion*

Twenty years after Congress passed § 2339B, the federal district court in *Jama* addressed whether individuals receiving material support from defendants accused of violating § 2339B were part of an FTO. The court eventually found the defendants guilty of providing material support to al-Shabaab, a designated FTO.[95] However, the defendants' arguments pushed the court to create an original test to determine the requisite level of involvement an individual must have with an FTO to be deemed part of that FTO under § 2339B.[96]

In the court's reading of § 2339B, an individual has provided material support or resources "to" an FTO under § 2339B "if that person delivers material support or resources intended for an FTO, either directly or through conduits, to someone who is deemed a part of the FTO."[97] The defendants in the case did not dispute that they intended to provide some material support to al-Shabaab in limited, exempted ways.[98] They did contend, though, that their fundraising activities in online chatrooms and monetary transmissions were done through individuals "who supported, *but were entirely independent of*," al-Shabaab, and therefore, the government had not established a prima facie case against them in this respect.[99]

The resulting question before the court was whether the individuals who received the contributions from the defendants were sufficiently connected with al-Shabaab, and the court recognized that it had

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93. *See infra* Section IV.A (analyzing the *Jama* test and determining that it gives the judiciary too much discretion in deciding who it deems part of an FTO).

94. *See infra* Section IV.A.2 (critiquing the *Jama* court's "significant activity" test and finding it added little clarity to the already ambiguous concept of "terrorism").

95. *Jama*, 217 F. Supp. 3d at 895.

96. *Id.* at 892.

97. *Id.* at 887.

98. *Id.* at 890 (stating that the defendants argued their funds would only be used to provide medical care, which is excepted under § 2339B).

99. *Id.* at 888, 890 (emphasis added).

"surprisingly little case law" to act as precedent or even guidance to formulate an answer.[100] The court found no opinion from the Supreme Court or any appellate-level court explicitly addressing the issue of what showing is legally sufficient under § 2339B for a court to deem an individual part of an FTO.[101] In lieu of precedent, the court first addressed both the defendants' and government's proposed tests.

1. The defendants' arguments and U.N. sanctioning regimes

The defendants asserted that the individual in question must be a part of a "command and control" leadership structure within the FTO[102] and, based on analogous U.N. sanctioning designations, a "member" of the FTO, as opposed to merely a "supporter," "financier," or "facilitator."[103] Though the defendants did not reference particular sanctioning regimes in their closing argument briefs,[104] one example they could have referenced to highlight the risks of creating a broad FTO definition is U.N. Security Council Resolution 1267.[105] Almost since its inception in 1999, Resolution 1267—which designated Osama bin Laden, his "associates," and the Taliban as terrorists and subjected them to a series of sanctions[106]—has been plagued with criticism.[107] The criticisms have centered around due process concerns regarding the fairness and accuracy of the listing process.[108]

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100. *Id.* at 890.

101. *Id.* ("It appears that no decision of the Supreme Court, Fourth Circuit, or any other circuit court has addressed explicitly what showing is legally adequate to constitute . . . material support to an FTO under [§] 2339B.").

102. *Id.* at 891.

103. *Id.* Separately, the defendants argued that the new legal test should accommodate the First Amendment rights of advocacy and association, including the protection of financial donations as speech. *Id.* The court held that § 2339B punishes conduct, not speech, and easily dismissed the defendant's proposed "non-speech protected overt act" requirement. *Id.* at 894.

104. Closing Arguments of Defendant Hinda Osman Dhirane at 29–30, United States v. Jama, 217 F. Supp. 3d 882 (E.D. Va. 2016) (No. 1:14cr230-AJT).

105. S.C. Res. 1267 (Oct. 15, 1999).

106. *Id.* ¶ 4.

107. *See, e.g.*, Abdelrazik v. Canada, [2010] 1 F.C.R. 267 para. 53 (Can.) ("The 1267 Committee regime is . . . a situation for a listed person not unlike that of Josef K. in Kafka's *The Trial*, who awakens one morning and, for reasons never revealed to him or the reader, is arrested and prosecuted for an unspecified crime.").

108. *See, e.g.*, Ian Johnstone, *Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit*, 102 AM. J. INT'L L. 275, 297 (2008) (noting the concern is *how* the Security Council and the 1267 Committee have gone about freezing assets and not that they have frozen assets at all).

In 2005, Resolution 1617 modified 1267's reach to include al-Qaeda.[109] Resolution 1617 provided an extremely broad definition of what constitutes "associat[ion] with" al-Qaeda: those who (1) "otherwise" support al-Qaeda's activities "or any cell, affiliate, splinter group or derivative thereof," even if they do not engage in any "financing, planning, facilitating, preparing, or perpetrating" of terrorism; (2) recruit for al-Qaeda; or (3) supply, sell, or transfer arms to al-Qaeda.[110] This definition placed the focus on association with an organization—not on the commission of specific acts. While not uncommon in post-9/11 counterterrorism laws, many were concerned that this focus led to inaccurate listings based on little or low-quality information.[111]

In response to these critiques, the United Nations has adopted numerous corrective measures to increase transparency and accuracy, though none have completely quieted the concerns.[112] In 2015, the Security Council included one of these measures in Resolution 2253, which lists individuals and entities associated with al-Qaeda and the Islamic State in Iraq and the Levant (ISIL).[113] Resolution 2253 narrowed the criteria to focus on an individual's or entity's specific acts in furtherance of terrorism instead of relying on 1617's generic "association" criteria. There are now three listing criteria for placement on 2253's sanctions list[114]:

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109. S.C. Res. 1617, ¶ 1 (July 29, 2005).

110. *Id.* ¶ 2.

111. For example, in 2001, three Somali men challenged their Resolution 1267 listing, which was based on U.S. intelligence. Peter Gutherie, Note, *Security Council Sanctions and the Protection of Individual Rights*, 60 N.Y.U. ANN. SURV. AM. L. 491, 511 (2004). When asked for further information on the reason for their listing, the U.S. government produced a twenty-seven-page document, twenty-three pages of which were news reports. *See id.* at 512; *see also* Kent Roach, *The Eroding Distinctions Between Intelligence and Evidence in Terrorism Investigations*, *in* COUNTER-TERRORISM AND BEYOND: THE CULTURE OF LAW AND JUSTICE AFTER 9/11 48, 50–54 (Nicola McGarrity et al. eds., 2010) (describing the tension between intelligence, which aims to identify suspect associations, and evidence, which aims to prove guilty acts and minds).

112. *See generally* GEORGE A. LOPEZ ET AL., KROC INST. FOR INT'L PEACE STUDIES, OVERDUE PROCESS: PROTECTING HUMAN RIGHTS WHILE SANCTIONING ALLEGED TERRORISTS 2, 12–13 (2009), https://www.ciaonet.org/catalog/16501 (providing a brief summary of procedural changes instituted by the Security Council).

113. S.C. Res. 2253, ¶ 45 (Dec. 17, 2015).

114. *See* U.N. Sec. Council, *Sanctions List Materials*, UNITED NATIONS, https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list (last visited Nov. 30, 2017) (containing the names of all individuals and entities on the Resolution 2253 sanctions list). This process is administered by a sanctions committee made up of members of the Security Council, which has listed hundreds of individuals for sanctioning. *See* U.N. Sec. Council, *Press Releases*, UNITED NATIONS,

> (a) Participating in the financing, planning, facilitating, preparing, or perpetrating of acts or activities by, in conjunction with, under the name of, on behalf of, or in support of;
>
> (b) Supplying, selling or transferring arms and related materiel to; [or]
>
> (c) Recruiting for; or otherwise supporting acts or activities of Al-Qaida, ISIL, or any cell, affiliate, splinter group or derivative thereof.[115]

Since the adoption of the resolution, individuals have been added to the sanctions list for actions ranging from raising money and transferring it to al-Qaeda[116] to recruiting fighters for North Caucasus terrorist groups (many of which have pledged allegiance to ISIL)[117] to claiming responsibility for assassinations.[118]

2. The government's argument and the Racketeer Influence and Corrupt Organizations Act

The government in *Jama*, on the other hand, proposed a more "informal" test similar to the one courts use to determine whether an individual is part of an "enterprise" under the Racketeer Influence and Corrupt Organizations Act (RICO).[119] Prosecuting terrorists under RICO is not a new concept.[120] Though initially enacted to fight

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http://www.un.org/sc/suborg/en/sanctions/1267/press-releases (last visited Nov. 30, 2017) (aggregating press releases from the Resolution 1267 Committee).

115. S.C. Res. 2253, ¶ 3.

116. U.N. Sec. Council, *Narrative Summaries of Reasons for Listing: QDi.402 Nayif Salih Salim al-Qaysi*, UNITED NATIONS (Feb. 22, 2017), https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries/individual/nayif-salih-salim-al-qaysi.

117. U.N. Sec. Council, *Narrative Summaries of Reasons for Listing: QDi.397 Ayrat Nasimovich Vakhito*, UNITED NATIONS (Aug. 6, 2016), https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries/individual/ayrat-nasimovich-vakhitov; *The North Caucasus Insurgency and Syria*, CENTER FOR STRATEGIC & INT'L STUD. (Apr. 13, 2017), https://www.csis.org/events/north-caucasus-insurgency-and-syria.

118. U.N. Sec. Council, *Narrative Summaries of Reasons for Listing: QDi.375 Boubaker ben Habib ben al-Hakim*, UNITED NATIONS (Sept. 29, 2015), https://www.un.org/sc/suborg/en/sanctions/1267/aq_sanctions_list/summaries/individual/boubaker-ben-habib-ben-al-hakim.

119. United States v. Jama, 217 F. Supp. 3d 882, 891 (E.D. Va. 2016); 18 U.S.C. §§ 1961–1968 (2012).

120. *See generally* Priester, *supra* note 51, at 1255 (comparing federal criminal law and international law as possible frameworks for defining a terrorist). Other than the obvious laws criminalizing direct involvement in the substantive unlawful acts themselves, prosecutors have successfully convicted individuals with terrorism-related charges under federal conspiracy laws. *See, e.g.*, United States v. Moussaoui, 382 F.3d

organized crime,[121] the government uses RICO against alleged terrorist "enterprises," aided in part by courts' liberal reading of the statute.[122]

A substantive RICO violation is conduct of an enterprise through a pattern of racketeering activity.[123] Since its enactment, the Supreme Court has widened RICO's applicability to various types of groups by holding that "the RICO statute provides that its terms are to be '*liberally construed* to effectuate its remedial purposes.'"[124] It was not until after the 9/11 attacks, however, that Congress officially extended the "enterprise" to encompass terrorist organizations by passing the USA PATRIOT ACT,[125] which revised RICO's "racketeering" activities to include acts of international terrorism.[126]

RICO weaves a broad web. It does not explicitly define the outer boundaries of the "enterprise" concept, but to establish the existence of an "enterprise," the plaintiff must demonstrate there is a formal or informal group of individuals functioning as a unit toward a common purpose.[127] The statute explains that an "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."[128]

453, 456–57 (4th Cir. 2004) (finding Zacarias Moussaoui, the "twentieth hijacker," guilty of conspiracy in the 9/11 plot); Jason Zengerie, *Twentieth Hijacker, The*, N.Y. MAG. (Aug. 27, 2011), http://nymag.com/news/9-11/10th-anniversary/twentieth-hijacker.

121. S. REP. NO. 91-617, at 80–81 (1969) (explaining that RICO was enacted to address problems of infiltration of legitimate businesses by individuals connected with organized crime).

122. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("RICO is to be read broadly."). Though supporters of the concept had written extensively before 9/11, the 2001 attacks pushed RICO back into the spotlight. President George W. Bush remarked upon the similarities in his address to a joint session of Congress nine days after 9/11 when he said "[a]l-Qaeda is to terror what the mafia is to crime. But its goal is not making money; [rather,] its goal is remaking the world . . . ." *Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11*, 2 PUB. PAPERS 1140, 1141 (Sept. 20, 2001).

123. *See, e.g.*, Ray v. Spirit Airlines, Inc., 836 F.3d 1340, 1348 (11th Cir. 2016) (identifying the requisite factors to show a RICO violation after analyzing past case law).

124. Boyle v. United States, 556 U.S. 938, 944 (2009) (emphasis added) (quoting 18 U.S.C. § 1961 (2006)).

125. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of U.S. Code).

126. 18 U.S.C. § 1961(1) (2012).

127. § 1962.

128. § 1961(4).

Although an "enterprise" may exist merely when a group of individuals jointly commit a RICO offense,[129] courts have established the basic structure of an enterprise. In *Boyle v. United States*,[130] the Supreme Court clarified that an "enterprise must have at least three structural features: a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose."[131] No "chain of command" or hierarchical structure is required, and "nothing in RICO exempts an enterprise whose associates engage in spurts of activity punctuated by periods of quiescence."[132] However, to succeed on a RICO claim, a plaintiff must still establish that the defendants were central figures in the underlying scheme or conspiracy.[133]

Despite the flexible reading of "enterprises" and prosecutors' expanded use of RICO to include acts of international terrorism, the court in *Jama* did not engage this argument.[134] It merely stated the government's proposed test before moving on to its own analysis of the issue.

3. The Jama *court's test*

The district court in *Jama* did not consider the defendants' or the government's proposals persuasive. The court found that although the material support statute does not specifically address who is deemed part of an FTO, specific terms defined within § 2339B indicated congressional intent that courts "consider the nature of an individual's actions broadly in relation to the overall goals of the terrorist organization."[135]

The court specifically looked at the statute's definition of the term "personnel,"[136] which is a type of prohibited "material support."[137] The statute defines "personnel" as individuals who "work under that

129. *See, e.g.*, Allstate Ins. Co. v. A.M. Pugh Assocs., Inc., 604 F. Supp. 85, 100 (M.D. Pa. 1984) (agreeing with the majority of federal courts to construe RICO liberally).

130. 556 U.S. 938 (2009).

131. *Id.* at 946.

132. *Id.* at 948.

133. 18 U.S.C. § 1962(a) (2012); *see also In re* Terrorist Attacks on Sept. 11, 2001, 349 F. Supp. 2d 765, 828 (S.D.N.Y. 2005) (dismissing plaintiffs' RICO claim for failing to prove the defendants were central figures in a terrorism plot), *reconsidered in part*, 392 F. Supp. 2d 539 (S.D.N.Y. 2005), *aff'd*, 538 F.3d 71 (2d Cir. 2008), *and aff'd*, 714 F.3d 118 (2d Cir. 2013).

134. United States v. Jama, 217 F. Supp. 3d 882, 891 (E.D. Va. 2016).

135. *Id.* at 891–92.

136. 18 U.S.C. § 2339B(h), (j).

137. § 2339A(b)(1). For the full definition of "material support," see *supra* note 40.

terrorist organization's direction or control or . . . organize, manage, supervise, or otherwise direct the operation of that organization."[138] It includes one caveat: "[i]ndividuals who act entirely independently of the [FTO] to advance its goals or objectives shall not be considered to be working under the [FTO's] direction or control."[139] The court stated that "the specific *exclusion* in the definition of 'personnel' of individuals working 'entirely independently' and the specific *inclusion* of individuals whose activities involve organizing, managing, or supervising various operations (as well as those who operate under the FTO's direction or control)" indicate that Congress intended § 2339B to apply to a broader reach of individuals than solely those under a command and control structure.[140]

Thus, the court went on to hold that for an individual to be deemed part of an FTO under § 2339B, the individual must be "engaged in significant activity on behalf of an FTO relative to that FTO's goals and objectives."[141] To remedy the vagueness of the phrase "significant activity," the district court named seven nonexclusive factors a court should consider:

> (1) the nature of the assistance provided or received by the individual (whether lawful or unlawful) and how it benefitted the FTO or otherwise advanced its goals and objectives; (2) for what time period the support or resources were provided; (3) whether the individual undertakes his or her activities specifically and exclusively for the benefit of the FTO or whether the individual undertakes similar activities for other organizations or for the public at large; (4) the degree to which the individual's actions are directed by or coordinated with others associated with the FTO or any of its generally recognized representatives; (5) the nature and extent of the individual's contacts within the FTO or with others acting on behalf of the FTO, including access to the FTO's leadership and to non-public information pertaining to the FTO's activities; (6) whether the individual self-identifies with the FTO, represents himself or herself as being part of the FTO, or purports to act on behalf of the FTO; and (7) whether the individual is reliably identified as being part of an FTO by recognized international law enforcement or other organizations.[142]

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138. 18 U.S.C. § 2339B(h).
139. *Id.*
140. *Jama*, 217 F. Supp. 3d at 892.
141. *Id.*
142. *Id.*

After dismissing both the government's and the defendants' proposed legal tests, the court applied its own seven-factor test and found that the defendants knowingly and willingly entered into an agreement to provide material support to individuals sufficiently connected to an FTO.[143]

B. Other "Terrorist Lists"

To effectively identify whether an individual is linked to a terrorist organization, courts must move beyond the *Jama* test. While the FTO list remains a symbolic counterterrorism tool because of its public role in prosecuting high-profile alleged terrorists under § 2339B, the U.S. government, other countries, and the United Nations keep numerous other "terrorist lists" that are instructive in determining whether an individual is sufficiently connected to a terrorist organization.[144] These lists create a log of individuals or entities that the U.S. government or the United Nations determine are connected to terrorist activities; once included on a list, the government freezes that individual's or entity's assets.[145] International humanitarian law (IHL) provides another set of potentially applicable doctrines. Some international courts have even addressed the specific issue of whether an individual is sufficiently linked to a terrorist organization, though not under § 2339B.

1. "Specially designated terrorists" and "specially designated global terrorists"

The most relevant domestic lists are the "specially designated terrorists" (SDT) list and the "specially designated global terrorists" (SDGT) list, both of which the executive branch created to block terrorist financing.[146] The legal authority for the U.S. government's SDT and SDGT lists is found in the International Emergency Economic Powers Act (IEEPA).[147] The IEEPA authorizes the President to freeze the assets of "any foreign person, foreign organization, or foreign country

143. *Id.* at 893.

144. *See, e.g.*, AUDREY KURTH CRONIN, CONG. RESEARCH SERV., RL32120, THE "FTO LIST" AND CONGRESS: SANCTIONING DESIGNATED FOREIGN TERRORIST ORGANIZATIONS 3 & n.6 (2003) (discussing the various domestic and international terrorist lists along with the prohibition of U.S. aid to the countries on the lists).

145. *Id.* at 2.

146. *See generally id.* at 4. In the 2001 executive order establishing the SDGT list, President George W. Bush cited "the pervasiveness and expansiveness of the financial foundation of foreign terrorists" as justification for imposing "financial sanctions . . . [on] those foreign persons that support or otherwise associate with . . . foreign terrorists." Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).

147. 50 U.S.C. §§ 1701(a), 1702(a)(1)(a) (2012).

that he determines has planned, authorized, aided, or engaged in such hostilities or attacks against the United States."[148] President George W. Bush invoked this authority following 9/11 when he issued Executive Order 13,224, giving the United States the power to freeze the assets of and prohibit transactions with those designated as SGDTs.[149]

The Treasury Secretary, in consultation with the Secretaries of State and Homeland Security and the Attorney General, may designate individuals or entities as SDTs or SDGTs if they are determined to be one of the following: (1) one who has committed or poses a "significant risk" of committing a terrorist act;[150] (2) one "owned or controlled by, or . . . [who] act[s] for or on behalf of, any person" already listed in the SDT or SDGT lists;[151] (3) one who "assist[s] in, sponsor[s], or provide[s] financial, material, or technological support for, or financial or other services to or in support of" either terrorist acts or individuals already on the SDT or SDGT lists;[152] or (4) one "otherwise associated" with any individual already on the SDT or SDGT lists.[153]

Similar to the U.N. sanctioning regimes, critics have attacked the SDGT listing criteria as extremely broad and constitutionally flawed. Organizations such as the American Civil Liberties Union have argued that the list violates the Fourth and Fifth Amendments because it lacks the required procedural protections guaranteed by the Constitution[154]—and courts have tended to agree.[155] Despite these criticisms, the Treasury Department has not made any public announcements of changes to address these issues.[156]

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148. § 1702(a)(1)(C).
149. Exec. Order No. 13,224, 66 Fed. Reg. 49,079 (Sept. 25, 2001).
150. 31 C.F.R. § 594.201(as)(2) (2016).
151. § 594.201(a)(3).
152. § 594.201(a)(4)(i)(A)–(B).
153. § 594.201(a)(4)(ii).
154. *See, e.g.*, ACLU, THE "SPECIALLY-DESIGNATED GLOBAL TERRORIST" DESIGNATION SCHEME AND ITS CONSTITUTIONAL FLAWS 4–5, https://www.aclu.org/sites/default/files/field_document/sdgt_designation_briefer_final.pdf (last visited Nov. 30, 2017) [hereinafter SPECIALLY-DESIGNATED GLOBAL TERRORIST].
155. *See* Al Haramain Islamic Found. Inc. v. U.S. Dep't of Treasury, 686 F.3d 965, 979 (9th Cir. 2012) (finding OFAC did not sufficiently protect procedural due process in its use of classified information without paper disclosure); KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner, 647 F. Supp. 2d 857, 864 (N.D. Ohio 2009) (addressing OFAC's denial of procedural due process prior to freezing assets).
156. *See* SPECIALLY-DESIGNATED GLOBAL TERRORIST 4, *supra* note 154.

2. International laws of war

In contrast to the U.S. and U.N. lists, IHL is based in laws and doctrines that are laden with detailed procedural protections. However, the applicability of international law to transnational terrorist organizations and individuals suspected of terrorist acts has not been well developed.[157] IHL governs the conduct of wartime activities toward both combatants and noncombatants,[158] and it is defined by the four Geneva Conventions,[159] the first two Additional Protocols of the Geneva Conventions,[160] and a body of customary law.[161] While the United States is a party to the Conventions and is thereby bound to "respect and ensure to respect" the treaties,[162] the government has not incorporated most of these treaties into domestic law.[163]

Despite the lack of domestic laws, the moral weight of the Conventions and customary international law still weigh heavily over U.S. policy and politics.[164] Thus, courts often must address the

157. *See generally* Priester, *supra* note 51, at 1276–79 (providing an overview of the complexities of applying international law to terrorism cases).

158. INT'L COMM. OF THE RED CROSS, WHAT IS INTERNATIONAL HUMANITARIAN LAW? 1 (2004), https://www.icrc.org/en/download/file/4541/what-is-ihl-factsheet.pdf.

159. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

160. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict (Protocol I), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Geneva Convention Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Geneva Convention Protocol II].

161. *See* INT'L COMM. OF THE RED CROSS, *supra* note 158, at 1–4 (noting that IHL is composed of treaty-based law, customary rules, and general principles of law).

162. *See, e.g.*, Geneva Convention I, *supra* note 159, art. 1 ("The High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances.").

163. The only legally binding treaty within the United States regarding the Geneva Conventions remains Common Article 3 of the Conventions, which was incorporated into domestic law through 18 U.S.C. § 2441, and criminalizes war crimes, including torture and cruel or inhuman treatment. 18 U.S.C. § 2441(d)(1) (2012).

164. While not incorporated in domestic law in the United States, the Geneva Conventions' applicability to the U.S. policy on terrorist detainees was a hot-button

applicability of international law to domestic cases when the cases involve U.S. actions abroad or actions against non-U.S. citizens during conflict. Because there is no statutory mandate for the courts, a variety of factors determine whether they must follow customary international law. As is often the case, the persuasiveness of international law principles depends on the particular court and the particular issue.[165]

Given Congress's intent in enacting § 2339B as a counterterrorism measure, Israel's perspective is worth U.S. courts' attention. In Israel, like in the United States, the military routinely engages in anti-terrorism operations.[166] Both countries have experienced attacks on their citizens by politically or religiously motivated organizations, and both countries have developed robust anti-terrorism laws to combat terrorism and the financing of terrorist activities.[167] Additionally, Israel's highest court has heard petitions related to the Occupied Palestinian Territories, giving the court the opportunity to develop relatively robust jurisprudence on various aspects of IHL.[168]

The Israeli High Court of Justice's[169] decision in *Public Committee Against Torture in Israel v. Government of Israel*[170] provides an analogous

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issue during the Bush and Obama administrations. *See* John B. Bellinger, III, *Obama, Bush, and the Geneva Conventions*, FOREIGN POL'Y (Aug. 11, 2010, 8:31 PM), http://foreignpolicy.com/2010/08/11/obama-bush-and-the-geneva-conventions (comparing the Obama and the Bush administration's conclusions on the Geneva Conventions' applicability to the conflicts in Afghanistan and Iraq).

165. *Compare* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (plurality opinion) (relying on customary international law and international treaties to hold that the government had authority to detain enemy combatants), *with* Al-Bihani v. Obama, 590 F.3d 866, 871 (D.C. Cir. 2010) (holding that international law does not limit the scope of the President's detention power).

166. *See generally* Aviv (Cohen) Dekel, *The Unique Challenge of Dual-Purpose Organizations: Comparative Analysis of U.S. and Israel Approaches to Combating the Finance of Terrorism*, 35 LOY. L.A. INT'L & COMP. L. REV. 389, 392–99 (2013) (comparing U.S. and Israeli approaches to combatting terrorism financing).

167. *Id.*

168. *See, e.g.*, Victor Kattan, *The Legality of the West Bank Wall: Israel's High Court of Justice v. The International Court of Justice*, 40 VAND. J. TRANSNAT'L L. 1425, 1425–28 (2007) (dissecting High Court of Justice cases with a relationship to Palestine and noting the court often considers IHL as a guide).

169. The High Court of Justice rules as a court of first instance, primarily regarding the legality of State authority decisions. Its jurisdiction is limited to matters it considers necessary to grant relief in the interests of justice and that are not within the jurisdiction of another court or tribunal. YAACOV S. ZEMACH, THE JUDICIARY OF ISRAEL 48 (3d ed. 2002).

170. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459 (Isr.).

framework for determining who is part of an FTO under § 2339B because it was a judicial attempt to clarify the legal status of civilians who take "direct participation in hostilities" ("DPH").[171] DPH is a concept from Article 51(3) of Protocol I that states that civilians should not be targeted for killing during conflicts "unless and for such time as they take a direct part in hostilities."[172] This is a critical determination because of the changing nature of war: terrorists tend to hide within civilian populations, individuals may fluidly join and quit terrorist organizations, and militaries increasingly rely on civilian contractors.[173]

In *Public Committee Against Torture in Israel*, the court delved into the definition of DPH to create a more concrete set of criteria to determine when an individual is a legally targetable civilian because of the individual's engagement in terrorist activities. The court broke Article 51(3) into three components: (1) "hostilities"; (2) "taking a direct part"; and (3) "for such time."

First, the court defined "hostilities" broadly as acts, which by nature and objective, are intended to cause damage to the army or to other civilians.[174] Second, the court also defined "taking direct part" in a broad way, explaining that the expansive definition served to deter civilians from joining hostilities.[175] As a guide, the court then went on to provide examples of participation that should be included in the definition of "taking a direct part": someone who "collects information about the armed forces"; "leads unlawful combatants to or from the place where the hostilities are being carried out"; "operates weapons being used by unlawful combatants"; or "supervises their operation or provides service for them, whatever the distance . . . from the battlefield may be."[176]

On the other hand, actions not considered "taking a direct part" include an individual who "sells an unlawful combatant food products or medicines"; "helps unlawful combatants with a general strategic analysis and grants them general logistic support, including financial

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171. *See generally* Eric Christensen, *The Dilemma of Direct Participation in Hostilities*, 19 J. TRANSNAT'L L. & POL'Y 281, 300 (2010) (examining the interpretations of the phrase "direct participation in hostilities"). In this case, the court addressed the legality of Israel's preventive strike policy against Palestine in the early 2000s. *Id.*

172. Geneva Convention Protocol I, *supra* note 160, art. 51(3).

173. *See, e.g.*, Christensen, *supra* note 171, at 282 (describing the advantages and disadvantages to different interpretations of DPH).

174. *Pub. Comm. Against Torture in Isr.*, [2006](2) IsrLR at 493.

175. *Id.* at 494–96.

176. *Id.* at 496–97.

support"; or "disseminates propaganda that supports those unlawful combatants."[177]

Third, the court addressed the definition of "for such time," which is the time commitment required for the court to deem an individual a combatant rather than a civilian.[178] The court was aware of the "revolving door" nature of terrorism, in which individuals may often come and go as they please, in contrast to a national military in which individuals serve a term of years. On one hand, the court found it overly harsh to allow the government to target for killing a civilian who only participated in a hostile act once in the distant past; on the other hand, the court stated that civilians who regularly participate in hostile actions could be targeted at nearly any time.[179] With this framework, the court provided a set of criteria that illustrate prohibited or permitted activities that a U.S. judge could consider when deciding the FTO question in a § 2339B case.[180]

IV. DETERMINING WHO IS PART OF AN FTO UNDER § 2339B SHOULD INCORPORATE IHL AND THE SDGT LISTING CRITERIA

The *Jama* seven-factor test grants too much discretion to the judiciary. The effect of this judicial test is to label an individual a "terrorist" under U.S. law;[181] with this outcome, courts should not rely on a test that fails to balance the stigma and consequences of the terrorist label with the reality of terrorist organizations' varying structures and group affiliation networks.[182] Because the plain meaning of "provides material support or resources *to* a foreign terrorist organization"[183] is

177. *Id.* at 497.

178. *Id.* at 499.

179. *Id.* at 500.

180. Not all were pleased with the decision, however. *See, e.g.*, Gideon Levy, *An Enlightened Occupier*, HAARETZ (Dec. 17, 2006, 12:00 AM), https://www.haaretz.com/an-enlightened-occupier-1.207387 ("All the restrictions the High Court of Justice placed on targeted assassinations are no more than a collection of hollow words.").

181. *See supra* notes 144–45 and accompanying text (describing the legal ramifications of FTO designation for its members, including inability to travel to the United States, asset seizure, and prosecution under § 2339B).

182. *See generally* Audrey Kurth Cronin, *Behind the Curve: Globalization and International Terrorism*, INT'L SEC., Winter 2002/2003, at 30, 38 (describing international terrorism as characterized by religious and spiritually motivated movements, exacerbated by "states, entities, and people who . . . support them because they feel powerless and left behind in a globalizing world").

183. 18 U.S.C. § 2339B (a)(1) (2012) (emphasis added).

ambiguous, looking to comparative jurisprudence would have provided the *Jama* court with insight into how other courts and institutions have addressed similar legal questions.[184] As it stands, the test the *Jama* court created is simply too vague and overreaching. Instead, the proper test courts should utilize to determine whether an individual is part of an FTO under § 2339B is one that incorporates elements from U.S. sanctioning regimes and IHL.

A. Criticism of the Jama *Test*

Even if the *Jama* court did not err in ignoring analogous laws to answer § 2339B's FTO question, the court's use and reading of the definition of "personnel"—a word included within the definition of the phrase "material support"—was flawed. Under the statutory canons of construction, if Congress intended the definition of "personnel" to also apply to who is part of an FTO, Congress would have made that explicit within the statute. This weakness illustrates that the proposed test—that an individual is deemed part of an FTO if he or she conducts "significant activity" on behalf of the FTO—is too vague and lacks consideration of other relevant factors.[185]

1. The Jama *court improperly relied on the definition of "personnel" to interpret § 2339B*

In an attempt to clarify what it means to provide material support *to* a terrorist organization, the *Jama* court relied on the definition of "personnel."[186] The statute includes the word "personnel" within the definition of "material support," indicating that recruitment efforts on behalf of an FTO are considered "material support" and are prohibited.[187] The definition of "personnel" in full states:

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184. *See supra* notes 133–42 and accompanying text.

185. This Comment avoids duplicating the *Jama* defendants' arguments on appeal and instead provides alternative critiques of the *Jama* test and reasoning. In their appeal, counsel for the defendants have put forth many challenges, including that the court created an improperly broad definition of the word "organization"; that other courts have construed "FTO" members to include only those under a formal command and control structure; and that the district court's "statutory construction violated basic principles of federal criminal law," such as the rule of lenity. Joint Opening Brief of the Appellants at 20–24, 28, United States v. Jama, 217 F. Supp. 3d 882 (E.D. Va. 2016) (No. 1:14-cr-230-AJT), *appeal docketed*, Nos. 17-4205(l), 17-4226 (4th Cir. Apr. 7, 2017).

186. *Jama*, 217 F. Supp. 3d at 886.

187. *Id.*

> No person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with [one] 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.[188]

The court treated the definition as an indicator of congressional intent to only exclude those working "entirely independently" of the FTO from § 2339B's reach and to include "*all* persons who act on behalf of an FTO to further its goals and objectives in significant ways."[189]

It is worth reemphasizing that the *Jama* court could not have relied upon the statute's congressional history because the record is silent on the requisite level of connection to an FTO to satisfy § 2339B. Nor was there precedent from the higher courts. With this the case, the rule of criminal statutory construction is that ambiguous statutes imposing a penalty are generally subject to strict construction and interpreted in favor of defendants,[190] but a court's interpretation cannot provide a substitute for common sense.[191] In addition, "[j]ust as Congress'[s] choice of words [in a statute] is presumed to be deliberate, so too are its structural choices."[192]

In this instance, there are no circumstances to dissuade from strict construction. Congress intended § 2339B to cut off all financing to terrorist groups, particularly those FTOs that serve dual roles within the community—both carrying out unlawful "terrorist" acts and providing lawful political or social services.[193] Congress was concerned with the fungibility of money given to that type of organization; thus,

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188. § 2339B(h) (emphasis added).

189. *Jama*, 217 F. Supp. 3d at 892 (emphasis added).

190. *See, e.g.*, United States v. Santos, 553 U.S. 507, 519 (2008) (plurality opinion) (stating that courts must "interpret ambiguous criminal statutes in favor of defendants, not prosecutors"); Fed. Mar. Comm'n v. Seatrain Line, Inc., 411 U.S. 726, 733 (1973) (construing exemptions from antitrust laws strictly); Beulah v. State, 42 S.W.3d 461, 466 (Ark. 2001) ("This court strictly construes criminal statutes . . . .").

191. *See, e.g.*, United States v. Standard Oil Co., 384 U.S. 224, 227–30 (1966) (analyzing the legislative history of the Rivers and Harbors Act to interpret the meaning of the word "refuse").

192. Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2529 (2013).

193. *See supra* notes 48–50 and accompanying text (discussing congressional intent in passing § 2339B).

Congress removed the intent requirement and instead criminalized providing "material support," no matter the intended use.[194] However, the history of § 2339B does not touch upon the threshold to be considered part of a terrorist organization—it concerns the actions of the hypothetical defendant, not the nuances of FTO membership.[195] With such a gap in precedent and legislative history, the court in *Jama* erred in construing § 2339B's language so broadly.

Yet the record is *not* silent as to the "personnel" definition within § 2339B on which the *Jama* court based its reasoning. The "personnel" definition was not included within the statute until the Intelligence Reform and Terrorism Prevention Act of 2004[196]—eight years after Congress enacted § 2339B.[197] In the congressional history, various officials refer to the newly included "personnel" definition multiple times as a mere clarification of terms to avoid various legal challenges claiming that the word was unconstitutionally vague.[198] No official ever suggested that "personnel" should be read into who is part of an FTO under the statute.

Based on this history, the court erred in using the definition of "personnel" because it is inconsistent with the congressional intent and structure of § 2339B as a whole. First, there is clear history that Congress did not intend for "personnel" to refer back to the definition of an FTO within § 2339B. Second, even if the court did not err in relying on the definition, the canons of construction maxim *expressio*

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194. *See* § 2339B (criminalizing the act of knowingly providing material support to an FTO, regardless of what type of material support is provided or how it is used by the FTO).

195. *See supra* Section I.A–B (examining the history of § 2339B and the statute's current form).

196. Pub. L. 108-458, 118 Stat. 3638 (2004) (codified as amended 50 U.S.C. § 401 (2012)).

197. *See* DOYLE, *supra* note 38, at 18 ("Section 2339B alone has a more explicit description of "personnel" covered by its proscription, which confines the term to those provided to [an FTO] to direct its activities or to work under its direction or control.").

198. *See A Review of the Tools to Fight Terrorism Act: Hearing Before the Subcomm. on Terrorism, Tech. and Homeland Sec. of the S. Comm. on the Judiciary*, 108th Cong. 4 (2004) (statement of Daniel J. Bryant, Assistant Attorney General) ("The [bill] amends the definition of 'personnel[]' . . . in a way that addresses the concerns about vagueness and at the same time maintains the statutes' effectiveness."); H.R. REP. NO. 108-724, at 224 (2004) (amending § 2339B with the definition of "personnel"); 151 Cong. Rec. 6566 (Apr. 14, 2005); *see also* United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 397–98 (D. Conn. 2009) ("These changes to § 2339B were enacted against a backdrop of numerous legal challenges to that provision on the ground of vagueness.").

unius est exclusio alterius states that "where an offense is defined by statute and its application to enumerated conditions prescribed, it is implied that it will not apply to other conditions not enumerated."[199] Put more simply, the express mention of one thing excludes all others.[200] Accordingly, the breadth of the court's test that includes those working on "behalf of an FTO" in "significant ways" is flawed. A proper reading of "personnel" would be narrowed to include only those activities enumerated in the definition: activities conducted under the "direction or control" of the FTO or related to "organiz[ing], manag[ing], supervis[ing], or otherwise direct[ing] the operation of that organization."[201]

There are other problems with the court's interpretation of the "personnel" definition. Consider that the definition of "personnel" is only included in § 2339B and appears in no other anti-terrorism statute—not even § 2339A, which is most closely related to § 2339B.[202] This omission is striking given that both statutes prohibit providing "material support." As a result, a handful of courts have determined that § 2339B is subject to the definitional limitation, while § 2339A is subject to a much broader definition of "personnel," akin to one found in the average dictionary.[203] These courts have found that the definition of personnel purposefully constrains liability under § 2339B by limiting the scope of the term to specific individuals working under a specific structure or conducting specific activities listed in the definition. It is ironic then that the court in *Jama* would later use this term to proclaim that an FTO includes "all persons who act on behalf of an FTO to further its goals and objectives in significant ways"—a broad and far-reaching statement.

Though the court construed the term to include "all persons," in fact, there is a wide range of possible participation that is not included in the "personnel" definition. For example, a financier is one such person whose function would not be included between acting "entirely independently" and "under [a] terrorist organization's direction or control or . . . organiz[ing], manag[ing], supervis[ing], or otherwise

199. 73 AM. JUR. 2d *Statutes* § 189 (2012).
200. *Id.*
201. *Id.*
202. *See* DOYLE, *supra* note 38, at 18 ("Section 2339B alone has a more explicit description of 'personnel' covered by its proscription, which confines the term to those provided to [an FTO] to direct its activities or to work under its direction or control.").
203. *Id.*; *see also* Estate of Parsons v. Palestinian Authority, 651 F.3d 118, 126 (D.C. Cir. 2011); *Abu-Jihaad*, 600 F. Supp. 2d at 400.

direct[ing] the operation of [an] organization."[204] A financier is not under the direction or control of an FTO or in a position to direct an FTO's operation; in many cases, this individual is a middleman between an "entirely independent" supporter and the FTO. The exclusion of a financier from the "personnel" definition is a strict reading of the statute, and it fails to comport with § 2339B's purpose to eradicate terrorist funding. This failure further illustrates the court's error in relying on the definition to create its "significant activity" test.

2. The court's "significant activity" test is too broad and does not consider the realities of terrorist activity

The *Jama* court's totality of the circumstances test, stating that individuals are part of an FTO when they are "engaged in significant activity on behalf of an FTO relative to that FTO's goals and objectives,"[205] is overly vague. "Significant activity" is a broad term, and its lack of specificity is especially troubling given § 2339B's lengthy sentences and the stigma society attaches to the "terrorist" label. The *Jama* court, possibly recognizing that "significant activity" does not clarify an already ambiguous concept, set out seven non-exclusive factors to guide courts in future analyses.[206] These factors include "the nature of the assistance" and the benefit received by the FTO; the "time period" of the support; whether the support was "specifically and exclusively for the benefit of the FTO"; the amount the support was "directed by or coordinated with" the FTO; any interactions with others associated with the FTO (including FTO leadership); whether the "individual self-identifies with the FTO"; and whether the individual is "identified as being part of an FTO by recognized international law enforcement or other organizations."

Some of these factors have little resemblance to legal doctrines determining sufficient association with an entity and are not particularly descriptive or helpful in understanding the nuances of terrorist engagement with an FTO. For example, considering "whether the individual undertakes his or her activities specifically and exclusively for the benefit of the FTO or whether the individual undertakes similar activities for other organizations or for the public at large"[207] is an odd take on addressing the question; it relies on

204. 18 U.S.C. § 2339B(h) (2012).
205. United States v. Jama, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).
206. *Id.*
207. *Id.*

surface-level exclusivity of membership with a particular organization and not the degree, quality, or type of participation.

Other factors unfairly assume the answer to the question. Consideration of "whether the individual is reliably identified as being part of an FTO by recognized international law enforcement or other organizations"[208] or "whether the individual self-identifies with the FTO, represents himself or herself as being part of the FTO, or purports to act on behalf of the FTO"[209] are obvious indications of involvement, but there are serious issues with both factors. For the former factor, across the spectrum, international law enforcement bodies have varying levels of evidentiary standards, and *Jama* gives no indication as to what standards it would deem acceptable or unacceptable. Many enforcement arms in international law are imperfect, unevenly applied, and slow to work.[210] There is no guarantee that evidentiary standards of "international law enforcement or other organizations" are in line with the high standards of the U.S. judiciary system and the U.S. Constitution.

The latter factor requires no evidence that the individual has actually committed any act on behalf of the organization at all, potentially implicating First Amendment freedoms of association and speech. This "self-identification" factor may lead to confusion when distinguishing between FTO members and "lone wolf" terrorists, who may be inspired by an FTO but who are not considered part of it.[211] For example, this nuance allowed President Barack Obama to claim in December 2016 that "[n]o foreign terrorist organization ha[d] successfully planned and executed an attack on our homeland" during his administration.[212] This created some controversy because of the

208. *Jama*, 217 F. Supp. 3d at 892.

209. *Id.*

210. *See* Frederic L. Kirgis, *Enforcing International Law*, ASIL (Jan. 22, 1996), https://www.asil.org/insights/volume/1/issue/1/enforcing-international-law (examining the enforcement mechanisms used by the United Nations).

211. *See generally* Katie Worth, *Lone Wolf Attacks Are Becoming More Common—and More Deadly*, FRONTLINE PBS (July 14, 2016), http://www.pbs.org/wgbh/frontline/article/lone-wolf-attacks-are-becoming-more-common-and-more-deadly ("[The] definition of a lone wolf is narrow: To be included, the perpetrator must be politically motivated . . . and they must act entirely on their own.").

212. Remarks on United States Counterterrorism Strategy at MacDill Air Force Base, Florida, 2016 DAILY COMP. PRES. DOC. 3–4 (Dec. 6, 2016) ("[T]he most deadly attacks on the homeland over the last [eight] years have not been carried out by operatives with sophisticated networks or equipment, directed from abroad. They've been carried out by homegrown and largely isolated individuals who were radicalized online.").

terror attacks that occurred in the United States during his tenure, including the San Bernardino, California, attack in which a radicalized married couple killed 14 people and wounded 22; the shooting at Fort Hood, Texas, in which a U.S. Army major killed 13 people and wounded 32 others; and the Boston Marathon bombings, in which two brothers made a homemade bomb that killed 2 people and wounded 132.[213] According to the Department of Homeland Security's "Global Terrorism Database," these attackers were "unaffiliated individuals" who were not part of an FTO, despite all being inspired by and self-identifying with terrorist groups.[214]

The shortcomings of these factors are apparent upon reflection. With such weaknesses built into the test, the *Jama* court should have more conscientiously considered and learned from the proposed tests before creating its own.

B. The Defendants' and Government's Proposed Tests in Jama *Are Not Perfect, but They Provide Useful Insight*

The *Jama* court missed an opportunity to look to analogous laws—both international and domestic—for help in determining what factors should be relevant to define the adequacy of ties to an FTO.[215] These comparative laws can provide alternative frameworks for answering the difficult question of who is part of an FTO. The defendants' and government's proposed tests included examples of both types of law. The defendants relied on analogous U.N. sanctioning regimes[216] to argue that the correct test would require that the individual receiving the material support operates under the "command and control" structure of a recognized FTO leadership and is a "member" of the FTO, as opposed to a "supporter" or "financier."[217] The government, on the other hand, proposed a test

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213. *See* Glenn Kessler, *Obama's Claim that No Foreign Terror Organization "Successfully" Attacked the Homeland on His Watch*, WASH. POST (Dec. 8, 2016), https://www.washingtonpost.com/news/fact-checker/wp/2016/12/08/obamas-claims-that-no-foreign-terror-organization-successfully-attacked-the-homeland-on-his-watch (noting multiple "high-profile terror attacks").

214. *Id.*

215. *See supra* Section III.B (addressing additional tests derived from international or domestic law that the *Jama* court could have used).

216. *See infra* Section III.A.1 (describing the U.N. sanctioning regime structure of resolutions aimed at preventing terrorist organizations like al-Qaeda and the Islamic State from receiving financial support).

217. United States v. Jama, 217 F. Supp. 3d 882, 891 (E.D. Va. 2016).

similar to the test courts use to determine whether an individual is part of an "enterprise" under RICO.[218] The court did not expound much on the reasons why it rejected both arguments, but the analogous frameworks are worth further analysis; each resolve questions that closely resemble the *Jama* issue.

1. U.S. federal law, the government's argument, and the applicability to § 2339B

Though the question of membership within a criminal enterprise is similar to the § 2339B question, the court correctly dismissed the government's proposed RICO-based test.[219] The government would be heavily favored in a test that relied on the factors used in RICO because courts read RICO very broadly to encompass a wide variety of "enterprises" and "racketeering activities."[220] For instance, the requisite activity must occur only two times within a ten-year span;[221] no continuous activity or normalized schedule need exist.[222]

The RICO elements certainly err on the side of inclusion within an enterprise and this flexible standard encompasses a wide range of organizational structures.[223] While some structure is needed that includes "a purpose, relationships among those associated with the enterprise, and longevity sufficient to permit these associates to pursue the enterprise's purpose,"[224] the defendant in question only needs to be a central figure in the particular scheme, not necessarily a central figure in the organization as a whole.[225] Therefore, inclusion within an "enterprise" for the purpose of RICO can be proved through evidence that the individuals had a common goal or jointly committed a crime.[226]

At the time RICO was passed, the U.S. government needed a flexible standard to effectively tackle organized crime because prosecutors

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218. *Id.*

219. *Id.* (stating simply that "[t]he government proposes a much less formal test, akin to that used to determine whether someone is part of a criminal enterprise under [RICO]").

220. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ("RICO is to be read broadly.").

221. *See supra* notes 123–24 and accompanying text (describing the elements for a RICO prosecution).

222. *See supra* notes 123–24 and accompanying text.

223. *See supra* notes 220–25 and accompanying text (describing enterprises under RICO to be loosely associated).

224. Boyle v. United States, 556 U.S. 938, 946 (2009).

225. *Id.*

226. *See supra* Section III.A.2 (discussing the parameters of inclusion within an "enterprise" under RICO).

could generally only reach the low-level criminals and not the upper-level kingpins of the criminal organizations.[227] Yet there are a plethora of federal statutes available to the government to prosecute terrorists of all levels and types of engagement with terrorists, terrorist groups, or countries alleged to be supporting terrorism.[228] Section 2339B is not the only way the government could prosecute a terrorism case, and the government need not even use an anti-terrorism statute specifically. For example, the government could instead prosecute under a law like § 2339A, which criminalizes providing material support to any "terrorist," or like conspiracy.[229] The intent behind the creation of RICO and that of § 2339B is distinct, and the laws arose in different contexts. With the variety of antiterrorism statutes available to prosecutors, inclusion within an FTO should not be as fluid as inclusion within an "enterprise."

2. U.N. sanctions, the defendants' argument, and the applicability to § 2339B

The *Jama* court correctly dismissed the defendants' proposed test based on the U.N. sanctioning criteria,[230] but the court ignored lessons it could have gleaned from the United Nation's "terrorist lists."[231] The defendants claimed that an FTO has an "identifiable structure with identifiable leaders and persons who are under the command and control of that leadership," so FTOs should be considered different

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227. *See generally* Brian P. Comerford, Note, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 732–33 (2005) (analogizing the federal RICO laws to the material support statutes).

228. *See, e.g.*, 18 U.S.C. § 2332a (2012) (use of weapons of mass destruction); § 2332d (financial transactions in support of international terrorism); § 2332f (bombings of places of public use, government facilities, public transportation systems, and infrastructure facilities); *cf.* Susan Hennessey, *Is DOJ Rethinking Material Support Laws and Domestic Terrorism?*, LAWFARE (Feb. 5, 2016, 1:06 PM), https://www.lawfareblog.com/doj-rethinking-material-support-laws-and-domestic-terrorism ("[T]here is a demonstrable disparate impact to Muslim populations in the realm of material support laws. Put simply, supporting a foreign terrorist organization—designations which are overwhelmingly applied to groups of Islamic identity—is a serious federal offense. While supporting a domestic terrorist organization—say, an armed militia occupying a federal building—is not.").

229. *Contra* Andrew Peterson, *Addressing Tomorrow's Terrorists*, 2 J. NAT'L SECURITY L. & POL'Y 297, 301 (2008) (arguing that § 2339B reaches crimes not covered by other criminal laws and is the nearest thing the United States has to criminalizing being a terrorist).

230. United States v. Jama, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).

231. *See supra* notes 145–68 and accompanying text (discussing various international terrorist lists).

from domestic criminal organizations with more fluid structures.[232] The defendants argued for a test that requires the individual receiving the material support to be under the "command and control" of an FTO or to be a "member" of an FTO, not merely a "supporter," "financier," or "facilitator."[233] In support of their position, the defendants cited to the U.N. terrorist designations, which distinguish between a "member" of an FTO and other types of participants.[234]

While the defendants' proposed test claimed that FTOs have an identifiable structure,[235] FTO structures, in fact, vary widely.[236] Scholars in the counterterrorism field have distinguished between prior waves of terrorism and terrorist organizations, which were often structured in a straight-forward hierarchical fashion, with the current wave of terrorist organizations, which often have a networked structure and operate independent of a central command.[237] For example, al-Qaeda is a network structure with many branches, and its core leadership only serves to centralize messaging and strategy rather than manage the daily operations of its organization.[238] Al-Qaeda's affiliates operate relatively unchecked by any senior management.[239] In contrast, ISIL leadership claims to directly control its members, and the governing structure is hierarchical with a vertical leadership format.[240] Based on the differing structures of terrorist organizations and how they are evolving over time, the *Jama* court rightly dismissed the defendants' argument that individuals must operate within the "command and control" of recognized FTO leadership because not every FTO has a recognizable leadership structure.

The defendants' argument that the individual must be a "member" of an FTO, as opposed to a "supporter," "financier," or "facilitator,"

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232. *Jama*, 217 F. Supp. 3d at 891.
233. *Id.*
234. *Id.*
235. *Id.*
236. *See* Peterson, *supra* note 229, at 298 ("Today, fewer terrorists are still affiliated with structured organizations; instead, the greatest threat to the United States comes from a diffuse global network of terrorists.").
237. *See generally* William F. Shughart II, *An Analytical History of Terrorism, 1945–2000*, 128 PUB. CHOICE, No. 1/2, July 2006, at 12–32.
238. *See* Cameron Glenn, *Al Qaeda v ISIS: Leaders & Structure*, WILSON CTR. (Sept. 28, 2015), https://www.wilsoncenter.org/article/al-qaeda-v-isis-leaders-structure (distinguishing between the organizational structures of al-Qaeda and ISIL, which has a direct hierarchical structure).
239. *See id.*
240. *See id.*

based on U.N. designations,[241] also departs from the congressional intent to stop financing of terrorist organizations through § 2339B. "Supporters" may well be excluded from FTOs, as they may include the FTO-inspired lone wolf terrorists and individuals who never participate in terrorist acts in any way.[242] However, it does not make sense to exclude "financiers" from being part of an FTO when Congress consciously enacted § 2339B in response to fears that FTOs were raising funds within the United States.[243] While independent supporters may never act on behalf of an FTO, many financiers are presumably actively involved in fundraising or transferring funds on behalf of the FTO.

The *Jama* court was likely correct when it stated that the "United Nations' system of categorization of persons associated with an FTO is not inconsistent with Congress's overall intention."[244] However, the court failed to learn important lessons from the U.N. sanctioning systems that could have informed its own efforts to create a test. When the U.N. Security Council first introduced Resolution 1267, it faced criticism regarding the accuracy of its definitional system used to identify what constituted sufficient association with terrorist groups.[245] In response to the criticism, language within U.N. resolutions evolved from sanctioning those who associate with al-Qaeda, "even if they do not engage in any financing, planning, facilitating, preparing, or perpetrating" of terrorism,[246] to language that explicitly listed specific actions and activities that would lead to U.N. sanctions.[247] There are now three listing criteria under Resolution 2253, which modified 1267: (1) "[p]articipating in the financing, planning, facilitating, preparing, or perpetrating of acts"; (2) "[s]upplying, selling or transferring arms and related materiel"; or (3) recruiting.[248]

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241. United States v. Jama, 217 F. Supp. 3d 882, 891 (E.D. Va. 2016).

242. *See supra* notes 210–13 and accompanying text (distinguishing between FTO members and unaffiliated terrorists who may be inspired by FTO rhetoric).

243. *See supra* notes 36–38 and accompanying text (recounting Congress's intent to close the "economic loophole" within a previous statute by passing § 2339B).

244. *Jama*, 217 F. Supp. 3d at 892.

245. *See supra* notes 105–11 and accompanying text (explaining that the UN sanctioning regime's due process criticism stemmed from broad and opaque definitions that led to inaccurate listings).

246. Craig Forcese & Kent Roach, *Limping into the Future: The U.N. 1267 Terrorism Listing Process at the Crossroads*, 42 GEO. WASH. INT'L L. REV. 217, 222 (2010) (citing S.C. Res. 1617, ¶ 2 (July 29, 2005)).

247. *See* S.C. Res. 2253, ¶ 3 (Dec. 17, 2005).

248. *Id.*

The *Jama* court failed to learn from this flaw in the U.N. sanctioning regime. Instead of heeding this example, the *Jama* court created its seven-factor "significant activity" test that focused on overall association with an FTO and included no specific activities that would guide courts in their determination.[249] The list of specific activities need not have been exhaustive, but the *Jama* court should have substantially narrowed its criteria and eliminated overly encompassing factors like "whether the individual self-identifies with the FTO."[250]

C. The Proper Test Should Consider the SDGT Criteria and the Public Committee Against Torture *Analysis and Explicitly Include Prohibited Activities and a Temporal Requirement*

The SDGT criteria and *Public Committee Against Torture* analysis should be combined so that courts do not implement a broadly construed test. The *Jama* court's "significant activity" test, which focuses mainly on factors vaguely describing indicators of membership,[251] and the previous U.N. sanctioning regimes, which critics scrutinized for being overly expansive,[252] should serve as warnings to future courts deciding how to approach the issue. The SDGT and *Public Committee Against Torture* designations should be combined to accommodate both the congressional intent behind § 2339B to eradicate financing to FTOs under the guise of aid[253] and § 2339B's position as a criminal statute.[254]

First, the individual's personal conduct should fit into one of two prongs heavily based on two of the SDGT's criteria: (1) "owned or controlled by, or to act for or on behalf of,"[255] an FTO; or (2) "assist[ing] in, sponsor[ing], or provid[ing] financial, material, or technological support for, or financial or other services to or in support of"[256] an FTO's goals. Second, based on the *Public Committee Against Torture* analysis, the individual's conduct should be considered

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249. *See supra* Section IV.A.2 (criticizing the *Jama* court's seven-factor test as over inclusive).

250. United States v. Jama, 217 F. Supp. 3d 882, 892 (E.D. Va. 2016).

251. *See supra* Section IV.A.2 (discussing how the *Jama* court's "significant activity" test does little to clarify the ambiguous criteria).

252. *See supra* Section IV.B.2 (examining criticism of the United Nations' broad sanctioning criteria).

253. *See supra* Section I.A (detailing the congressional intent behind § 2339B).

254. *See supra* Section I.B (noting § 2339B's position as a criminal statute).

255. 31 C.F.R. § 594.201(a)(3) (2016).

256. § 594.201(a)(4)(i)(A)–(B).

as "directly participating" in furtherance of the FTO's goals at the time she receives the material support by either (1) regularly participating in the activities set forward above or (2) showing a pattern of acting on behalf of an FTO such that a court cannot construe her participation as having happened in the distant past.

The SDGT list is a U.S. government-maintained designation that includes specific criteria—short of actually committing a terrorist act—that suspected "terrorists" must meet before the government freezes their assets. These criteria are: (1) an individual who has committed or poses a "significant risk" of committing a terrorist act;[257] (2) an individual "owned or controlled by, or [who] act[s] for or on behalf of," an individual or entity already listed in the SDT or SDGT lists;[258] (3) an individual who "assist[s] in, sponsor[s], or provide[s] financial, material, or technological support for, or financial or other services to or in support of" either terrorist acts or individuals already on the SDT or SDGT list;[259] or (4) an individual "otherwise associated" with any individual already on the SDT or SDGT list.[260]

The full SDGT list includes criteria that are overly broad for a test determining whether an individual is part of an FTO. First, the SDGT list is created by the Treasury Secretary in consultation with the Secretaries of State and Homeland Security and the Attorney General.[261] To have leeway in determining who is or is not an SDGT, it is in the government's interest to create broadly written criteria so it has space to argue the merits of each case. Especially because the government often relies on classified materials not available to the public, this flexibility is key to its ability to defend designations to the public. Second, although having one's assets frozen is a serious penalty for designation as an SDGT, it is nowhere near as serious as § 2339B's threat of potential imprisonment.[262] A crime with a more serious penalty than sanctions should have stricter criteria. Thus, the recommended test for § 2339B includes the criteria designating specific prohibited actions and excludes the broad language concerning whether an individual is "associated" with an FTO or is a "significant risk."

257. § 594.201(a)(2).
258. § 594.201(a)(3).
259. § 594.201(a)(4)(i)(A)–(B).
260. § 594.201(a)(4)(ii).
261. § 594.201(a)(3).
262. 18 U.S.C. § 2339B(a)(1) (2012).

IHL, in contrast, generally provides a high level of procedural protections; an understanding of the seriousness of the consequences of each legal doctrine; and consideration of the rights applicable to civilians, combatants, and criminal defendants.[263] For example, in the *Public Committee Against Torture* case, the Israeli court interpreted the DPH test to determine the legality of Israel's "preventive strike policy" against Palestinians in the Gaza Strip, which killed many civilians.[264] The court defined "hostilities" as acts that by nature and objective are intended to cause damage to the army or to other civilians,[265] and it defined "direct part" expansively to encourage civilians to refrain from joining hostilities.[266] Finally, the court defined the requisite time commitment as only "for such time" that the individual takes direct part in hostilities.[267]

Although the Israeli court undoubtedly made its decision in the midst of a highly politicized and sensitive atmosphere, it made a calculation of rights available to civilians and terrorists when dissecting what it means to directly participate in hostilities.[268] The court analyzed each word in the phrase "direct part in hostilities" to draw a line as specific as possible between "civilian" and "terrorist." It made its decision based on reasoning intended to remove incentives to join a terrorist organization.[269] It also provided concrete examples that courts and humanitarian organizations alike could look to when determining whether material support is going to an FTO.[270]

However, in contrast to the SDGT list, the *Public Committee Against Torture* analysis is too narrow in its interpretation. The Israeli court stated that individuals who gather tactical intelligence, transport terrorists to the site of an attack, operate weapons or supervise the operation of weapons, or service weapons are all taking a direct part in

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263. *See generally* Int'l Comm. of the Red Cross, *Internment in Armed Conflict: Basic Rules and Challenges passim* (Opinion Paper, 2014), https://www.icrc.org/en/download/file/3223/security-detention-position-paper-icrc-11-2014.pdf (explaining the different procedural protections offered by IHL).

264. *See* Christensen, *supra* note 171, at 300 (explaining that the severe scope of violence in the Second Intifada led to the Public Committee Against Torture in Israel filing the case).

265. HCJ 769/02 Pub. Comm. Against Torture in Isr. v. Gov't of Isr. [2006] (2) IsrLR 459, 493 (Isr.).

266. *Id.* at 494.

267. *Id.* at 499.

268. *Id.* at 493–94.

269. *Id.* at 494.

270. *Id.* at 496–98.

hostilities.[271] On the other hand, individuals are not considered to directly participate in hostilities if they sell food or medicine to terrorists, provide strategic intelligence, provide logistical support, donate money, distribute propaganda, or are employed in the armaments industry.[272] The court needed to limit the possibility of civilian death, which required this strict test with more detailed guidelines governing military responsibilities.

The SGDT list and the *Public Committee Against Torture* analysis balance each other's weaker points, and a combination of the two tests provides a reasonable middle ground for § 2339B. First, the individual's personal conduct should fit into one of two prongs borrowed from the SDGT list: (1) an individual "owned or controlled by, or [who] act[s] for or on behalf of," an FTO;[273] or (2) an individual who "assist[s] in, sponsor[s], or provide[s] financial, material, or technological support for, or financial or other services to or in support of" an FTO's goals.[274]

The two SDGT factors balance the organization of traditional models of FTOs that have a hierarchical structure through the first prong ("owned or controlled by") with the organization of modern FTOs that have a network structure through the second prong (the list of proscribed activities). To ensure that the § 2339B test does not improperly pull in lone wolves who are merely inspired by an FTO, the first and fourth prongs of the SDGT list—an individual who has committed or poses a "significant risk" of committing a terrorist act[275] and individuals who are "otherwise associated" with any individual already on the SDT or SDGT list[276]—are excluded.

Second, borrowing from the *Public Committee Against Torture* analysis, the individual's conduct should be considered as "directly participating" in furtherance of the FTO's goals at the time he or she receives the material support. This means that the individual must either be "owned or controlled by, or . . . act[ing] for or on behalf of"[277] an FTO or be intentionally "assist[ing] in, sponsor[ing], or provid[ing] financial, material, or technological support for, or

271. *Id.* at 497.
272. *Id.*
273. 31 C.F.R. § 594.201(a)(3) (2016).
274. § 594.201(a)(4)(i)(A)–(B).
275. § 594.201(a)(2).
276. § 594.201(a)(4)(ii).
277. § 594.201(a)(3).

financial or other services to or in support of"[278] the FTO at the time the individual receives the material support. If the individual does not regularly participate in the listed activities or has not shown a pattern of acting on behalf of an FTO, then that does not constitute "directly participating." The inclusion of the "directly participating" requirement serves the important purpose of excluding those who may have disengaged from the FTO, those who may live in close proximity with FTO members but do not act on the FTO's behalf, and those who live in areas where the FTO is the de facto government and thus rely on some contact with the FTO to function in society. An individual who regularly engages in the proscribed activities on behalf of an FTO should obviously be deemed part of an FTO, but, for example, an individual who had engaged in activities on behalf of an FTO once several years prior should not be caught in § 2339B's web or foreclosed from ever receiving aid from an aid agency.

Taking these two factors into account will be a highly fact-specific inquiry, but it will provide greater clarity among humanitarian groups interacting with those who may be linked to terrorist organizations and among courts deciding § 2339B cases. This integrated model balances the importance of personal conduct and group affiliation by focusing on defined actions within a particular time period on behalf of an FTO—not just mere contact. These defined actions will then provide a useful guide for others, like aid organizations, trying to avoid prosecution under § 2339B.

CONCLUSION

Section 2339B imposes criminal liability on individuals who "knowingly provide[] material support or resources to a foreign terrorist organization, or attempt[] or conspire[] to do so." Since its enactment, the U.S. government has successfully wielded the statute as a sword against any individual it believes is supporting an FTO—even if the individual does not intend to facilitate any terrorist activities. This poses a problem for humanitarian aid groups that seek to provide assistance to the most vulnerable, who many times may either live among terrorist organizations or in areas in fact run by terrorist organizations. In addition, despite the abundance of § 2339B criminal cases, no appellate-level court has ever specifically addressed the elements necessary for a court to deem the individual receiving the

278. § 594.201(a)(4)(i)(A)–(B).

support to be part of an FTO. Thus, aid groups have little to no guidance when they are operating in the field, leaving it either exposed to potential prosecution under § 2339B or hesitating to provide assistance at all.

With this lack of precedent, the *Jama* court directly addressed the issue of who is sufficiently tied to an FTO under § 2339B,[279] but its test is flawed because the court misinterpreted the "personnel" definition and did not take into account similar laws that had decided issues analogous to who should be deemed part of an FTO. The seven-factor non-exclusive test that the *Jama* court created grants too much discretion to the judiciary in determining who is sufficiently associated with an FTO to be deemed part of it. The proposed tests from the defendants and the government were also untenable.

The *Jama* test should be amended to incorporate principles from IHL and the U.S. government's terrorist sanctioning regimes. Based on SDGT criteria, the individual's personal conduct should fit into two of the SDGT's prongs: "owned or controlled by, or . . . act[ing] for or on behalf of," an FTO;[280] or "assist[ing] in, sponsor[ing], or provid[ing] financial, material, or technological support for, or financial or other services to or in support of" an FTO's goals.[281] Further, based on the *Public Committee Against Torture* analysis, the individual's conduct should be considered as "directly participating" in furtherance of the FTO's goals at the time she receives the material support. A test based on these two factors clarifies who should be part of an FTO under § 2339B by balancing the importance of personal conduct and actions on behalf of an FTO with an understanding of the variety of organizational structures found within FTOs.

The lack of a clear judicial definition regarding who is part of an FTO under § 2339B is particularly troubling for humanitarian aid groups fearful of prosecution. It is crucial for both donors and charitable organizations to know who exactly is tied to a designated FTO and who is not, especially considering the threat of hefty sentencing[282] and the far-reaching adverse effects on humanitarian aid

279. United States v. Jama, 217 F. Supp. 3d 882, 890–91 (E.D. Va. 2016).

280. 31 C.F.R. § 594.201(a)(3).

281. § 594.201(a)(4)(i)(A)–(B).

282. *See* Uniting and Strengthening America by Fulfilling Rights and Ensuring Effective Discipline Over Monitoring Act of 2015, Pub. L. No. 114-23, § 704, 129 Stat. 268, 300 (2015) (amending 18 U.S.C. § 2339B(a)(1)) (increasing the penalty for material support of FTOs from fifteen years to twenty years).

delivery.[283] The test recommended within this Comment provides an opportunity to begin to remedy these concerns, thus ensuring smoother humanitarian aid operations and the maximum reach of humanitarian aid resources.

283. *See supra* Part II (discussing § 2339B's implications on humanitarian aid delivery).