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"A Hungry Child Knows No Politics:" A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism

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It was the late President Ronald Reagan who courageously declared that "a hungry child knows no politics," in order to justify his decision to send food aid to the Communist dictatorship in Ethiopia at the height of the Cold War. Although he no doubt believed that defeating the communist regime in that country was important to our national security, he was not willing to forego feeding starving civilians on that basis.[1]

Like most Americans, President Reagan would probably be quite shocked to learn that our current government has cast aside his teaching and actually criminalized humanitarian relief to victims of war and natural disaster in the name of the war on terror. As I learned first-hand while doing tsunami relief work in Sri Lanka, that is exactly what has happened under the so-called "material support of terrorism" laws.[2] The material support laws are a constellation of statutes found in the federal criminal code, immigration code, and elsewhere, whose ostensible purpose is to enhance our national security by stopping aid to terrorist groups. However, because of the enormous breadth of these laws, humanitarian organizations and volunteers operating throughout the world in conflict zones and natural disaster sites have scaled back and in some cases, simply abandoned their efforts to aid those in greatest need of help. While advocates have spoken out from time to time about the pernicious unintended consequences of these laws, their calls have gone entirely un-heeded in the current political climate.[3] Legal challenges to the laws have met with only slightly greater success.[4]

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[1] Although the phrase is now uniformly attributed to Reagan, it appears to have first been used by United States Agency for International Development (U.S. AID) personnel working in his administration. *See* Kathleen Teltsch, *U.S. Presses for Increased Relief Aid for Famine-Stricken Ethiopia*, N.Y. TIMES, Aug. 19, 1983, at A4. I discuss the provenance of the idea behind the phrase in more detail below.

[2] *See generally* 18 U.S.C. § 2339A; 18 U.S.C. § 2339B (criminal liability for material support to designated terrorist organizations); 8 U.S.C. § 1182(a)(3)(B)(iv)(VI); 8 U.S.C. § 1227(a)(4)(B) (authorizing exclusion and deportation of non-citizens who provide material support to designated organizations, and to certain organizations even if not designated); 50 U.S.C. § 1701 (general statute pursuant to which government has exercised authority to freeze all assets of designated organizations).

[3] Journalists and scholars have written about the problems that humanitarian organizations have faced because of the material support laws since at least 2003. *See, e.g.*, Stephanie Strom, *Small Charities Abroad Feel Pinch of U.S. War on Terror*, N.Y. TIMES, Aug. 5, 2003, at A8; Nina J. Crimm, *High Alert: the Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004). Humanitarian organizations themselves have also spoken out to some degree. After the Treasury Department published a set of extremely onerous "Voluntary Best Practices" for humanitarian organizations to follow in keeping with the material support laws, a number of advocacy groups led by the Council on Foundations published a set of "Principles of International Charity" designed to govern the conduct of charitable organizations so as to allow them to continue doing vital humanitarian work while simultaneously ensuring that their efforts did not support terrorism. While the Principles did not explicitly criticize the material support laws, their language suggests that the groups believed that the Treasury Department's efforts to ensure compliance with those laws had undermined important humanitarian efforts. THE TREASURY GUIDELINES WORKING GROUP OF CHARITABLE SECTOR ORGS. AND ADVISORS, PRINCIPLES OF INTERNATIONAL CHARITY (2005), *available at* http://www.usig.org/PDFs/Principles_Final.pdf.

[4] The most significant legal challenge to the material support laws was brought by the Humanitarian Law Project and several smaller humanitarian organizations and individuals, and litigated by a team of lawyers from the Center for Constitutional Rights, led by Professor David Cole of Georgetown University's Law Center. They have argued that the laws violate the

In Part I of this article I describe the humanitarian crisis I witnessed first-hand in Sri Lanka and explain how that crisis has evolved over the last three years. In Part II, I describe how the material support laws undermine critical humanitarian relief efforts through the lens of my experiences in Sri Lanka both in the immediate aftermath of the tsunami and more recently. In Part III, I discuss the view taken by the federal government on the issue and explain why that view is fundamentally misguided. Finally, in Part IV, I put forth several proposals for reforming the material support laws to allow for vital humanitarian assistance to go to those who need it most.

I. The Tsunami and its Aftermath

My understanding of the grave problems created by the material support laws has been shaped by my experiences in Sri Lanka. I was born and raised in the United States, but my parents and extended family are from Sri Lanka. I was on a plane to visit relatives there in December 2004, in the air between Los Angeles and Singapore, when the tsunami struck – killing over 30,000 people in Sri Lanka alone.[5] I landed there a day later and spent the next three weeks doing relief work with several different humanitarian organizations.

The suffering and devastation I saw was nearly unimaginable. My first mission was to a displaced persons camp in eastern Sri Lanka, with a relief team from the Hospital Christian Fellowship. At that camp we treated about 200 people. Every person I spoke with had lost at least one family member to the tsunami. I spoke with mothers and fathers who had been unable to keep hold of their children as they were sucked away by the sea, and parents who had been forced to choose, in a split second, which of their children to save because they could not hold on to all of them. I met children who saw their families, their homes, their villages – everything they had known – disappear in an instant. Seeing the destruction of whole towns, places of worship, roads, trees – everything – was a humbling experience that is indelibly etched in my memory.

If this had happened anywhere in the world, the devastation and its aftermath would have been terrible to behold. But it was made worse because it happened in Sri Lanka – a country that has been torn by civil war for over twenty years. Approximately one-fifth of the territory of Sri Lanka is currently controlled by the Liberation Tigers of Tamil Eelam (LTTE), an armed group fighting against the government of Sri Lanka. The LTTE has been designated as a Foreign Terrorist Organization by the State Department pursuant to Section 219 of the Immigration and Nationality Act, 8 U.S.C. § 1189. As a result, it is a violation of law to give "material support" to that group. Material support is defined very broadly, as I will discuss below, and the consequences for violating the law are severe. Non-citizens face deportation, while citizens and non-citizens alike face civil forfeiture and criminal penalties of up to fifteen years in prison. 8 U.S.C. § 1227(a)(4)(B); 18 U.S.C. § 2339B.

First and Fifth Amendments. Those groups have been involved in protracted litigation concerning their challenge for over ten years. As of this time, the United States Court of Appeals for the Ninth Circuit has upheld most but not all of the provisions of the material support law subject to challenge in the suit. The litigation is discussed in greater detail below.

[5] The tsunami killed over 30,000 people in Sri Lanka. *See* John Lancaster, *In Sri Lanka, a Hard Lesson On Road of Good Intentions*, WASH. POST, May 28, 2005, at A01. Approximately 800,000 more were rendered homeless. Robert McFadden, *Relief Effort Gains As Aid Is Reaching More Survivors*, N.Y. TIMES, Jan. 3, 2005, at A1. In Indonesia, figures vary widely, but reports indicate that approximately 150,000 people died. Alan Sipress & Colum Lynch, *Indonesia's Death Toll Varies; 'Perhaps We Will Never Know,' President Says*, WASH. POST, Jan. 20, 2005, at A20. Large numbers of people died in other countries as well, including Thailand, the Maldives, India, and along the eastern coast of Africa.

Although the LTTE is designated as a terrorist group, in the territory it controls it functions as a government. The LTTE runs a court system, a police force, orphanages, a set of health clinics, and even its own traffic police. It is, for all practical purposes, the government for approximately 500,000 people who live in the LTTE-controlled areas. And, because the LTTE governs its territory as an authoritarian military regime, it exerts a significant amount of control over all of the institutions in its territory. As with civil war and disaster situations around the globe – northern Iraq, western Pakistan, south and east Colombia, and Israel/Palestine, to name a few – providing humanitarian aid to the most needy people in Sri Lanka almost inevitably requires working in areas controlled by, and dealing directly with, a designated terrorist group.[6]

Unlike our material support laws, natural disasters do not differentiate between areas under the control of designated terrorist groups and those controlled by the governments at war with them. In Sri Lanka, thousands of people living in LTTE-held territory died in the tsunami. Hundreds of thousands more were displaced into camps, many having lost some or all of their family members and in urgent need of food, shelter, and medical care. In fact, because the LTTE controls large segments of the eastern seaboard of the island, which was most directly hit by the tsunami, people in LTTE territory were some of the most severely affected.

Although many hoped that the horror of the tsunami would somehow bring an end to the conflict in Sri Lanka, this has not come to pass, and the country remains in a severe humanitarian crisis now three and a half years since the tsunami struck. The peace that had existed for three years prior to the tsunami effectively ended in 2006, and the war has resumed with tremendous ferocity. The government formally withdrew from its ceasefire agreement with the LTTE in January 2008. Since that time hundreds of civilians have been killed, and tens of thousands of civilians living in the war zone have fled their homes.[7] Not surprisingly, many of those displaced live in the area controlled by the LTTE, much of which has become a war zone. As a result, even as I write this, there continue to be thousands of civilians living in those areas in urgent need of food, shelter, and medical care, just as there were on December 27, 2004, the day after the tsunami struck.[8]

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[6] Designated terrorist organizations control territory in all of the conflict areas listed. U.S. DEP'T OF STATE OFFICE OF COUNTERTERRORISM, FOREIGN TERRORIST ORGANIZATIONS FACT SHEET (2005), *available at* http://www.state.gov/s/ct/rls/fs/37191.htm.

[7] The war resumed approximately one year after the tsunami. In the first nine months of 2006, over 1,000 civilians died in the conflict, and approximately 13,000 refugees attempted to flee northern Sri Lanka's war zone by boat. *See* Somini Sengupta, *Resumption of Sri Lanka War Tests Civilians' Endurance*, N.Y. TIMES, Sept. 18, 2006, at A12. The violence has escalated still further since the formal end of the ceasefire. *See* HUMAN RIGHTS WATCH, UNIVERSAL PERIODIC REVIEW OF SRI LANKA: HUMAN RIGHTS WATCH'S SUBMISSION TO THE UNITED NATIONS' HUMAN RIGHTS COUNCIL (2008), *available at* http://hrw.org/english/docs/2008/04/07/global18554.htm.

[8] Most urgently, the United Nations' World Food Programme recently reported severe food shortages in north Sri Lanka, including several areas under LTTE control. As explained below, food aid constitutes material support under the current statute. "'Scarcity of food items and the subsequent escalation in the cost of essential items may result in more than one million in the country facing starvation,' Mohamed Saleheen, the resident representative of United Nations (UN) World Food program (WFP) in Colombo told the media Friday." *One million people in Sri Lanka may face starvation – WFP*, TAMILNET, Apr. 26, 2008, *available at* http://www.tamilnet.com/art.html?catid=13&artid=25437.

II. How The Material Support Laws Undermine Humanitarian Relief

Although one might think that the law governing humanitarian relief should not distinguish between victims living in different parts of war-torn nations, that is not how our material support laws currently operate. A close examination of the specific laws at issue makes this clear.

A. The Statute's Text

The current version of the statute defines material support as follows: "the term 'material support or resources' means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials." 18 U.S.C. 2339A(b).[9]

Several features of this statute work to undermine humanitarian relief efforts. First, the definition of what constitutes material support is exceedingly broad. "Any property, tangible or intangible," can constitute material support. By its plain language, this definition would appear to cover a number of items that are obviously critical to the survival of people who are the victims of war and natural disaster. Much of what is needed for humanitarian relief work in situations of massive displacement, including water, water purification systems, sanitation equipment such as toilets, all forms of shelter (including even children's clothing), and the materials needed for longer-term reconstruction such as boats and building materials, constitutes "*any* property, tangible or intangible." Because the law makes no distinction between lethal aid – such as weapons or ammunition – and non-lethal aid, an organization seeking to provide toilets to the LTTE's health ministry to take to camps in an area under its control risks violating the material support laws by providing such critical assistance. This is so notwithstanding the fact that the LTTE is the government for all practical purposes in the areas it controls.

Second, the statute contains no general exception for humanitarian assistance, even if it is necessary to save the lives of people who happen to live in territory held by a designated group. Instead, it contains a far narrower exception, for "medicine and religious materials." While this exception is important, it is sorely inadequate to meet the needs of people caught in humanitarian crises, whether they arise from natural disasters or political conflict. Thus, if one provides food aid to refugees and can show that the aid did in fact go to those refugees, the law still criminalizes that conduct if the designated group received that aid prior to distributing it. Indeed, the government could even contend that providing such aid was illegal as long as the designated group authorized its distribution, whether or not the group physically received it. In this context, it is irrelevant that medicine alone cannot save a starving person – the law allows the provision of medicine, but not food.

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[9] As noted earlier, there is a similar material support prohibition in the immigration statute, although the provision is in some respects substantially broader than the criminal prohibition. Most significantly, its provisions are not limited to groups that are explicitly designated as terrorist organizations by the Secretary of State and Attorney General, and instead applies broadly to any number of groups, including groups that engage in no violence whatsoever. *See* 8 U.S.C. § 1182(a)(3)(B)(vi)(III) (defining "terrorist organization" for purposes of the immigration statute). All of the arguments I advance here in support of reforming the criminal material support laws also counsel in favor of parallel reforms to the immigration laws. Humanitarian assistance is equally vital whether provided by citizens or non-citizens, and neither group should be deterred from providing that assistance.

Third, the statute does not limit its proscription to material objects, but also bans the provision of "services," "training," "personnel," and "expert advice or assistance." Thus, a doctor who wants to teach medical workers who work for a designated group how to detect contagious diseases in a refugee camp, such as cholera or dysentery, may well be engaged in "training," while a doctor who wants to treat dying refugees in the group's camp may well be providing "personnel." Similarly, the statute's ban on the provision of "expert advice or assistance" could easily be read to mean that a public health expert who advises a designated group about how to set up water supplies so as to minimize the spread of diseases probably could be prosecuted under the statute. Indeed, even training psychological counselors working with a designated group – which is a crucial need for children who have lost parents to disaster or war – may violate the "training" or "personnel" provisions, as long as the training imparts a "specific skill" and the counselors work under the group's "direction and control."[10]

Finally, the law punishes support to a designated group regardless of whether the person providing that support intended to further, or did in fact further, the group's violent (or "terrorist") activities. Under amendments to the law passed in December 2004 (ironically, only weeks before the tsunami), a person violates the material support laws as long as he or she provides the support knowing that the recipient group has been designated as a "terrorist organization" or that the organization has been involved in "terrorist activity."[11] In the context of Sri Lanka (and, I imagine, in many other similar contexts), many people in the humanitarian aid community are well aware of the LTTE's designation, which has been the subject of a number of high-profile court decisions. Even without knowing of the designation, anyone with even a passing understanding of Sri Lanka knows that the LTTE and the Sri Lankan government are involved in a violent conflict. Knowledge that the LTTE has engaged in violent acts would probably satisfy the intent requirement under current law, given the breadth of the definition of "terrorist activity" itself. Thus, aid workers who provide humanitarian assistance to people living under LTTE control cannot defend their actions on the ground that their intentions are purely humanitarian.[12]

In sum, providing desperately needed drinking water, blankets, clothing or tents in LTTE-held areas may require working with the LTTE officials who are the de facto government in that area. Yet

[10]After the court in the *Humanitarian Law Project* litigation struck down certain sections of the criminal statute as impermissibly vague, Congress amended the law, in December 2004. Under the amendments, the term "training" is now somewhat more specifically defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge." The amendments also defined "expert advice or assistance" as "advice or assistance derived from scientific, technical or other specialized knowledge." 18 U.S.C. § 2339A(b)(2-3). The amendments also clarified the meaning of the prohibition on "personnel," stating that "No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly . . . work[ed] under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control." 18 U.S.C. § 2339B(h). The statute enacting the amendments is the Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6603. Substantial amendments to the original law, which was passed in 1996, were also enacted in the Patriot Act, at USA PATRIOT Act, Pub. L. No. 107-56, § 805, 115 Stat. 272 (2001).

[11] That change is codified in the law's intent section, found at 18 U.S.C. § 2339B(a)(1), and was originally enacted in Section 6603 of the Intelligence Reform and Terrorism Prevention Act of 2004.

[12] Under the applicable definition, "terrorist activity" is not limited to hijackings, bombings, and other similar tactics, but broadly includes the use of any "weapon or dangerous device (other than for mere personal monetary gain), with intent to endanger, directly or indirectly, the safety of one or more individuals or to cause substantial damage to property." Surely every aid worker who travels to Sri Lanka knows that the LTTE has engaged in "terrorist activity" under this extremely broad definition. *See* 8 U.S.C. § 1182(a)(3)(B)(iii)(V).

our material support laws put aid workers in the untenable position of having to choose between providing assistance, which exposes them and their organizations to the risk of exclusion from the United States, deportation, civil forfeiture or even criminal prosecution on the one hand, and abandoning the desperate victims of war and natural calamity in their hour of greatest need on the other.

B. The Material Support Law's Chilling Effect

In the immediate aftermath of the tsunami and in the years since, I have learned that the difficulties I am describing here are far from hypothetical. There can be no serious dispute that qualified organizations and individuals who have the willingness and ability to help those suffering in Sri Lanka and other parts of the world are scared to do so because of the current material support laws. I have spoken personally with dozens of doctors, teachers, and others who want to work with people desperately needing their help in Sri Lanka, but fear liability under the material support laws.

For example, in the first few days of relief work after the tsunami, my team of aid workers focused on treating people's immediate medical needs – wounds, dehydration, respiratory infections – with medicine and dressings. Such assistance would probably fit under the law's exception for "medicine." But within a week, the most serious public health problems for the hundreds of thousands of displaced people changed. In situations of mass displacement, the greatest killer is often infectious disease, which spreads through contaminated water, inadequate sanitation, and exposure from a lack of shelter. To prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such provisions which are not "medicine" but nonetheless serve an absolutely critical medical function. However, providing these items to people living under the control of designated terrorist groups is nearly impossible to do consistent with our material support laws. As a result, many charitable organizations forego providing a number of vital – and perfectly innocuous – items such as clothing, children's books, and medical equipment, to desperate victims of war.

I spoke with a number of people working both independently and for charitable organizations who feared to send funds for such urgent humanitarian needs in the immediate aftermath of the tsunami, and in my capacity as an ACLU attorney, I have heard similar concerns from charitable organizations in the years since the disaster. Indeed, a set of humanitarian organizations including Oxfam, Operation USA, and the Unitarian Universalist Service Committee filed a brief asking a federal court to substantially narrow the material support law because of its adverse impact on their humanitarian work.[13] More recently, two organizations concerned about this issue – OMB Watch and Grantmakers Without Borders – have extensively documented the ways in which "counterterrorism laws create barriers for international philanthropy and programs."[14]

The effect of the ban on services, training, personnel, and expert advice or assistance is equally cruel. It is difficult for those of us living in peace to understand the impact of discouraging doctors from

[13] Brief for American Civil Liberties Union et al as Amici Curiae Supporting Plaintiffs-Appellees, Humanitarian Law Project v. Gonzales, 380 F.Supp.2d 1134 (9th Cir. 2006) (Nos. 05-56753, 05-56846), *available at* http://www.aclu.org/images/general/asset_upload_file394_25628.pdf.

[14] *See Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, at 47-50 (2008) (on file with author). The report also concludes that the Treasury Department's claims concerning the extent to which terrorist organizations divert funds from charitable contributions are greatly exaggerated. *See id*. at 31, 34.

providing assistance to a particular area, because we do not live under the acute shortages that arise in conflict zones. In Northeast Sri Lanka, approximately fifty-five hospitals have been destroyed over the last twenty-five years of war. During that time, the overwhelming majority of professionally trained doctors have fled the war zones, because they fear for their lives. However, approximately half a million other people remain there. For the remaining several hundred thousand people living in the heart of the war zone in Sri Lanka, there are only about ten to twenty professionally-qualified doctors of any kind. That the law functions to discourage volunteer professionals from traveling to war zones to provide assistance is particularly perverse, because the conflict itself causes indigenous doctors, nurses, and other critical professionals to flee the areas worst-affected.[15]

The current material support statute, with its limited exceptions and extremely broad intent requirement, leads to truly irrational results. A humanitarian organization may send medicine to perform dialysis, but risks prosecution if it also seeks to send either the doctor or the equipment needed to perform the dialysis itself. Surely we do not enhance our nation's security by enacting statutes that lead to such absurd, and cruel, results.[16]

III. The Government's View Concerning the Material Support Laws and Humanitarian Relief

The federal government's arguments in litigation have advanced the extremely broad interpretation of the material support laws described above, and in doing so, have shown that the fears of humanitarian organizations are well-justified. Our Department of Justice has argued that doctors seeking to work in areas under LTTE control are not entitled to an injunction against prosecution under the material support laws, and it has even succeeded in winning deportation orders under the immigration law's definition of material support for merely giving food and shelter to people who belong to a "terrorist organization" even if that group is not designated.[17] More recently, the government has denied asylum to doctors and nurses who provided medical care at the behest of terrorist groups.[18]

The government has justified these draconian results primarily by reference to a single argument. The government has maintained – and a number of federal courts have agreed – that its sweeping

[15] This data is derived from interviews with medical doctors involved with humanitarian assistance to Northeast Sri Lanka, which are on file with the author.

[16] Dialysis is a particularly apt example because in Northern Sri Lanka it is often needed to treat snake bites which can otherwise be fatal. Temporary dialysis serves to alleviate the transient kidney failure which otherwise leads to easily preventable deaths.

[17] *See* Humanitarian Law Project v. Reno, 205 F.3d 1130, 1133 (9th Cir. 2000); Humanitarian Law Project v. U.S. Dep't of Justice, 393 F.3d 902 (9th Cir. 2004) (en banc); Singh-Kaur v. Ashcroft, 385 F.3d 293, 299-301 (3d Cir. 2004). As of the time of this writing, the Ninth Circuit has held that the ban on "services," "training," and some forms of "expert advice and assistance" (but probably not medical advice) are unconstitutionally vague, while the rest of the law has been upheld. Humanitarian Law Project v. Mukasey, 509 F.3d 1122 (9th Cir. 2007). However, the government is seeking rehearing in the case. In any event, the Ninth Circuit's decision does not bar the government from prosecuting people under those portions of the statute in other parts of the country.

[18] *See* Brief of Physicians for Human Rights as Amicus Curiae in Support of Respondent B.T. (filed before the Board of Immigration Appeals in Matter of B.T. on Dec. 26, 2006). The Board has yet to decide the case. For a broader description of the problem, see Leonard S. Rubinstein, *Doctors Without Refuge*, WASH. POST, Mar. 5, 2007, at A15 ("The U.S. government is appealing an immigration judge's decision granting asylum to a Nepalese health worker who was twice kidnapped by a Maoist group that wanted him to attend to a wounded rebel. It rejected the asylum claim of a Colombian nurse who was kidnapped by the Revolutionary Armed Forces of Colombia, assaulted and forced at gunpoint to provide medical care to its members.").

interpretation of the material support laws is required because all humanitarian assistance to designated terrorist groups is "fungible" with other, more pernicious types of support.

The fungibility argument comes in a variety of forms. At its narrowest, the argument is simply that designated groups can divert funds from humanitarian to military ends – if an NGO provides money for blankets, the group may use the money to buy guns instead. *See, e.g.*, *United States v. Afshari*, 446 F.3d 915 (9th Cir. Cal. 2006) ("money is fungible; if an organization engages in terrorism, it can channel money donated to it for humanitarian and advocacy purposes to promote its grisly agenda.").[19] However, the argument also appears in broader forms. The government has asserted that non-financial assistance can be fungible, such that if an NGO provides a doctor to work in the designated group's refugee camp, then the group need not spend its own money on that doctor and can instead direct that money toward a violent end. As Judge Posner explained in a recent Seventh Circuit decision, when describing the rationale that Congress employed:

> If you provide material support to a terrorist organization, you are engaged in terrorist activity even if your support is confined to the nonterrorist activities of the organization. Organizations that the statute, and indeed in this instance common parlance, describes as terrorist organizations, such as Hamas in Gaza and Hezbollah in Lebanon, often operate on two tracks: a violent one and a peaceful one (electioneering, charity, provision of social services). If you give money (or raise money to be given) for the teaching of arithmetic to children in an elementary school run by Hamas, you are providing material support to a terrorist organization even though you are not providing direct support to any terrorist acts.

Hussain v. Mukasey, 518 F.3d 534, 538 (7th Cir. 2008).[20] Finally, at its broadest, the government deploys the fungibility argument to assert that *anything* done to benefit a designated group enhances its capacity in some sense, and enhancing that capacity provides the group greater capability for the group to use toward violent ends. As the Office of Foreign Assets Control has asserted, "terrorist abuse" of charitable organizations extends to the "exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist groups and networks."[21] On this view, a doctor who works with a designated group to save children dying of infectious diseases has provided material support to that group because saving the child has enhanced the group's legitimacy.

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[19] In a suit against a bank for providing material support to Hamas, a complaint made a similar allegation: "Due to the substantial expenditures of the HAMAS organization and the fungible nature of money, significant sums of money collected externally under charitable and humanitarian banners are routed for HAMAS military and other operational uses." Weiss v. Arab Bank, PLC, 2007 U.S. Dist. LEXIS 94029 (E.D.N.Y. Dec. 21, 2007) (allegations in complaint).

[20] There is support in the legislative history of the material support laws for the claim that Congress endorsed this view, although without any coherent explanation. Section 307 of the Anti-Terrorism and Effective Death Penalty Act of 1996, in which the material support laws were first enacted, contained a Congressional finding that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." I cannot believe the politicians who wrote this would have wanted their statement to deprive food, shelter, and medical care to the orphaned children I met in the tsunami's aftermath, no matter how "tainted" were the people who ran the camps to which those children had been brought.

[21] U.S. DEP'T OF THE TREASURY, ANNEX TO THE ANTI-TERRORIST FINANCING GUIDELINES: VOLUNTARY BEST PRACTICES FOR U.S. BASED CHARITIES 14 (2006), *available at* http://www.treas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf.

There are many problems with the fungibility argument in defense of the material support laws. First, and most important, its rationale is fundamentally inconsistent with our values as a nation. As a society, we simply do not believe in collectively punishing innocent civilians in the name of furthering our political goals, however laudable and important those goals may be. I mentioned the most salient example at the outset -- President Ronald Reagan's declaration that "a hungry child knows no politics." President Reagan's statement reflects the basic American idea that we will not collectively punish innocent civilians for the sins of their government.

Reagan's moral vision on this issue has had a long life. That same vision informs the policy of the International Committee of the Red Cross, whose first three Principles of Conduct in Disaster Response Programmes state that:

> The humanitarian imperative comes first. The right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries. . . Aid is given regardless of the race, creed or nationality of the recipients and without adverse distinction of any kind. Aid priorities are calculated on the basis of need alone. . . Aid will not be used to further a particular political or religious standpoint.[22]

The Red Cross's policy reflects President Reagan's moral vision, but cannot be reconciled with the material support laws, which forbid the provision of aid if the aid must pass through the hands of designated groups. Reagan's view has also become official United States Agency for International Development (U.S. AID) policy. As the agency explained in a background paper on famine in 2002, "[f]ood aid will not be used as an instrument of diplomacy in a nutritional emergency. We separate people from government and follow Ronald Reagan's advice: 'a hungry child knows no politics.'"[23] However, U.S. AID's principle also cannot be reconciled with the material support laws, which flatly prohibit giving food to designated groups for distribution to civilians living under their rule.[24]

A second serious problem with the fungibility argument is that it proves too much; its rationale is too broad for what it seeks to support. As the government has itself argued, and as federal courts have recognized, there are a number of activities with respect to designated terrorist groups that cannot be banned. The statute itself explicitly exempts the provision of medicines and religious materials. As a result, during the tsunami's aftermath, humanitarian organizations could provide medicines to hospitals run by the LTTE without fear of being prosecuted. The Constitution also requires certain other exemptions. For example, the criminal laws do not, and cannot, punish mere membership in designated groups, because the First Amendment protects that freedom of association. Similarly, both the

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[22] *See* INT'L FED'N OF RED CROSS AND RED CRESCENT SOC'YS, THE CODE OF CONDUCT: PRINCIPLES OF CONDUCT FOR INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT AND NGOS IN DISASTER RESPONSE PROGRAMMES, *available at* http://www.ifrc.org/publicat/conduct/code.asp.

[23] Press Release, U.S. Agency for Int'l Dev., Background Paper: Famine, (June 11, 2002), *available at* http://www.usaid.gov/press/releases/2002/02fs_famine.html.

[24] A number of other organizations also endorse the principle. For example, several aid groups, including the United Nations World Food Program, CARE, Catholic Relief Services, and World Vision invoked it to justify giving food aid to North Korea during a famine in 1997. *See generally* postings of Ted Yamamori & Andrew Natsios to http://www.pbs.org/newshour/forum/august97/korea1.html (Aug. 26, 1997).

Constitution and the statute establish that the government cannot prohibit someone from writing articles in support of a designated group, or speaking out on its behalf.[25]

However, the fungibility argument in support of the material support laws cannot make sense of these exceptions. If an aid organization gives medicine to a designated group, the group can use the money it would have spent on medicines to buy guns instead. At a broader level, membership in a group and advocacy on its behalf obviously serve to enhance its image at the most general level, and thereby enhance its capacity to engage in all of its activities, including terrorist activity. Indeed, if enough people were to write propaganda on behalf of a designated group, the group would not have to spend any of its own resources producing that propaganda, and could use those resources for other purposes. Nonetheless, Congress has not chosen to ban these forms of support, and at least some of them are constitutionally protected.

What these exceptions show is that legal and moral principles already recognized by Congress and in the Constitution require that we allow people to engage in some forms of activity even when those activities have the incidental effect of furthering the aims of designated terrorist groups, because other values trump our nation's interest in denying support to those groups. Although this principle is perfectly clear from the examples cited above, the material support laws recognize it in only the most haphazard way. They authorize providing medicine to designated groups in the name of the humanitarian imperative and allow people to be members of those same groups in the name of free speech and association, but do not allow doctors to treat people living under the control of these groups or aid workers to provide food, water, or a variety of other resources that are critical to the survival of people victimized by humanitarian disaster or armed conflict. These irrational policies offend our most basic values as a nation and also greatly increase the suffering of the most vulnerable people on our planet – innocent victims of wars and natural disasters.

IV. Reforming the Material Support Laws

The solution to this problem is for Congress to modify the material support laws to allow vital humanitarian assistance to proceed in situations of war and natural disaster. Congress could accomplish this in several ways. First, it could simply amend the law by requiring the government to prove that individuals charged under the material support laws actually intended to further terrorist activity when they provided humanitarian assistance. The government's assertion, in litigation, that the law should not apply to at least some people who engage in activity that has the incidental effect of supporting designated groups provides support for this view. If a person can write an article that advocates on behalf of a designated group without going to prison even though this activity may have the incidental effect of benefiting the group in some way, similarly a doctor should be able to provide medical care to civilians living under the group's rule even if that behavior also benefits the group in some abstract way.

[25] *See* 18 U.S.C. § 2339B(h) (exempting from liability the provision of personnel if done outside the direction and control of the designated group); Humanitarian Law Project v. Reno, 205 F.3d 1130, 1134 (9th Cir. Cal. 2000) ("Plaintiffs here do not contend they are prohibited from advocating the goals of the foreign terrorist organizations, espousing their views or even being members of such groups. They can do so without fear of penalty right up to the line established by [the First Amendment as explained in] Brandenburg v. Ohio, 395 U.S. 444 (1969)"). The government has also endorsed this view in its briefs, by arguing that people who independently advocate on behalf of designated groups cannot be subject to prosecution on that basis. *See* Cross-Appellees' Petition for Rehearing and Rehearing En Banc, at 17-19, *Humanitarian Law Project v. Mukasey*, (9th Cir.).

Amending the law in this way would recognize that the United States values the lives of innocent civilians everywhere, no matter what kind of government they happen to live under.

The government has argued that a rule requiring proof that an individual actually intended to further terrorist activity will allow bad actors who provide support to terrorist groups to escape liability. However, proof of intent has proved a workable standard in a variety of legal contexts. Reckless disregard of the risk that resources will be misused could still serve as a basis for prosecution, and "deliberate ignorance" or willful blindness to such misuse could also be punished. Indeed, implausible claims that a humanitarian agency did not intend to support a terrorist group are unlikely to succeed in front of juries concerned about the threat of terrorism.[26]

If lawmakers have concerns about such an intent requirement, notwithstanding its use in other contexts, they should still support a second, narrower, solution. This would be to create an affirmative defense in the statute for certain kinds of humanitarian assistance. Under this approach, someone providing material support to a designated group could avoid criminal liability if they affirmatively show that their assistance went only to civilians, for humanitarian purposes. If they could not prove that the assistance they provided reached civilians for such purposes, they could be convicted under the statute. Under this approach, organizations should be able to continue their work if they carefully screen and monitor projects to ensure that aid is sent only to those who truly need it, audit their programs through detailed receipts and written acknowledgements from beneficiaries, or send their own personnel to ensure that aid is provided as intended. Such an approach should fully allay the government's concern regarding the creation of "sham" charities that could covertly aid designated groups, while allowing legitimate humanitarian organizations that can show that their work does not further terrorist activity to continue providing life-saving services in conflict areas such as Sri Lanka.

Whether or not Congress adopts either of these two approaches, at a minimum it should broaden the existing exception for medicine and religious materials to cover certain other services that are essential to victims of war and natural disaster. At a very minimum, the statute should authorize an exception for not only medicine and religious materials, but also "medical equipment and services, civilian public health services, and, if provided to non-combatants, food, water, clothing, and shelter."

Finally, given the disastrous humanitarian situation in Sri Lanka at the moment, including approximately one million people displaced from their homes, many of whom may soon be at risk of starvation according to the United Nations World Food Program, the Bush Administration need not wait for Congress to act. Amendments to the statute put in place in 2004 allow the Secretary of State, acting in concert with the Attorney General, to essentially waive the "personnel," "training," and "expert advice or assistance" prongs of the statute so as to allow material support under certain circumstances, provided that the support cannot be used to carry out terrorist activity. While obviously not a complete solution, the administration should invoke this provision to allow humanitarian organizations to provide those forms of assistance in Sri Lanka.[27]

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[26] A slightly different version of this approach would allow humanitarian organizations to avoid liability if they could show that they took "reasonable measures" to ensure that their aid was not diverted to support violence. Under this approach, the law would still focus upon the organization's intent, but would place the burden on the organization to prove that its intent was pure, rather than requiring the government to prove that its intent was to support violence.

[27] *See* 18 U.S.C. § 2339B(j). Even with such a waiver in place, the material support laws would still bar much-needed humanitarian aid such as food, water, blankets and other genuine humanitarian items. For this reason, among others, invocation of the waiver is not a substitute for reform of the material support laws.

V. Conclusion

I was working in Manhattan on September 11, 2001, and I felt the horror of the terrorist attacks in a very personal way. I believe we must do everything we can to make our country safe from the scourge of terrorism. However, as I sit here writing, the faces of the people I saw in the camps in Sri Lanka flash before me, and I know their need. Without some amendment along the lines discussed above, humanitarian organizations and individual volunteers will continue to be deterred from providing vitally needed assistance to victims of disasters like the tsunami. The people who managed to survive the tsunami and civil war in Sri Lanka should not be deprived of basic necessities such as food and shelter in their hour of greatest need simply because they happen to live in an area under the control of a designated terrorist group. Denying humanitarian assistance to such people does not make us safer; giving basic necessities to these devastated people simply does not undermine our nation's security. We do not have to choose between national security and our commitment to help those who are suffering around the globe. Amending our material support laws to allow vital humanitarian work to go unimpeded would allow us to fulfill our moral obligations without undermining our safety. The innocent victims of natural disaster and civil conflict deserve nothing less.