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## Combating Terrorism: Will Civil Penalties Help Win the War on Terror?

Matthew T. Glavin

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*FEATURE ARTICLE***COMBATING TERRORISM:  
WILL CIVIL PENALTIES HELP  
WIN THE WAR ON TERROR?***by* MATTHEW T. GLAVIN

**O**n May 13, 1996, seventeen-year-old David Boim was waiting at a bus stop in the West Bank of Israel.<sup>1</sup> David held dual citizenship in the United States and Israel, and was living in Israel while studying the Torah at a yeshiva.<sup>2</sup> As he waited for the bus with his classmates, a car approached and its occupants opened fire on the students.<sup>3</sup> David was shot in the head and killed.<sup>4</sup> The murderers were believed to be members of the military wing of

Hamas, a group classified as a terrorist organization by the United States Department of Treasury.<sup>5</sup>

After his death, Joyce and Stanley Boim, David's parents, filed suit against a variety of organizations with ties to Hamas, including the Holy Land Foundation.<sup>6</sup>

The Holy Land Foundation is a non-profit organization that has claimed to be the largest Muslim charity in the United States.<sup>7</sup> Ostensibly, Holy Land Foundation funded social service programs and humanitarian relief for Palestinians, especially in the West Bank and the Gaza Strip.<sup>8</sup> In 2001, the United States government classified the organization as a specially designated terrorist organization and froze its assets.<sup>9</sup>

The Holy Land Foundation was accused of providing funds to Hamas, whose charter calls for the obliteration of the State of Israel and the establishment of an Islamic republic in the area now comprising Israel, the West Bank and the Gaza Strip.<sup>10</sup> Hamas's designation as a terrorist organization made it illegal for any United States citizen to provide it with any material support or resources.<sup>11</sup>

Hamas has two divisions: military and political.<sup>12</sup> Its political division operates a series of Da'was, which provide "medical care, schooling and other services to Palestinians living in and around the Gaza Strip and the West Bank."<sup>13</sup> These organizations have helped Hamas establish a connection with the community, leading to the election of Hamas candidates within the Palestinian Authority in 2006.<sup>14</sup>

### *THE BOIMS' LAWSUIT*

In their suit, the Boims alleged that Hamas's military wing depended on foreign contributions, and that the Holy Land Foundation was one of Hamas's main fronts in the United States.<sup>15</sup> They further alleged that contributions from the Holy Land Foundation to Hamas paid for military supplies, including vehicles and guns, which were used to kill their son.<sup>16</sup>

The Seventh Circuit, ruling on interlocutory appeal of Holy Land Foundation's motion to dismiss, held there were two theories of liability under which the Boims could proceed.<sup>17</sup> First, under the U.S. codes that outlaw providing

material support to terrorists (18 U.S.C. § 2339(a) and § 2339(b)), the court interpreted Congress' intent to "undoubtedly [be] that the persons providing financial support to terrorist[s] should be held criminal[ly] liable for those violent acts."<sup>18</sup> The court noted that there was no reason to construe civil liability under section § 2339 more narrowly than the equivalent criminal threshold.<sup>19</sup>

Second, the court found that corporations could be held civilly liable under a theory of aiding and abetting.<sup>20</sup> This theory extends liability beyond the individuals who actually committed the act of terrorism, and reaches those who provided aid to the persons responsible for the acts.<sup>21</sup>

The Seventh Circuit, however, also held that for a plaintiff to successfully prove that a defendant is liable for aiding and abetting, he must establish the defendant *intended* to further the unlawful act.<sup>22</sup> Thus, the court held that upon remand, the Boims must "prove that the defendants knew of Hamas's illegal activity, that they desired to help those activities succeed, and that they engaged in some act of helping those illegal activities."<sup>23</sup>

Following the Seventh Circuit ruling, the district court held Holy Land Foundation, and the three other co-defendants, liable and the jury awarded \$52 million in damages.<sup>24</sup> Under the statute, the court was able to treble damages, and they increased the award to \$156 million.<sup>25</sup>

Holy Land Foundation appealed the judgment and the Seventh Circuit vacated and remanded the case.<sup>26</sup> The Seventh Circuit held that on remand "the Boims will have to demonstrate an adequate causal link between the death of David Boim and the actions of the Holy Land Foundation."<sup>27</sup> The court further held this would require evidence that the conduct of the defendants "helped bring about the terrorist attack that ended David Boim's life."<sup>28</sup> The court explained that the defendants do not need to be the only or principal cause, but rather simply be part of the causal chain that indirectly facilitated Hamas's terrorist activities.<sup>29</sup>

After the Seventh Circuit entered this judgment, Boim petitioned for rehearing, and on September 10, 2008, the Seventh Circuit heard the case *en banc*.<sup>30</sup>

## WILL CIVIL LIABILITY HELP FIGHT TERRORISM?

Many scholars see the use of civil penalties as a useful weapon in the War on Terror. One of those scholars, Jimmy Gurule, a Notre Dame Law School professor, has recently published a book entitled "Unfunding Terror: The Legal Response to the Financing of Global Terrorism."<sup>31</sup>

Gurule feels that, "the message has been sent to the Muslim community . . . loud and clear. You better make sure you know who you are doing business with. You better make sure the particular entity you are giving your money to is legitimate. And, if you don't there is a risk . . . you could be designated [as a terrorist] yourself."<sup>32</sup>

While acknowledging these civil penalties will not end funding to terrorist organizations, Gurule believes "to the extent that these sanctions make it more difficult, forcing them to operate out of their comfort zone, forcing them to operate in an area where there is greater risk and less comfort, that has value. It's a preventive strategy that's intended to disrupt."<sup>33</sup>

Jay Tcath, Executive Director of the Chicago Jewish Community Relations Council, a department of the Jewish United Fund, concurs with Gurule, stating, "we have a responsibility to make it as difficult as possible for people in this country to support international terrorism. It is one additional arrow in our quiver that we can use in this battle."<sup>34</sup>

Despite Tcath's desire to see the Seventh Circuit hold Holy Land Foundation liable, he recognizes that the Boim family is unlikely to ever recover any money from a judgment.<sup>35</sup> Thus, Tcath is focused on using the *Boim* case to "further tighten the vice on those American individuals, and more importantly, institutions, which were willingly and knowingly funding international terrorist organizations."<sup>36</sup>

## POTENTIAL PROBLEMS

Charitable contributions in Islam are more than a recommended practice; they are a required obligation. Zatak, or alms for the poor, is one of the five pillars of Islam and an essential part of practicing the faith.<sup>37</sup> The 9/11 Commission recognized that the Muslim concept of charitable giving is fundamentally dif-

ferent than what is practiced in the West.<sup>38</sup> “[Zakat] is broader and more pervasive than Western ideas of charity—functioning also as a form of income tax, educational assistance, foreign aid, and a source of political influence. The Western notion of separating civic and religious duty does not exist in Muslim culture.”<sup>39</sup>

The heightened attention to Islam in the post-9/11 world reduced the amount of funds given to organizations to fund terrorism.<sup>40</sup> However, it also reduced the amount of donations to legitimate Muslim organizations providing humanitarian aid across the world.<sup>41</sup>

Multiple reasons have been proffered to explain the decrease in funding to Muslim charities. First, donors are worried their well-intentioned donation to a Muslim charity may end up in the hands of terrorists.<sup>42</sup> Despite the best intentions of donors, tracking the flow of money from an organization to those in need is not easy. Secondly, many Muslims are afraid that making contributions to any Islamic charity will brand them as a terrorist, making them the target of investigation.<sup>43</sup> Finally, the threat of litigation may have a chilling impact on Islamic charities, an issue that has come to the forefront in *Boim*.

According to Christina Abraham, Civil Rights Director of the Council on American-Islamic Relations, the “threat of civil liability has had a clear impact on donations to Islamic organizations.”<sup>44</sup>

“It has become very difficult to provide social services that are desperately needed to Palestinians without the fear of criminal or civil penalties. It is nearly impossible to provide any service to Palestinians without Hamas knowing about it, and somehow becoming involved—they are the elected government,” she articulated.<sup>45</sup>

Tcath admits there may be a chilling effect on Islamic charities, but sees it as a risk the United States must be willing to take.<sup>46</sup>

He stated, “it would be unfortunate if there is some spill over from some donors who would otherwise be contributing to international humanitarian causes who are now deterred from doing so. That does not, however, trump the overall American strategic goal of stemming the flow of funding for international terrorism.”<sup>47</sup>

Gurule also sees the possibility that holding the Holy Land Foundation liable may have a chilling effect on individual donors, but believes the difficulty of proving the case might temper that effect.<sup>48</sup>

According to Gurule, “until we start seeing more of these kinds of cases and start seeing some civil judgments actually being upheld, I think it’s difficult to say at this stage that it will have much of a chilling effect . . . [T]he problem is that the cases are so long and difficult to prove, law firms may be less likely to jump in and take them on, especially on a contingency basis.”<sup>49</sup>

Abraham believes that one way to combat these negative consequences is for the government to create a “safe-list” of organizations they have deemed to be legitimate.<sup>50</sup>

“It is not unusual for an organization to be considered an ally of the United States one day, and be blacklisted the next. Rather than just providing a list of organizations that are off-limits, it would be nice to know which ones have been deemed legitimate,” proclaimed Abraham.<sup>51</sup>

In addition to the possible chilling effect on donations in general, a problem arises when determining where to cease liability.

At the *en banc* oral argument, Judge Posner posed a hypothetical— would an organization like the Red Cross or Doctors Without Borders that provides social services, such as childcare or hospitals, to Palestinians be civilly liable?<sup>52</sup> Posner speculated that these are services typically provided by Hamas, and any funds “freed up” by not having to spend on these services allows for more money to be spent on its military operations.<sup>53</sup>

Tcath does not believe that these organizations should be liable, and stresses an intrinsic difference between social services provided by the Red Cross or Doctors Without Borders and Hamas.<sup>54</sup>

According to Tcath, these organizations are fundamentally different from Hamas, whose “very charter called for war.”<sup>55</sup> Tcath states that Hamas uses social services as a tactic to win the hearts and minds of more supporters and believes Hamas uses these organizations to indoctrinate and recruit the recipients of the services to join their cause.<sup>56</sup>

“The entire infrastructure, the *raison de etre*, of Hamas is all together different than Doctors Without Borders or the Red Cross,” Tcath stated.<sup>57</sup>

“The real question is during World War II would we have sent medical supplies to Nazi Germany? They had needy people,” Tcath asked rhetorically.<sup>58</sup>

Unlike Tcath, Gurule does see a risk for organizations like the Red Cross and Doctors Without Borders being held liable for monetarily supporting terrorists by providing services usually offered by Hamas.<sup>59</sup>

“There are some that believe that this example points to the reason why the statute is too broad, and should require specific intent. However, right now it’s difficult enough as it is to make these cases,” Gurule exclaimed.<sup>60</sup>

Gurule also spoke about the difficulties regarding the fungibility of contributions.<sup>61</sup>

“Even if funds go into the bank account for humanitarian causes, who’s to say what happens to them after?,” Gurule asked.<sup>62</sup>

Even if the funds were not transferred, he noted that giving money to the social wing frees up funds to be spent on the terrorists division— a point also made by Judge Posner during oral arguments.<sup>63</sup>

While Tcath is clearly in favor of a harsh judgment against the Holy Land Foundation, he recognizes the concerns of imposing liability on individual donors.<sup>64</sup>

“It has been our assertion that . . . the leaders of the group misled the donors and misappropriate[d] their dollars for purposes other than what they were specifically solicited for in most cases.”<sup>65</sup> In this case, there were “misleading solicitations of what the money was going to go for, of the individual donors, who neither knew, . . . [nor] supported, the use of the funds for Hamas,” Tcath said.<sup>66</sup>

## CONCLUSION

While civil liability may be an effective weapon in the War on Terror, the potentially negative unintended consequences should not be ignored. Whether



this case will create a chilling effect on Islamic giving remains to be seen, but all eyes will be focused on the Seventh Circuit when the *en banc* opinion is published.

*After this article went to print, the Seventh Circuit offered a split-decision, upholding the \$156 million judgment against American Muslim Society, the Islamic Association for Palestine-National and the Quranic Literacy Institute. However, the Court remanded the issue of the Holy Land Foundation's liability, saying a decision in a separate case holding that Holy Land Foundation supplied aid to terrorists was improperly applied in this case.*

*The court held, "anyone who knowingly contributes to the nonviolent wing of an organization that he knows to engage in terrorism is knowingly contributing to the organization's terrorist activities."<sup>67</sup>*

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## NOTES

1 *Boim v. Holy Land Found.*, 511 F.3d 707, 711 (7th Cir. 2007), *vacated, reh'g granted by* 2008 U.S. App. LEXIS 12925 (7th Cir. 2008).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at 711.

6 *Id.*

7 *Id.*

8 *Id.* at 713.

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*

13 *Id.* at 712.

14 *Id.*

15 *Boim v. Quranic Literacy Inst.*, 291 F.3d 1000, 1003 (7th Cir. 2002).

16 *Id.*

17 *Id.* at 1014.

18 *Id.*

19 *Id.* at 1015.

20 *Id.* at 1003.

21 *Id.*

22 *Id.* at 1023. (emphasis added).

23 *Id.*

- 24 *Boim v. Holy Land Found.*, 511 F.3d 707, 720 (7th Cir. 2007), *vacated, reh'g granted by* 2008 U.S. App. LEXIS 12925 (7th Cir. 2008).
- 25 *Id.*
- 26 *Id.* at 710.
- 27 *Id.* at 711.
- 28 *Id.*
- 29 *Id.* at 710-11.
- 30 *Id.* at 707.
- 31 JIMMY GURULE, UNFUNDING TERROR: THE LEGAL RESPONSE TO THE FINANCING OF GLOBAL TERRORISM (Edward Elgar Pub.) (forthcoming 2009).
- 32 Telephone interview with Jimmy Gurule, Professor, Notre Dame Law School, in Notre Dame, Ind. (Oct. 21, 2008).
- 33 *Id.*
- 34 Telephone interview with Jay Tcath, Executive Director, Chicago Jewish Community Relations Council, in Chi., Ill. (Oct. 17, 2008).
- 35 *Id.*
- 36 *Id.*
- 37 ENCYCLOPEDIA BRITANNICA, PILLARS OF ISLAM, <http://www.britannica.com/EBchecked/topic/295625/Pillars-of-Islam> (last visited Nov. 25, 2008).
- 38 9/11 COMMISSION, THE 9/11 COMMISSION REPORT, 372 (2004).
- 39 *Id.*
- 40 Kathryn A. Ruff, Comment, *Scared to Donate: An examination of the effects of designating Muslim Charities As Terrorist Organizations on the First Amendment Rights of Muslim Donors*, 9 N.Y.U. J. Legis. & Pub. Pol'y 447, 474 (2006).
- 41 *Id.*
- 42 *Id.* at 473.
- 43 *Id.*
- 44 Telephone interview with Christina Abraham, Civil Right Director, CAIR-Chicago, in Chi., Ill. (Nov. 20, 2008).
- 45 *Id.*
- 46 Jay Tcath, *supra* note 34.
- 47 *Id.*
- 48 Jimmy Gurule, *supra* note 32.
- 49 *Id.*
- 50 Christina Abraham, *supra* note 44.
- 51 *Id.*
- 52 Seventh Circuit Oral Argument, *En Banc*, Sept. 10, 2008, *available at* <http://www.ca7.uscourts.gov/tmp/IM0Q3VKA.mp3>.
- 53 *Id.*
- 54 Jay Tcath, *supra* note 34.
- 55 *Id.*
- 56 *Id.*
- 57 *Id.*
- 58 *Id.*
- 59 Jimmy Gurule, *supra* note 32.
- 60 *Id.*
- 61 *Id.*
- 62 *Id.*
- 63 *Id.*

64 Jay Tcath, *supra* note 34.

65 *Id.*

66 *Id.*

67 Boim v. Holy Land Found., 2008 WL 5071758 at \*12 (7th Cir. 2008).