

Chapter 2

The Continuously Expanding Interpretation of What Is Prohibited

Since 2001, the Department of the Treasury's Office of Foreign Assets Control (OFAC) and the Justice Department have incrementally expanded their interpretation of the International Emergency Economic Powers Act (IEEPA) and what is considered prohibited "material support" of, or "otherwise associat[ing] with," designated terrorist organizations or individuals. Originally understood to be direct transfers of funds or goods, "material support" is now interpreted to include legitimate charitable aid that may "otherwise cultivate support" for a designated organization. Furthermore, "otherwise associated with" can include indirect or past relationships, even when there is no claim that the relationship included aiding terrorists or participating in terrorist plots or conspiracies.

This incremental expansion of what is prohibited activity, coupled with the vague standards defining alleged terrorist associations, makes it increasingly difficult for charities and foundations to predict what constitutes illegal behavior. Consequently, the U.S. nonprofit community operates in fear of what may spark OFAC to use its power to shut them down.

From a Bar on Direct Support to "Otherwise Cultivate"

When OFAC began shutting down U.S.-based charities after 9/11, it claimed each had provided direct financial support to terrorists.⁵⁴ This caused a great deal of concern in the nonprofit sector, which strongly opposes the use of charities or foundations to support terrorism. Nonprofits asked OFAC to produce specific examples to substantiate these claims and inform the nonprofit community of what to avoid. Instead, OFAC made statements within its *Anti-Terrorist Financing Guidelines* (Guidelines) that dramatically broadened its interpretation of what constitutes support for terrorism. In

⁵⁴These included the Holy Land Foundation of Texas, the Global Relief Foundation, and Benevolence International of Illinois. In December 2001, OFAC designated the Holy Land Foundation for Relief and Development (HLF), alleging the group funneled millions of dollars to Hamas, a designated terrorist organization since 1995, and provided funds to families of suicide bombers. HLF argued that it only provided humanitarian relief to Palestinian refugees and victims of the wars in Bosnia, Kosovo, and Turkey. OFAC seized more than \$5 million of HLF's assets, including all of its documents and property. On December 14, 2001, the Treasury Department made similar claims when it seized and froze the assets of the Global Relief Foundation (GRF), pending an investigation into alleged ties to terrorist organizations. According to OFAC's website "the Global Relief Foundation ... and its officers and directors have connections to, and have provided support for and assistance to Usama bin Laden, al Qaeda, and other known terrorist groups." The same day, OFAC seized the assets, bank accounts, records, computers, and personal effects of Benevolence International Foundation (BIF), pending an investigation. According to the Treasury Department, BIF allegedly "provided support for and has been linked in other ways to al Qaeda and its operatives." On Nov. 19, 2002, the Treasury Department placed BIF on the Specially Designated Global Terrorist list.

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the Annex of the 2006 version of the Guidelines,⁵⁵ OFAC said that the risk of terrorist abuse “cannot be measured from the important but relatively narrow perspective of terrorist diversion of charitable funds...,” but also includes the “exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and networks.” OFAC referenced investigations of “terrorist abuse of charitable organizations, both in the United States and worldwide, *to raise and move funds, provide logistical support, encourage terrorist recruitment or otherwise cultivate support for terrorist organizations and operations.*”⁵⁶ (emphasis added) However, it did not provide details of these investigations or explain how the law authorized it to expand its mission so dramatically.

Consequently, OFAC has created an impossibly vague standard. Any activity that OFAC believes may cultivate support, such as providing disaster relief in a territory controlled by a designated terrorist organization or speech in support of political ideas that are similar to those advanced by politically oriented terrorist groups, can be swept into this regulatory black hole. OFAC can then close a nonprofit and seize its assets indefinitely, with no effective recourse for the affected nonprofit.

Criminal Prosecution for Supporting Non-Designated Charities

Concern about OFAC’s expanding interpretation of the law is not unjustified. Most of OFAC’s and the Justice Department’s actions against nonprofits have relied on broad interpretations of “material support” and the “otherwise associated with” standard. For example, in the criminal prosecution of Holy Land Foundation (Holy Land) and its leaders, prosecutors did not argue that the group gave direct material, technical, or other actual support to a designated organization.⁵⁷ Instead, the prosecution argued that by providing \$12.4 million for the charitable activities of non-designated zakat committees in the West Bank and Gaza Strip, Holy Land gave an indirect benefit to Hamas, a designated organization. Prosecutors argued that although the zakat committees were not designated organizations, the defendants “should have known” they were “otherwise associated” with Hamas.⁵⁸

Many nonprofit organizations worried that a conviction on these facts would further complicate the already confusing counterterrorism laws, making it more difficult for organizations to operate and discouraging other U.S. organizations from working overseas. Nonprofit organizations could no longer rely on the government’s designated terrorist watch lists to learn with whom it is legal to do business. In addition, when operating in regions where designated organizations exist or control territory, charities and foundations could expose themselves to criminal prosecution because of the real or perceived associations of program beneficiaries. These concerns remain unresolved. On Oct. 22, 2007, a Texas jury acquitted one Holy

⁵⁵ U.S. Dept. of the Treasury, *U.S. Department of the Treasury Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S. Based Charities*, 2006 version, Annex pp. 14-16. Available at <http://www.treas.gov/press/releases/reports/0929%20finalrevised.pdf>.

⁵⁶ *Ibid.*

⁵⁷ The Holy Land Foundation for Relief and Development and five of its leaders were indicted in 2004 on charges of providing material support for terrorism, money laundering, and conspiracy. See July 24, 2004, Department of Justice press release at <http://www.usdoj.gov/archive/ag/speeches/2004/72704ag.htm>.

⁵⁸ Greg Krikorian, “Mistrial in Holy Land terrorism financing case”, *Los Angeles Times* (Oct. 23, 2007).

Land leader and deadlocked on the remaining 197 charges.⁵⁹ However, the government's interpretation of the law has not changed, and prosecutors say they intend to retry the case.⁶⁰

Past Affiliations and Associations Have Led to Designation

Under EO 13224, being "otherwise associated with" a designated terrorist can result in the same sanctions as direct provision of material support. OFAC and the Justice Department's actions indicate that the government takes a very broad view of what relationships are sufficient to lead to designation and closure of an organization.

In 2004, OFAC designated the Sudan-based Islamic African Relief Agency, a/k/a Islamic Relief Agency (ISRA) as a supporter of terrorism.⁶¹ OFAC also shut down the Missouri-based Islamic American Relief Agency (IARA-USA). According to OFAC, IARA-USA is a branch of ISRA, and as such, could be closed for that reason alone.⁶²

IARA-USA asked OFAC to reconsider the closure and blocking of its assets, arguing that it is a separate and independent organization from ISRA, with its own board of directors, administrative structure, executive decision making process, and legal and financial accountability obligations, and that none of these functions and responsibilities is shared with any other organization.⁶³ OFAC denied the request, citing past organizational ties between IARA-USA and ISRA.⁶⁴

In upholding OFAC's action, the United States Court of Appeals for the District of Columbia held that, even though "the unclassified record evidence is not overwhelming," it would defer to OFAC because the issues affect national security and foreign policy. More specifically, the court rejected IARA-USA's argument that OFAC must show ISRA controlled it, holding that the asset-blocking order may stand if there is sufficient evidence that the two groups are the same "even in the absence of evidence that one controls the other." In addition, the court held that "the threat need not be found with regard to each individual entity."⁶⁵

OFAC's action in this case raises important questions for nonprofits. What degree of

⁵⁹ <http://www.nytimes.com/2007/10/23/us/23charity.html>

⁶⁰ "Mistrial for Most Defendants in Muslim Charity Trial," Associated Press (Oct. 22, 2007), available at <http://www.dallasnews.com/sharedcontent/APStories/stories/D8SEFSUO0.html>.

⁶¹ See <http://www.treas.gov/press/releases/js2025.htm>.

⁶² "Treasury Designates Global Network, Senior Officials of IARA for Supporting bin Laden, Others," Press Release, Dept. of the Treasury (Oct. 13, 2004) at <http://www.treas.gov/press/releases/js2025.htm>. In March 2007, IARA-USA, its former executive director, and other leaders were indicted for violating economic sanctions against Iraq. In January 2007, additional charges were filed for funding an orphanage in the Shamshatu Refugee Camp in Pakistan that is located on land belonging to a designated Afghan rebel leader, Gulbuddin Hekmatyar. There are no charges of material support for terrorism, and the cases have not yet come to trial. "Charity Charged with Violating Economic Sanctions in Grants to Orphanage," *OMB Watcher* (Feb. 5, 2008), available at <http://www.ombwatch.org/article/articleview/4159/1/407?TopicID=1>.

⁶³ Jennifer Myers, "Lawyer Backs Islamic Agency, Despite Suspicion, Attorney Says Local Charity Opposes Terrorism", *Columbia Missourian* (Oct. 22, 2004). Available at <http://www.columbiamissourian.com/stories/2004/10/22/lawyer-backs-islamic-agency/>.

⁶⁴ Letter from Robert Werner, Director, OFAC, to Shereef Akil, Attorney for IARA, March 18, 2005.

⁶⁵ *Islamic American Relief Agency (IARA-USA) v. Alberto Gonzales*, United States Ct. of Appeals for the District of Columbia, No. 05-5447 (Feb. 13, 2007).

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separation is necessary to protect one organization from being held responsible for the actions of another, and what steps need to be taken to separate one organization from another? This case makes it clear that separate incorporation and tax-exempt status in the U.S. are not enough. Other questions relate to timing. If, as OFAC held in this case, an organization can be deemed a supporter of terrorism based on the association with another group *before* it was designated, what steps, if any, can be taken to protect a nonprofit from being designated due to the bad acts of another?

Past associations were also the basis of OFAC's February 2006 closure of KindHearts USA, pending an investigation for suspected connections to Hamas.⁶⁶ OFAC alleged that KindHearts USA was created out of Holy Land and the Global Relief Foundation (GRF) – two groups shut down in 2001.

OFAC's press release stated that "former GRF official Khaled Smaili established KindHearts from his residence in January 2002. Smaili founded KindHearts with the intent to succeed fundraising efforts of both HLF and GRF, aiming for the new NGO to fill a void caused by the closures. KindHearts leaders and fundraisers once held leadership or other positions with HLF and GRF."⁶⁷



Sign on KindHearts booth at Gulf Charities conference

However, the former employees of Holy

Land and Global Relief Foundation were never on OFAC's SDGT list. In addition, when KindHearts USA learned of an indictment of a fundraising contractor that was a former Holy Land employee, it immediately terminated that relationship.⁶⁸ Nonetheless, Treasury cited this association as additional proof of KindHearts USA's support for terrorism.

OFAC also alleged that KindHearts USA gave more than \$250,000 to the Sanabil Association for Relief and Development, which was designated as a terrorist organization in August 2003.⁶⁹ However, KindHearts USA board chair, Dr. Hatem Elhady, told the *Toledo Blade* that it contracted with Sanabil to provide aid in refugee camps *before the designation was made*, and the amount was no more than \$115,000. He said, "We did not just give money. We gave it for specific projects, and we saw the results, and we have the receipts."⁷⁰

Treasury's investigation of KindHearts USA was still pending as of June 15, 2008; the group's funds have been unavailable for charitable work for over two years. There is no deadline for Treasury to either designate KindHearts USA or release the freeze on the group's assets.

⁶⁶"Treasury Freezes Assets of Organization Tied to Hamas," U.S. Dept. of the Treasury Press Release, Feb. 19, 2006. Available at <http://www.ustreas.gov/press/releases/js4058.htm>.

⁶⁷*Ibid.*

⁶⁸"Leaders vigorously rebut U.S. allegations; Board members deny Hamas ties," *Toledo Blade* (Feb. 21, 2006).

⁶⁹"Treasury Freezes Assets of Organization Tied to Hamas," U.S. Dept. of the Treasury Press Release, Feb. 19, 2006. Available at <http://www.ustreas.gov/press/releases/js4058.htm>.

⁷⁰"Leaders vigorously rebut U.S. allegations; Board members deny Hamas ties," *Toledo Blade* (Feb. 21, 2006).