Independent Study, 4E
Spring 2011

Sentencing Disparities in Material Support Law Violations:

Sri Lanka case study

"...I think we've got to do a much better job of clarifying what are the motivations, the raisons d'être of terrorists. I mean, what the Tamil Tigers are fighting for in Sri Lanka, or the Basque separatists in Spain, or the insurgents in al-Anbar province may only be connected by tactics. They may not share all that much in terms of what is the philosophical or ideological underpinning. And I think one of our mistakes has been painting with such a broad brush, which has not been particularly helpful in understanding what it is we were up against when it comes to those who pursue terrorism for whichever ends they're seeking..."

- Hilary Clinton, Interview UK Guardian, October 2007

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1. INTRODUCTION

The traditional precept, "treat like cases alike," central to Anglo-American jurisprudence, is often traced to Aristotle's Book 5 of Nicomachean Ethics, and considered customary. However, in the post-9/11 world, outcomes on sentencing for terrorism-related material support cases appear to have turned this tradition on its head. In the legal war on global terrorism (LWGT), as it is carried out through national litigation, more often than not, the similar cases based on similar facts appear to be treated differently by different national legal systems. Whereas in countries including Australia and United Kingdom, judges often use the discretion available to them in weight the contextual background to the 'list of the organizations' in sentencing in material support cases, sentencing in different countries have resulted in differential of 20+ years or more.

Is it unjust to permit embedded nation-state biases in counter-terrorism litigation to dictate disparities in sentencing for individuals who have committed the same act? If one is alleged to have participated in a transnational conspiracy to provide material support to a designated-terror group, does the nature and degree of punishment reduce to where you are extradited?

These are some of the philosophical issues that lie at the core of the theme of this paper. This study is a comparative legal analysis of ant-terrorism material support laws, focusing on the US legal system as applied to the Sri Lankan conflict and its terrorism component. In developing this analysis, this study attempts to provide empirical evidence of the existing disparities in applying the material-support laws in Australia, UK, Canada, and in US in the sentencing of defendants convicted in providing financial and other material support to the Liberation Tigers of Tamil Eelam (LTTE), an organization proscribed in these countries and listed in the Foreign Terrorist Organization (FTO) in the U.S.

The legal framework for the inconsistent sentencing outcomes flow from two principle sources:

1. the legal system including applicable statutes, and sentencing guidelines for litigating terrorism-related cases; and
2. nation-state biases arising from factors such as national foreign policies on terrorism, designation procedures for terrorist organization lists, and domestic implementing legislation of which terrorism-related material support statutes are a part of.

The post-9/11 environment, shaped by globalization, multi-polarity, and interdependence, through the spread of ideas, human capital, and perceived national security threats, have connected actors of nation-states and actors of designated terrorist organizations in an unprecedented manner over the past 10 years. This process of interconnect demarcates a clear shift from the relatively consistent enforcement of humanitarian law and fundamental human rights in response to genocide and ethnic conflict since the end of the Cold War (Rwanda, Yugoslavia, Kosovo etc.). At present, in the post-9/11 context, the pre-9/11 culture of consistent application of laws to regulate terrorism-related threats to

the peace of the international community has degenerated into a legal framework the sentencing outcomes of which appear inconsistent across countries that practice Anglo-American jurisprudence.
Then, aspiring U.S. Presidential candidate, Hilary Clinton, during an interview to the British broadsheet The Guardian said:

> "Well, I believe that terrorism is a tool that has been utilized throughout history to achieve certain objectives. Some have been ideological, others territorial. There are personality-driven terroristic objectives. The bottom line is, you can't lump all terrorists together. And I think we've got to do a much better job of clarifying what are the motivations, the raisons d'être of terrorists. I mean, what the Tamil Tigers are fighting for in Sri Lanka, or the Basque separatists in Spain, or the insurgents in al-Anbar province may only be connected by tactics. They may not share all that much in terms of what is the philosophical or ideological underpinning. And I think one of our mistakes has been painting with such a broad brush, which has not been particularly helpful in understanding what it is we were up against when it comes to those who pursue terrorism for whichever ends they're seeking."[1]

Clinton's statement that the end of humanitarianism has arrived seems to have come true.

The LWGT illuminates the inconsistency and unenforceability of laws of nations as they are applied to shape a common policy against what nations perceive as substantial threats to national security in particular, and international peace in general. The inconsistent legal policy among nations aligned in the post-9/11 war on terror is unequivocally visible from the American indecision to process enemy combatants in Guantanamo Bay or Article III Courts, to the non-existent legal response of Middle Eastern and North African nations to combat the global existential presence of Al Qaeda, to the de facto suspension of international humanitarian law in places such as Burma, Ethiopia, Iraq, and Afghanistan to permit victory over terrorism at any human cost..

While the LWGT and expansion of national security establishments of nation-states has fostered a culture of transnational cooperation in an unprecedented way, gross disparities in sentencing arising from the incongruity of statutory regimes of different nations prosecuting the same crime systematically create injustice for the class of indicted defendants.

Their fate rests not on their crime; it rests on the where they are domiciled or where they were extradited.

Disparate sentencing in the LWGT arises from the lack of transnational integration of terrorism-related statutory regimes in at the national jurisdictional space. While nations of

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[1] You can't lump all terrorists together
http://www.guardian.co.uk/world/2007/oct/23/usa.hillaryclinton

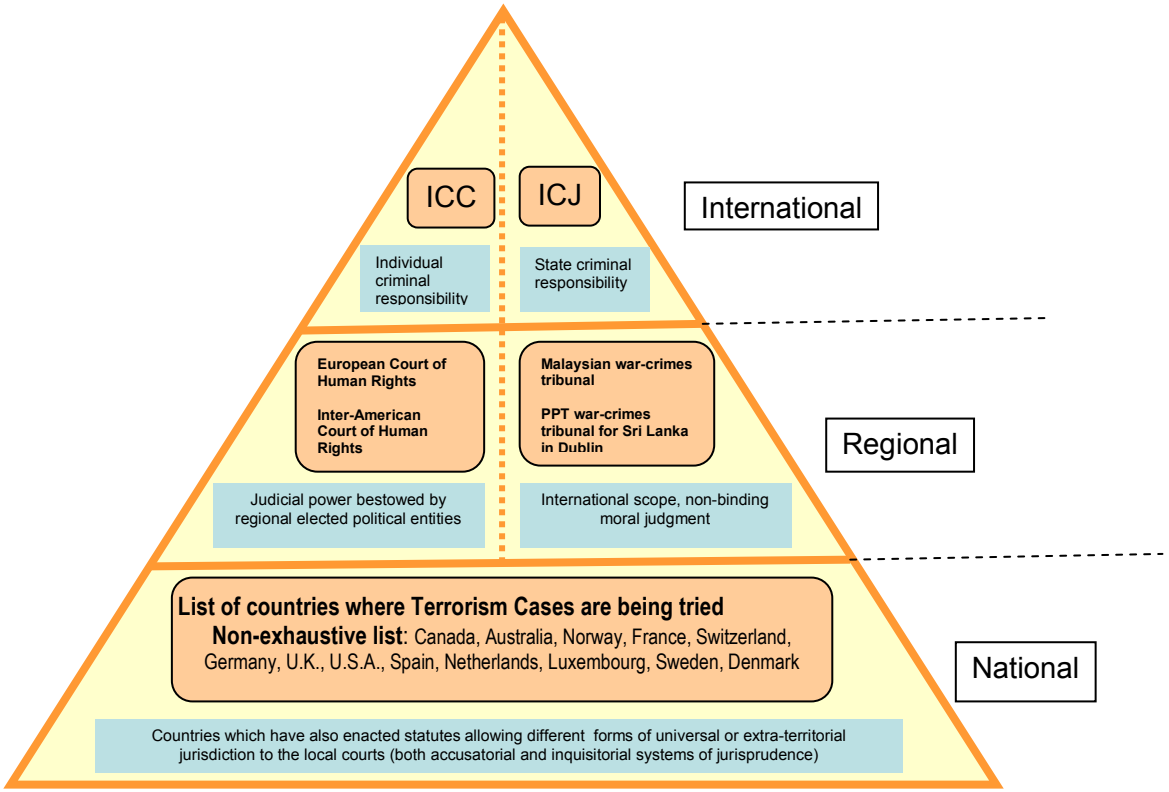
the Developed World, such as America, EU, Australia, collaborate on the political front to shape compatible national foreign policies on the issue of counter-terrorism litigation, there is no such collaboration on the legal front. The result, the application of divergent definitions and punitive remedies for terrorism-related conduct, causes injustice to the class of defendants caught in this global net of shared criminal national jurisdiction, where providing children school bags to a rebel movement may get 3 years in one country and 25 years in another.

2. BRIEF OVERVIEW OF MATERIAL SUPPORT LAWS

The global legal architecture relevant to contemporary collaborative transnational counter-terrorism efforts has three sources: multinational, regional, national. At each of these levels, the factors of policy, proscription, and statute control how material-support cases are litigated and how divergence in these 3 factors cause disparities in sentencing

At the multilateral level is the United Nations, which has the International Criminal Court (ICC) and the Security Council has passed resolutions proscribing groups

At the regional for example is EU, national is different countries. The national factors control the nature and dynamics of terrorism-related litigation in each nation.



A case study of counter-terrorism litigation related to the LTTE clearly shows the interplay of the different tiers in this global architecture, AND demonstrates how the absence of a culture of cooperation between nations in the legal dimension to shape common, consistent punitive policy to combat terrorism-related conduct causes injustice for the class of defendants indictment by pegging their sentence, not to their crime, but to which country they are prosecuted in.

combinations of these 3 sources of law establish legal frameworks to national litigation of transnational conspiracies to provide material support to the LTTE in Sri Lanka.

When we analyze the LTTE case study, the Global War on terrorism-related material support and varying definition and scope of terrorist activity invariably treat like cases differently.

A. Summary of Canadian Laws:

In December 2001, the Canadian Parliament passed the Anti-Terrorism Act[2], which made perpetrating, financing, or contributing to terrorist activity in Canada a crime. It is now a crime to knowingly support terrorist organizations through overt violence, documentary support, shelter or funds. The legislation requires the publication of a list of terrorist groups deemed to constitute a threat to the security of Canada and Canadians. The act also increased the government's investigative powers and paved the way for the country to sign the last two of the United Nations' 12 antiterrorism conventions.

Canada has designated 34 foreign terrorist organizations. The assets of the groups have been frozen, and belonging to a banned terrorist group, raising money for it or supporting its activities is a crime that could bring up to 10 years in prison.

B. Australian Statutes:

Australia has long played a leading role in the development of laws to combat terrorism. In fact, the Australian Government has introduced an extensive legislative regime around counter-terrorism, national security and other cross-jurisdictional offences. The Crimes Act 1914 covered a number of offences, however with the events of the past few years, new legislation has been enacted to ensure Australia and Australians are protected from emerging threats.

Key pieces of Australia's national security legislation include:

Anti-Terrorism Act (No. 2) 2005[3] amends the Criminal Code to allow for the listing of organizations that advocate the doing of a terrorist act as terrorist organizations,

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[2] http://laws-lois.justice.gc.ca/eng/acts/A-11.7/

[3] http://www.ema.gov.au/agd/WWW/nationalsecurity.nsf/AllDocs/A41A86E81E52A0B2CA25710A001A7EEA?OpenDocument

establishes procedures for preventative detention and control orders, updates the offence of sedition and other measures.
The Anti-Terrorism Act 2004[4] includes amending the Crimes Act 1914 to strengthen the powers of Australia's law enforcement authorities, setting minimum non-parole periods for terrorism offences and tightening bail conditions for those charged with terrorism offences as well as other initiatives.

The Anti-Terrorism Act (No. 2) 2004 amends the Criminal Code Act 1995 to make it an offence to intentionally associate with a person who is a member of a listed terrorist organization as well as other initiatives.

The Anti-Terrorism Act (No. 3) 2004 amends the Passports Act 1938, the Australian Intelligence Security Act 1979 and the Crimes Act 1914 to improve Australia's counter-terrorism legal framework as well as other initiatives.

The Australian Security Intelligence Organization Act 1979 sets out the functions of the Australia Security Intelligence Organization (ASIO) – Australia's security service.

Offence for individuals

(1) An individual commits an offence if:
(a) the individual, directly or indirectly, makes an asset available to a person or entity; and
(b) the person or entity to whom the asset is made available is a proscribed person or entity; and
(c) the making available of the asset is not in accordance with a notice under section 22.
(2) Strict liability applies to the circumstance that the making available of the asset is not in accordance with a notice under section 22.

Penalty for individuals

(2A) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (2B), or both.
(2B) For the purposes of subsection (2A), the amount is:
(a) if the contravention involves a transaction or transactions the value of which the court can determine--whichever is the greater of the following:
(i) 3 times the value of the transaction or transactions;
(ii) 2,500 penalty units; or
(b) otherwise--2,500 penalty units.

C. Material Support statutes in the U.K

[4]http://www.ema.gov.au/agd/www/nationalsecurity.nsf/AllDocs/5AF445420FE0AE94CA256FCC001189F2?OpenDocument

A large range of offences cover what people consider to be terrorist offences - murder, arson, sabotage and harassment. But the UK also has the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001 which are designed to give the police exceptional powers to deal with extraordinary circumstances.

The Terrorism Act 2000 proscribes groups considered to be terrorist in nature. So far 25 international groups and 14 domestic organizations (all Northern Ireland-based) have been named.[5]

The act gives police wider stop and search powers. Detectives can also detain a suspect for at least 48 hours in contrast to the standard 24. Custody can continue for up to seven days on the authority of a magistrate.

The Act includes three offences**:**

Inciting terrorism
Seeking or providing terrorism training here or abroad
Providing training/instruction in weapons from firearms to nuclear weapons

The Anti-Terrorism, Crime and Security Act (ATCSA)[6] was passed as a response to the 11 September attacks. Its most important section gives the home secretary the power to indefinitely detain without charge a foreign terrorist suspect if the individual cannot be deported for other legal reasons. This was introduced because the government believed there were individuals in the UK who were a potential threat but it could not deport back to regimes known for human rights abuses.

D. A Summary of U.S. Anti-terrorism Material Support Statutes

While the American scheme of anti-terrorism material support statutes is structurally and substantively similar to the schemes in Canada, Australia, U.K, it departs from the unifying fabric of customary common law jurisprudence of Western community of modern democracies, in the areas of mens rea, guilt by association, reflected in the structure and content of the statutes, as well as the sentencing guidelines and normative rules of plea-bargaining.

Congress, reacting to the bombing of the World Trade Center in 1993, passed legislation which created 18 U.S.C. 2339A, aimed at cutting off economic support to terrorist organizations. Following the Oklahoma bombings in April 1995, Congress passed the Anti-Terrorism and Death Penalty Act of 1996 (AEDPA), authorizing the Secretary of State to designate an organization as an FTO if conditions listed were met, and added a new Section 219 to the Immigration and Nationality Act (INA). While comprehensive

[5] http://www.homeoffice.gov.uk/publications/counter-terrorism/proscribed-terror-groups/proscribed-groups?view=Binary
[6] http://www.legislation.gov.uk/ukpga/2001/24/contents

legislative definition of terrorism is difficult to achieve, section 219 of the INA of 1996[7] provides one of the first legal definition of "terrorism" for application in US jurisprudence.

In the aftermath of 9/11, the Congress created the PATRIOT Act in 2001, and codified the FTO designation provisions in 8 U.S.C 1189.[8] Note that the FTO designation can also be made using the plenary powers of the President after he declares a national emergency using an executive order under the authority given by the International Emergency Economic Powers Act (IEEPA), and the National Emergencies Act[9]

The Material Support Statue 18 U.S.C. 2339B is the codified form of provisions in the AEDPA that prohibits persons from knowingly providing material support or resources to FTOs. Intelligence Reform and Terrorism Prevention Act (IRTPA) passed later by Congress in December 2004 modified sections related to material support provisions.[10] To better equip the U.S.'s law enforcement authorities to fight terrorism, Congress omitted a specific intent standard when the recipient of the aid is a designated FTO; here, intent changed to "knowingly" providing "material support or resources." The statutory definition of material support was borrowed from 2339A.

Cases filed under 18 U.S.C 2339B, the post-9/11 prosecutorial tool to criminalize material support of FTO-designated organizations, have raised the following issues: departing from normative mens rea standards in Anglo-American criminal jurisprudence, infringement of the constitutionally protected First Amendment rights of associational freedoms, and vagueness and over-breadth in the statutory language.

1 . Issues Considered

i. Mens Rea: Knowledge without Specific Intent

The mens rea requirement required for conviction under § 2339B was modified post-9/11 from specific intent to knowledge. This new standard criminalizes knowledge-based acts and does not require assessment of intent, broadening the range of the applicability of the statute. While this is in line with and reflects the US government's post-9/11 imperative to expand terrorism-related laws such that the domestic legal systems is able to adapt to and meet the security challenges of international terrorism, it also contravenes fundamental principles of criminal responsibility.

This shift in domestic criminal jurisprudence in the area of counter-terrorism from upholding an intent-based standard to supporting a more expansive knowledge-based

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[7] George P. Fletcher, Responding to Terrorism: The Quest for a Legal Definition, 4 J. Int'l Crim. Just. 894, 2006

[8] Jason Binimow and Amy Bunk, Validity, Construction, and Operation of "Foreign Terrorist Organization" Provision of Anti-Terrorism and Effective Death Penalty Act (AEDPA), 8 U.S.C.A. § 1189., 178 A.L.R. Fed. 535, 2002.

[9] See, e.g., http://www.ustreas.gov/offices/enforcement/ofac/programs/terror/terror.pdf

[10] Jason Binimow, Validity, Construction, and Application of 18 U.S.C.A. § 2339B, Which Criminally Prohibits Provisions of Material Support or Resources to Foreign Terrorist Organization, 184 A.L.R. Fed. 545, 2003.

mens rea standard, while broadening the net of who may be prosecuted, in parallel can criminalize morally innocent and constitutionally protected activity, a consequence which raises several concerns.

First, the knowledge-based mens rea standard in § 2339B contravenes a body of case law comprising Supreme Court jurisprudence which states that a criminal act should be a conscious one, an act with intent where knowledge without intent is insufficient.[11] Justice Thomas said for the Court in Staples v. United States[12], a criminal statue is construed "in light of the background rules of the common law ... in which the requirement of some mens rea for a crime is firmly embedded." Justice Thomas further wrote for the Court, that, "[W]e have taken [particular care] to avoid construing a statute to dispense with mens rea where doing so would 'criminalize a broad range of apparently innocent conduct.'"[13] In the circumstances when the law allows for a conviction without a "willful violation, Justice Jackson explained in Morissette v. United States "[t]he accused, if he does not will the violation, usually is in a position prevent it with no more care than a society might reasonably expect and no more exertion than it might reasonably exact from one who assumed his responsibilities."[14]

Second, for the conviction to be constitutional and not in violation of the First Amendment, the government must prove that material support was committed through acts which intended to further the unlawful activities of the FTO-designated organization[15]. The new mens rea standard of 2339B, falls short of this. 2339B's mens rea requirement would in an analogy, have made it a crime of material support to donate to the African National Congress during one of Nelson Mandela's speaking tours in the United States before the fall of Apartheid in South Africa.[16]

Third, from an American foreign policy perspective, § 2339B restricts United States and its citizens' ability to provide humanitarian assistance to regions of the world where an FTO-designated actor exists. The knowledge-based mens rea requirement of § 2339B from a foreign policy perspective, criminalizes morally innocent and well intentioned activity, and impedes the engagement of United States and its citizens in conflict regions where one actor is an FTO.

Among the host of post-9/11 material support prosecutions based on § 2339B, in United States v. Al-Arian,[17] the Court supported the claim that the knowledge-based mens rea standard of § 2339B departs from the normative mens rea standard within Anglo-

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[11] Randolph Jonakait, The Mens Rea for the Crime of Providing Material Resources to a Foreign Terrorist Organization, 56 Baylor L. Rev. 861
[12] Staples v. United States, 511 U.S. 600, 605
[13] Id.
[14] Morissette v. United States, 342 U.S. 246, 252
[15] Jonakait, supra note 31, at 862.
[16] David Cole, The New McCarthyism: Repeating History in The War on Terrorism, 38 Harv. C.R.-C.L.L. Rev. 1, 10 (2003).
[17] United States v. Al-Arian, 329 F.Supp.2d 1294 (M.D.Fla. Aug. 4, 2004).

American criminal jurisprudence, and read "specific intent" into § 2339B's statutory language, validating Scales[18] standard of intent-based criminal liability.[19]

ii. Guilt by Association and the 1st Amendment

The § 2339B's shift from intent-based to knowledge-based mens rea raises 1st amendment concerns where constitutionally protected associational freedoms can be violated, namely by the emergent norm of guilt by association under the statute echoing Cold War criminal jurisprudence,[20] and the "illusory" dichotomization of membership and support of FTOs.

With regard to guilt by association, the material support statute, in violation of the 1st amendment exercises guilt by association by "[imposing] liability regardless of individual intent or purposes, solely on the "individual's connection to others who have committed illegal acts" within the select group of FTOs designated by the Secretary of State."[21]

The analogy Cole draws between the Cold War and the post-9/11 world with regard to America's responses to Communism and Terrorism respectively, is apt in illustrating how § 2339B can violate the same constitutionally protected associational freedoms which were violated during the Cold War for the same purposes of allegedly protecting American national security.[22]

Cole, outspoken on this issue, describes the Bush II administration's response to international terrorism through its domestic terrorism-related legislation, as a clash of the post-9/11 world with a new era of McCarthyism, where the threat of Al Qaeda has replaced the threat of Communism.[23] It can be inferred from Cole's view, that § 2339B symbolizes the placement of guilt by association at the center of America's domestic legislative response to the War on Terror, "penalizing people under criminal and immigration laws for providing 'material support' to politically selected 'terrorist' groups, without regard to whether an individual's support was intended to further or in fact furthered any terrorist activity."

The censoring of subversive speech in the Cold War context is mirrored today by the knowledge-based mens rea standard of § 2339B, where the application of criminal law during the Cold War and in the post-9/11 world enforce guilt by association over personal guilt, a norm which is in violation of the first amendment.

In the Cold War context, ultimately, the "Supreme Court prohibited guilt by association as "alien to the traditions of a free society and to the First Amendment itself.""[24] The

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[18] Scales v. United States, 367 U.S. 203 (1961).
[19] Cole supra note 36, at 8
[20] Id. at 14.
[21] Id. at 10.
[22] Id.
[23] Id.
[24] David Cole, The New McCarthyism: Repeating History in The War on Terrorism, 38 Harv. C.R.-C.L.L. Rev. 1, 9 (2003).

Court stated in Scales v. United States, "[i]n our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity ... that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the Due Process Clause of the Fifth Amendment."[25] As Cole describes, "[t]he Court explained that groups often engage in both lawful and unlawful activities and that both the Due Process Clause and the First Amendment forbid punishing individuals who support only a group's lawful ends."[26]

With regard to the dichotomization of membership and support under the statute, this dichotomy evades confronting and addressing plausible violations permissible under § 2339B to 1st amendment associational freedoms.[27] Given the post-9/11 amendments to § 2339B, lawful membership without material support as defined by the statute is rendered meaningless. Under § 2339B, the expansive definition of material support encompasses and potentially criminalizes virtually all activities of substantive membership in a group.[28] As Cole asserts, "groups cannot exist without the material support of their members and associates. If the right of association meant only that one had the right to join organizations but not to support them, the right would be empty ... Surely the Supreme Court did not insist so strongly on the prohibition on guilty by association for it to be vulnerable to such a formalistic end run."[29] This is not to challenge the illegality of material support, but more to point out that under the expansive definition of material support given by the statute, acts of membership, and thus constitutionally protected associational freedoms are infringed.[30]

2. Statutory Regime of 1189 and 2339B working together

As discussed, Courts have largely dismissed First Amendment and Due Process challenges to Material Support Statutes.The structure of this statutory regime is immune from judicial challenge on three fronts. Firstly, the unjusticiability of the FTO designation and the preclusion of collateral attacks on the FTO designation in 2339B, mutually reinforce the overall judicial unchallengability of the FTO designation.

Secondly, the vague statutory language of 2339B can make illegal large class of acts protected by the constitutional right of associational freedoms. For example, terms in 2339B such as "expert advice or assistance" or "service" or licensing authority, have no clear definition.

Thirdly, the knowledge-based mens rea standard of 2339B together with its vague statutory language, can produce unclearly defined crimes where there was no intent.

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[25] Id.
[26] Id.
[27] Id. at 11.
[28] Id.
[29] Id.
[30] Id.

These three factors together – unjusticiability of 1189, vague statutory language and knowledge-based mens rea, render the statutory regime of § 1189 and § 2339B the potential to criminalize a broad range of innocent acts by innocent individuals.

3. SENTENCING IN US FEDERAL CRIMINAL CASES

In this section we explore the legal procedures that affect sentencing in criminal trials in U.S. federal courts. Two key aspects of sentencing will be considered: (1) the sentencing guidelines enacted in 1984, and effective since 1987, and (2) co-operation agreements, guilty pleas that prosecutors arrive at with defendants. These provide insight into the disparities in sentences within the different districts within the U.S., and also highlight the procedure elements that result in higher sentencing compared to judicial systems based on anglo-american jurisprudence.

A. Sentencing Guidelines

U.S. Congress enacted the Sentencing Reform Act (SRA)[31] of 1984 in a bipartisan effort to curb perceived sentencing disparities in federal criminal cases. The Act established US Sentencing Commission (Commission) whose mandate, to promulgate guidelines to achieve "certainty and fairness" in sentencing process for federal offenses resulted in the Sentencing Guide lines in 1987[32].

The centerpiece of the Guidelines is a 258-box grid. The horizontal axis represents Criminal History and is measured in past conviction record. The vertical axis represents the Offensive Level and is reflects the "base score" for a specific offense, adjusted by limited offense and offender characteristics.

Here, the judge may depart from the narrow range if the case exhibit factors the Commission failed to consider adequately in formulating the Guidelines and the judge states the reasons for departure.[33]

Sentencing guidelines have tended to transfer sentencing discretion from judges to prosecutors. Indeed, guidelines that appear to mandate tough sentences but leave plea bargaining unconstrained sometimes mimic the "good-cop, bad-cop" stratagem for obtaining confessions at the stationhouse. The sentencing commission, the "bad-cop," threatens the accused with harsh treatment. The prosecutor, the "good-cop," then offers to save the accused from the threatened guidelines sentence in exchange for a plea of guilty. Substantial sentencing discretion remains—except for defendants who exercise the right to trial.

Of course much depends on the extent to which prosecutors do approve less severe treatment than sentencing guidelines prescribe when defendants plead guilty. Federal prosecutors seem to have undercut guidelines less than state prosecutors, and although researchers have discovered at least occasional guidelines evasion through plea

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[31] Pub. L. No. 98-473, ch. 2, 98 Stat. 1987 (1984)(codified at 18 U.S.C. §§ 3551-3673 (1988); 28 U.S.C. §§ 991-998 (1988)).

[32] U.S. Sentencing Commission , Guildelines Manual (1992) [hereinafter U.S.S.G.]. The Commission researched over one hundred thousand cases and held public hearings on proposed draft before submitting the Guidelines to Congress in 1987.

[33] 18 U.S.C. § 3553(b), (c) (1988).

bargaining in every federal district studied, the extent of this evasion varies substantially from one district to the next.

B. Plea Bargain

The legislative history of this statute SRA reveals Congress's concern that plea bargaining could undermine the equality in sentencing it sought to achieve. When the Commission submitted its Sentencing Guidelines to Congress in 1987, the Commission said it will not in general make significant changes in current plea negotiation practices, but will collect data on the courts' plea practices and will analyze this information.

Most criminal prosecutions, especially material support cases, are settled without trial.[34]

i. Guilty Plea
ii. Alford Plea
iii. Nolo Contendere

In the United Kingdom, the sentencing guideline provides for a maximum reduction of one third reducing to 10% for a late plea. The maximum reduction is for a plea entered at the "first reasonable opportunity". The essence of the calculation of the reduction is to strike a proper balance between the level of incentive to plead guilty and the requirements of justice that a proper sentence is imposed for an offence. To be effective, the system needs to be readily understood and straightforward in application.[35]

C. Use of Terrorism Enhancement Provision: U.S.S.G. 3A1.4[36]

Congress in 1994 directed the Sentencing Commission to create an enhancement for sentences for felonies involving international terrorism[37]. After the Commission created section 3A1.4, later events have given this section far-reaching power and have led to serious consequences in sentencing procedures[38]. After the Oklahoma bombing, the Congress amended the enhancement power to apply to domestic terrorism as well.

Provision (a) of 3A1.4 states: "If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than level 32, increase to level 32," and provision (b) states: "In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category VI."

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[34] In 1989, 86% of all federal criminal cases were disposed of without trial. See U.S. Dep't of Justice, Source Book of Criminal Justice Statistics 502 tbl. 5.25.
[35] http://sentencingcouncil.judiciary.gov.uk/docs/Reduction_in_Sentence_for_a_Guilty_Plea_-Revised_2007.pdf
[36] http://ftp.ussc.gov/2010guid/3a1_4.htm
[37] Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 120004, 108 Stat. 1796, 2022.
[38] P. McLoughlin, Jr., Deconstructing United States Sentencing Guidelines Section 3A1.4, 28 Law & Ineq. 51, 2010

Use of 3A1.4 to increase sentences beyond those imposed under the terrorism based statutes, the breadth of the section's applicability, and its severity have made 3A1.4 a key component of the U.S. Government's anti-terrorism arsenal.

Prosecutors use this provision routinely to increase a terrorism defendants sentence.

Note that in U.S. v. Chandia, the Court left open the issue of burden of proof for 3A1.4 enhancements, preponderance of the evidence v. clear and convincing evidence, and concluded that, although the district court utilized the Guideline range provided by the 3A1.4 terrorism enhancement, it failed to make specific findings supporting the enhancement. The court rejected the idea that the mere fact that Chandia was convicted of one material support count justified the enhancement.

D. Sentences under material support 2339B

Conviction for a violation of Section 2339B is punishable by imprisonment for not more than 15 years (for any period of years or for life if death results from commission of the offense) and/or a fine of not more than $250,000. Strictly speaking, the U.S. Sentencing Guidelines are not binding[39]. Yet, they are an indispensible part any sentencing decision.

Applying the terrorism enhancement 3A1.4 provision can have the effect of requiring a sentence at the statutory maximum, because it calls for a minimum sentencing range that exceeds the statutory maximum of 15 years. The terrorism enhancement Guideline, Section 3A1.4, establishes a minimum offense level of 32 with a criminal history category of VI for a felony offense that "involved, or was intended to promote, a federal crime of terrorism." The Guideline sentencing range of a crime with an offense level of 32 and a criminal history category of VI is 210 to 262 months (17.5 to 21.8 years) imprisonment.[40] Since the maximum term of imprisonment for violations of Section 2339B is 15 years and since a Sentencing Guideline sentence may not exceed the statutory maximum, the Guidelines call for a court to impose the statutory maximum.[41]

The following table summarizes the statutory maximum terms of imprisonment for the material support claims under 2332a, 2332b, 2339A, 2339B, 2339C.

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[39] A sentencing must begin by correctly calculating the applicable sentencing range under the Sentencing Guidelines; should it elect to impose a sentence outside the Guideline range, it must demonstrate why it is reasonable for it to do so, *United States v. Stewart*, 590 F.3d 93, 134 (2d Cir. 2009).

[40] U.S.S.G. Sentencing Table.

[41] U.S.S.G. §5G1.1(a)("Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence"); *United States v. Warsame*, 651 F.Supp.2d 978, 981 (D. Minn. 2009)("The parties agreed, however, to the application a twelve-level enhancement pursuant to U.S.S.G. §3A1.4.... In light of these determinations, Warsame's guidelines sentencing range was 292 to 365 months. U.S.S.G. Ch.5, Pt.A. Because his single count of conviction carries a statutory maximum of 180 months [15 years], however, see 18 U.S.C. 2339B(a)(1), 180 months became his advisory guideline sentence").

Table 1: Material Support Crimes: Maximum Terms of Imprisonment[42]

Use of Weapons of Mass Destruction: 18 U. S.C. §2332a		
§ 2332a(a)	Using, threatening, attempting, or conspiring to use a weapon of mass destruction if death results	Death or life imprisonment
§ 2332a(a)	Otherwise (if no death results)	Any term of years or for life
Acts of Terrorism Transcending National Boundaries: 18 U. S.C. §2332b		
§ 2332b(c)(1)(A)	For a killing or if death results from other conduct covered by § 2332(b)	Death or for any term of years or for life
§ 2332b(c)(1)(B)	For kidnapping	For any term of years or for life
§ 2332b(c)(1)(C)	For maiming	Thirty-five years imprisonment
§ 2332b(c)(1)(D)	For assault with a dangerous weapon or if serious bodily injury results	Thirty years imprisonment
§ 2332b(c)(1)(E)	For destroying or damaging a structure or personal property	Twenty-five years imprisonment
§ 2332b(c)(1)(F)	For conspiracy or attempt	Same as if the offense had been completed
§ 2332b(c)(1)(G)	For threatening to commit one of the above	Ten years imprisonment
Financing Transactions with a Country Designated as Supporting International Terrorism: 18 U. S.C. §2332d		
§ 2332d		Ten years imprisonment
Providing Material Support to Terrorists: 18 U. S.C. § 2339A		
§ 2339A(a)	If death results	Life imprisonment or a term of years
§ 2339A(a)	Otherwise (if no death results)	Fifteen years imprisonment
Providing Material Support to DFTOs: 18 U. S.C. §2339B		

[42] P. McLoughlin, Jr., Deconstructing United States Sentencing Guidelines Section 3A1.4, 28 Law & Ineq. 51, 2010

§ 2339B(a)(1)	If death results	Life imprisonment or a term of years
§ 2339B(a)(1)	Otherwise (if no death results) (after 2001)	Fifteen years imprisonment
§ 2339B(a)(1)	Otherwise (before 2001)	Ten years imprisonment
Prohibitions Against Financing Terrorism: 18 U. S.C. §2339C		
§ 2339C(a)(1)	Providing or collecting funds with the intention or knowledge the funds are to be used to carry out (A) an act which constitutes an offense within the scope of a specified treaty; or (B) any other act intended to cause death or serious bodily injury to a civilian, or other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such an act, by its nature or context, is to intimidate a population or to compel a government or an international organization to do or abstain from doing any act	Twenty years imprisonment
§ 2339C(c)(2)	Knowingly concealing or disguising the nature, location, source, ownership, or control of any material support or resources (A) knowing or intending that the support or resources were provided, in violation of § 2339B; or (B) knowing or intending that any such funds are to be provided or collected, or knowing that the funds were provided or collected, in violation of § 2339C(a)	Ten years imprisonment

The application of the terrorism Guideline requires either that the offense of conviction constitutes a federal crime of terrorism or that the offense of conviction was intended to promote a federal crime of terrorism.[43] An offense qualifies as a federal crime of

[43] *United States v. Stewart*, 590 F.3d at 137 ("The enhancement is not limited, however, to offenses that are themselves federal crimes of terrorism. By including the "intended to promote" language, the drafters of the guidelines

terrorism if it satisfies two conditions.[44] The crime must be one listed as a federal crime of terrorism in 18 U.S.C. 2332b(g)(5)(B). Section 2339B is listed. Second, the crime must be "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government action," 18 U.S.C. 2332b(g)(5)(A).

E. Possession of Firearm in furtherance of a crime of violence

U.S. Statute 18 U.S.C. 924(c) allows prosecutor request enhanced, additional sentence to that provided for the crime of violence, if during and relation to any crime of violence the defendant was shown to use or carry a firearm.

Prosecutors routinely use this provision as another tool to increase the minimum sentence, up to life imprisonment, and try to establish that inspection of firearms for example, in a arms procurement activity, as falling within the reach of this statute.

Additional sentence that can be used in such a case depends on the type of weapon used. 924(c) provides the following:

- 924(c)(1)(A)(i): minimum term of imprisonment of not less than 5 years;
- 924(c)(1)(A)(ii): if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years;
- 924(c)(1)(A)(iii): if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years;
- 924(c)(1)(B)(i): if the firearm used is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years;
- 924(c)(1)(B)(ii): if the firearm used is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.
- 924(c)(1)(C)(i): In the case of a second or subsequent conviction under this subsection, the person shall be sentenced to a term of imprisonment of not less than 25 years;
- 924(c)(1)(C)(ii): In the case of a second or subsequent conviction under this subsection, the person shall if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

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unambiguously cast a broad net. The criminal conduct at issue need not itself meet the statutory definition of a federal crime of terrorism if a goal or purpose of the defendant's act was to bring or help bring into being a crime listed in 18 U.S.C. 2332b(g)(5)(B)"); *United States v. Arnaout*, 431 F.3d 994, 1000-1001 (7th Cir. 2005)("The district court found §3A1.4 did not apply because Arnaout was not convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B). We disagree.... We find that a defendant need not be convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B) for the district court to apply §3A1.4. Instead, the terrorism enhancement is applicable where a defendant is convicted of a federal crime of terrorism as defined by 18 U.S.C. 2332b(g)(5)(B) or where the district court finds that the purpose or intent of the defendant's substantive offense of conviction or relevant conduct was to promote a federal crime of terrorism as defined by 18 U.S.C. 2332b9g)(5)(B)").

[44] U.S.S.G. §3A1.4, cmt. 1 ("For purposes of this guideline, 'federal crime of terrorism' has the meaning given that term in 18 U.S.C. §2332b(g)(5)"); *United States v. Stewart*, 590 F.3d at 137; *United States v. Chandia*, 514 F.3d 365, 375-76 (4th Cir. 2008).

In a recent case heard by Judge Catherine Blake at the District Court in Baltimore, a request by the U.S. Government Prosecutor to add a 25-year prison term to a defendant charged in a 2339B case where arms inspection was involved, was denied by Judge Blake[45].

[45] Case 1:08-cr-00091-CCB-2, USA v. Santhirajah et al

4. SRI LANKA: PROSCRIPTION OF LIBERATION TIGERS

A. Brief Background to the History

Sri Lanka's civil war between the majority Sinhalese and minority Tamils lasted nearly 5 decades and was finally brought to an end in May 2009. This conflict represents a classic contemporary intra-state conflict where there was alleged widespread destruction to the environment and more than 30,000 civilians were allegedly killed[46]. The conflict also highlights the difficulties faced by the International Community in intervening in the conflict even after it was clear that large scale killing of unarmed civilians was imminent.

This section describes the background to the conflict, reviews the factors that add international character to the conflict, and examines how international criminal laws identified in earlier sections can be applied to the events surrounding Sri Lanka's war. Finally the section discusses the approaches the international community can take to bring the violators from both protagonists, the Government of Sri Lanka and the leadership of the armed group, the Liberation Tigers of Tamil Eelam (LTTE) which fought on behalf of the Tamils, to justice.

A. Background

Sri Lankan Tamils, 20% of the population and Sinhalese (80%) form the original inhabitants of the island state. Beginning in the 1950s the Sri Lankan government implemented public policies that institutionalized the majority community's dominance. Exclusionary and discriminatory policies marginalized the Tamils. In an effort to protect their culture and to ensure equal rights, the Tamils began to press for autonomy and independence. Continued suppression of political voice of Tamils resulted in armed resistance and, throughout the 1980s, various Tamil rebel groups, led by the Liberation Tigers of Tamil Eelam (LTTE), engaged in attacks against the Colombo government and its security apparatus.

From 1995 to 2000, Sri Lanka's different attempts to arrive at negotiated settlement to reach a political solution did not succeed. In 2001, the LTTE declared several ceasefires and the Sri Lanka Government invited Norway to facilitate talks between the protagonists. Between2002 and 2006 six peace talks were held in Japan, Thailand and three European capitals without success. LTTE dropped its long-standing demand for a separate state and declared that the group was ready to enter mainstream politics. In December 2003, the LTTE presented a set of proposals outlining its visions of an autonomous, but not separate, northeastern region in Sri Lanka. U.S., Japan, Norway, and European Union formed a group called Co-chairs to provide financial and moral support to the fledgling peace process.

The ceasefire collapsed in late 2005 and the conflict erupted again. By 2006, the conflict escalated into full-scale war, accompanied by a vicious counter-insurgency program aimed at the Tamil population that killed and disappeared thousands. In 2007, the armed

[46] See War Crimes in Sri Lanka, International Crisis Group (ICG), Asia Report N0: 191, pg. 5, May 2010.

forces captured the East, which the Supreme Court then separated from the Northern Province, elections were held to install a puppet of the government. Subsequent battles in the North, accompanied by targeted shelling, drove hundreds of thousands off their land and finally into a tiny enclave on the beach, where more than 40,000 civilians were alleged killed in a final assault by the armed forces. In May, 2009, the government declared that it had captured the last LTTE territory and had killed all top level leaders of the LTTE.

B. International Character of Sri Lanka's War

Sri Lanka's conflict contains many characteristics that can qualify the conflict as an intra-state armed conflict with international character. The characterization if accepted by the International Criminal Court (ICC) in any future litigation will set a landmark precedent to application of potent regulations from both IAC and NIAC that deal with laws of war.

- Involvement of Indian Army in Sri Lanka: In 1987 more India sent more than 10,000 troops and armed battalions to the North of Sri Lanka, providing an international dimension to the on-going Sri Lanka conflict. Fighting broke out between the Indian soldiers and the Liberation Tigers and the Indian engagement, described as India's Vietnam, ended in India's recalling of the troops.

- Involvement of International Community in Negotiating Peace: Norway as the main facilitator for peace, and members of several Scandinavian Countries as part of a Sri Lanka Monitoring Mission, supervised the ceasefire in Sri Lanka between 2002 and 2006.

- International funding and Prosecutions under Material Support laws: Tamils from Sri Lanka domiciled in several European countries, Australia, Canada, and the U.S. continued to provide financial and moral support to the rebel side of Sri Lanka's conflict. Countries including the US and Canada, which had strong anti-terror regulations prosecuted several expatriate Tamils for providing material support to a terrorist organization.

- Refugee influx to Australia, Canada and Europe: Sri Lanka war, though confined mainly to the territory of Sri Lanka, also resulted in refugee outflow, mainly to Canada and Australia, causing severe political difficulties to ruling governments in these countries.

In addition to the internationalization of Sri Lanka's conflict, alternatively Sri Lanka's conflict can also be characterized as a civil war or a struggle for self-determination allowing the rules of Additional Protocol I to the Geneva Convention to be applicable to the conflict.

C. Proscription in the U.S.

In October 1997, the US Secretary of State, pursuant to section 219 of the Immigration and Nationality Act, as amended under the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132), with the concurrence of the US Attorney General and Secretary of the Treasury, designated 30 armed groups, including the LTTE, as Foreign Terrorist Organizations (FTO).

The Statute states that the Secretary is authorized to designate an organization as an FTO, if three conditions are met:

1. The organization is foreign;
2. The organization is engaged in terrorist activity;
3. The terrorist activity threatens the security of United States citizens or the national security of the United States[47].

The law makes it a criminal offense to provide funds, weapons or other forms of material support to the organizations on the list. Members and representatives of these organizations are ineligible for visas to enter the United States, and are subject to exclusion from the United States.

FTO list designations, which last for two years and must be renewed, occur after an interagency process involving the departments of State, Justice, Homeland Security, and the Treasury. The LTTE's status as an FTO continues till this date.

After the designation, the Treasury Department may block financial transactions involving an organization's assets and determine whether U.S. banks are complying with the law. The Justice Department determines whether or not to prosecute offenders who violate any aspect of the Treasury Department's sanctions. Judges from the Department of Justice's Executive Office of Immigration Review decide immigration cases, with appeals potentially going all the way to the Attorney General.

FTO list is subject to judicial review. Mujahedin-e Khalq (MEK) and the Liberation Tigers of Tamil Eelam (LTTE) in 1999 filed suits in the District of Columbia[48] arguing that they had been denied due process.

Lawyers representing the LTTE, Ramsey Clark and Lawrence W Schilling, said they will argue that the Secretary's designation is arbitrary and capricious since it failed to take into consideration the context in which the LTTE's actions take place, namely the persecution of Tamils by the SriLankan Government[49]. LTTE lost the case.

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[47] See "Designation of foreign terrorist organizations," in the Antiterrorism and Effective Death Penalty Act, 8 U.S.C. 1189.

[48] People's Mojahedin Organization of Iranv. United States Department of State. 182 F.3d 17. U.S. Court of Appeals, D.C. Circuit, June 25, 1999.

[49] http://www.tamilnet.com/art.html?catid=13&artid=1948

5. CASES: PROVIDING MATERIAL SUPPORT TO THE LTTE

Cases in the United States, Australia, United Kingdom, and Canada where defendants are are charged with providing material support to the LTTE are briefly analyzed to ascertain the similarity or non-similarity in sentences given out by the different national court systems, the discretionary power exercised by the judges in arriving at the sentences, and the use of the guilty pleas by the prosecutors.

The material available for each of the cases will be grouped in a consistent subsection format to facilitate efficient comparison of the cases. The case material will be briefly summarized under the following subsections: (a) Case number, defendants and case citation, (b) charges in the complaint, (c) summary of arguments or judges opinion that reflect the sentencing approach taken, (d) Court sentencing results, and (e) Comments.

A. United States Terrorism Cases related to Sri Lanka

I. Cr. No. 06-615, U.S. v. Sarachandran

An illustrative case where the Prosecution uses techniques to increase the possible sentence term and to extract guilty plea is in Cr. No. 06-615, U.S. v. Sarachandran in Eastern District Court of New York under Judge Raymond Dearie. The case began in August 2008, and the four defendants (Sathajhan Sarachandran, Sahilal Sabaratnam, Thiruthanigan Thanigasalam, Nadarasa Yogarasa} were sentenced in January 2010.

(i) Summary of Charges

From the initial 2-count charge sheet , conspiracy to provide material support, and Attempt to provide material support to an FTO, the prosecution added conspiracy and attempt to acquire specific types of arms, in addition to the general material support charges. The new 5-count charge sheet follows:

> **Count 1:** that between January 2, 2003 and August 19, 2006, the defendant and others provided material support to the Liberation Tigers of Tamil Eelam in violation of 18 U.S.C. § 2339B(a)(1) and 18 U.S.C. § 2339B(d);
>
> **Count 2:** between January 2, 2003 and August 19, 2006, the defendant and others conspired to provide material support to the Liberation Tigers of Tamil Eelam in violation of 18 U.S.C. § 2339B(a)(1) and 18 U.S.C. § 2339B(d);
>
> **Count 3:** between January 2, 2003 and August 19, 2006, the defendant and others attempted to provide material support to the Liberation Tigers of Tamil Eelam in violation of 18 U.S.C. § 2339B(a)(1) and 18 U.S.C. § 2339B(d);
>
> **Count 4:** between July 1, 2006 and August 19, 2006, the defendant and others conspired to acquire, transfer, receive, possess, export and use anti-aircraft

missiles in violation of 18 U.S.C. § 2332g(a)(1), 18 U.S.C. § 2332g(b)(1) and 18 U.S.C. § 2332g(c)(1); 18 U.S.C. § 2339B(d); and,

Count 5: between July 1, 2006 and August 19, 2006, the defendant and others attempted to acquire, transfer, receive, possess, export and use anti-aircraft missiles in violation of 18 U.S.C. § 2332g(a)(1), 18 U.S.C. § 2332g(b)(1) and 18 U.S.C. § 2332g(c)(1).

(ii) Summary of Sentencing Argument

Using the terrorism enhancing provision the prosecution argued for 40 years to life for the defendants. Defense Counsel requested the judge to impose a sentence at variance with the guidelines and impose a sentence pursuant to 18 U.S.C. § 3553 (a).

The defense attorney argued that the case represents as example of how the mechanical application of the guidelines, with its numeric configurations, obscures the court's ability to find and impose a sentence that is sufficient but not greater than necessary to protect the public and prevent further crimes of the individual defendant before the court.

The Defence Counsel asserted that the court is required to impose a sentence on a young defendant, a bright college graduate, a young man whose reasons for engaging in the conduct deemed criminal in our nation was based completely and entirely upon his sadness at generations of brutal racial and ethnic discrimination and the level of relentless violence used by the government of Sri Lanka to crush the Tamil people into submission in his home - in Sri Lanka.

The attorney with the guilty plea pleads for the statutory minimum sentence of 25 years, against the 40 years to life proposed by the Prosecution.

(iii) Sentences

Of the four defendants who were charged in the anti-terrorism material support laws, attempting to procure arms, the Court imposed the following sentences, after all defendants entered guilty plea.

Defendant 1: Sathajhan Sarachandran	25 years
Defendant 2: Sahilal Sabaratnam	25 years
Defendant 3: Thiruthanigan Thanigasalam	26 years
Defendant 4: Nadarasa Yogarasa	14 years

The prosecution relied on addition of attempt, and conspiracy charges to increase the maximum possible sentences as stipulated in the guidelines.

(iv) Comments

Eastern District of New York has been well known for giving severe sentences to material support cases, and the sentences here appeared unreasonably long. One of the defendants who was caught with the same sting operation by the FBI, but whose case took longer due to procedural matters was decided 27th of April 2011. The defendant Dr Murty received time served (nearly 4 years) and was released to immigration custody.

II. USA v. Vijayshanthar Patpanathan Nachimuthu Socrates[50]

Case Cr-06-616, Eastern District Court of New York

The case involves six defendants charged under material support laws. Two of the defendants had traveled to India prior to charges were brought on them. Defendants plead guilty and were sentenced. FBI used a Sri Lankan informant to obtain recorded information on the illegal activities the defendants were involved in. Thavarajah Pratheepan was noted in the court documents as the principal liason between the LTTE leadership and the LTTE supporters in North America, and was alleged to be involved in procuring operational equipment. Defendant Murugesu Vinayagamoorthy is a physician from UK, who was visiting the U.S. Two U.S. citizen defendants are Nachimuthu Socrates and Vijay Shankar Patpanathan.

(i) Summary of Charges:

COUNT-1: Conspiracy to Provide Material support to a FTO - Between 2003 and August 2006 defendants knowingly and intentionally conspired to provide material support and resources, as defined in 18 U.S.C. 2339A(b), including currency and monetary instruments, communications equipment, weapons and personnel to a FTO, to wit: LTTE, which has been designated as an FTO since October 1997.

COUNT-2: Conspiracy to Bribe Public Officials – Between April 2004 and March 2006, the defendants knowingly and willfully conspire to corruptly give, offer and promise, directly and indirectly, things of value, to wit: federal agents purporting to be State Department Officials, with intent to influence official acts in violation of 18 U.S.C. 201(b)(1)(A).

COUNT-3: Conspiracy to Bribe Public Officials – Between April 2004 and March 2006, the defendants knowingly and willfully conspire to corruptly give, offer and promise, directly and indirectly, things of value, to wit: federal agents purporting to be State Department Officials, with intent to induce the public official to do an act in violation of the lawful duty of that official, to wit: the unauthorized dissemination of classified information in violation of 18 U.S.C. 201(b)(1)(C).

COUNT-4: Dealing in the Property of a Specially Designated Terrorist

[50] EDNY, CR-06-00616, October 7, 2010

(ii) Summary of Sentencing Argument

Counsel for Patpanathan said that earlier "when sentences weren't grounded in the guidelines and mandatory minimum, and we relied on the Court's good judgment and discretion, and now mechanically go back to a time when we ask the Court to do just that, rely on discretion, rely on its good judgment, and to put into perspective what the words "sufficient but not greater than necessary" had always meant before the era of mandatory guidelines.

"It is not enough to say the guidelines aren't mandatory anymore. It is not enough to say even today that it is a starting point because under Nelson and probably even Dorvee, it is not even a starting point anymore. It is one of many considerations that the Court must take into account. Nelson says there's no reason to assume the guidelines are reasonable anymore than they are pre-guidelines period, there's no reason to assume they are presumptively reasonable."

Counsel for Socrates: "Questions the Prosecutions effort to add the terrorism enhancement to a bribary charge and increase the levels from 1 to 6. The judge asks if §4A1.3. Departures Based on Inadequacy of Criminal History Category (Policy Statement) is available to the Court, and under 4A1.3 with the requisite finding theoretically move back to one, and nothing bars the application of 4A1.3.

Judge Dreary responded that he "needed more input, more of a dialogue, if you will, particularly as it relates to some of the non-guildelines issues or 3553, given what I perceive to be somewhat unusual circumstances for this case, and I explained at the time the reasons for it, and to that end we assembled again this morning in the hopes of being able to shed some additional light on the circumstances that confront each of these two gentlemen…It is often the case here for me the more difficult decision is not going to necessarily arise from the guidelines themselves, but instead from the universe of information that is before me concerning these individuals, their involvement in various offenses, the circumstances, the context, which is the word that has been used repeatedly, the context, the situation in Sri Lanka applies to the Tamils. Much of the information provided to me in the joint submission, to what extent that is relevant on the issues of sentencing…I wasn't ready to make these critical judgments."

In U.S.A. v. Dorvee[51], Justin K. Dorvee pled guilty to one count of distribution of child pornography in violation of 18 U.S.C. § 2252A(a)(2)(A). He was sentenced by the United States District Court for the Northern District of New York (McAvoy, J.) to the statutory maximum of 240 months, less 194 days for time served for a related state sentence. He challenges both the procedural and substantive reasonableness of his sentence.

Dorvee argues to us that his sentence should be vacated for three reasons: (1) the sentence is procedurally unreasonable because the district court erroneously calculated the Guidelines range; (2) the sentence is substantively unreasonable; and (3) the

[51] http://caselaw.findlaw.com/us-2nd-circuit/1533727.html

amendment process used to enact U.S.S.G. § 2G2.2(b)(7) was unconstitutional. We agree with his first two contentions, and therefore do not reach the third.

Appeals Court, in Dorvee, found that the district court never properly calculated Dorvee's Guidelines range, and concluded that this constitutes procedural error, and that the sentence imposed on Dorvee is substantively unreasonable and remanded to the district court for resentencing.

(iv) Sentences:

Nachimuthu Socrates:	time served (January 2011)
Vijayshathar Patpanathan	Time served (January 2011)
Murugesu Vinayagamoorty	Time served (sentenced 27th April 2011)

(v) Comments

Compared to the severe sentences of 15-20 years given to defendants in the Cr. No. 06-615, U.S. v. Sarachandran case described earlier, the same Judge in the EDNY gave reduced sentences in this case. Judge's sentencing memorandum reflected an uneasy judge who had asked pointed questions to the Prosecution on whether the Defendants were freedom fighters of terrorists, in light of the facts brought out by the Defense Counsel(s) on the civilian killings attributed to the Government of Sri Lanka.

A marked convergence among International Systems in considering the material support cases involving FTOs that exhibited different character to that of Al Queida. The argument of Counsel Dratel is clearly illustrative of this.

B. Australia: The Queen v Vinayagamoorthy & Ors [2010]

VSC 148 (31 March 2010)

Australia has not proscribed the LTTE. However, The Australian legal system considered the LTTE as a proscribed organization following from a series of regulatory and statutory provisions which in turn follow the adoption by the United Nations of resolution 1373 of 2001[52].

That resolution was passed following the terrorist attacks in the United States on 11 September 2001. The purpose of the resolution was to prohibit citizens of member states of the United Nations making assets available to nominated terrorist organizations.

The resolution became part of the domestic law of Australia, eventually in the form of the present provision. The list of organizations which have been proscribed was not part of that original resolution and the list is one chosen and settled by the Australian Government.

[52] http://www.un.org/News/Press/docs/2001/sc7158.doc.htm

(i) Summary of Charges:

> COUNT-1: Violation of the provisions of the United Nations Act 1945 ('The Act").
>
> COUNT-2: Directly or indirectly making monies available to Liberation Tigers of Tamil Eelam, the LTTE, otherwise than in accordance with a notice under s 22 of the Act. The offence was said to have been committed between 13 December 2002 and 23 November 2005.

The second count related to the making available of electronic components to the LTTE without the relevant notice in the period 4 December 2003 to 12 October 2004.

(ii) Summary of the Sentencing comments from the Judge

Victoria Supreme Court Judge during the sentencing of the three defendants appears to believe that the LTTE was almost a defacto government in the North and East and seems to establish a more sympathetic frame work for the defendants with regard to sentencing.

Judge points out that while as an element of the offense the prosecution should establish that the defendants knew that the LTTE was a proscribed organization, Judge was not fully satisfied if they knew of the proscription in Australia, noting that LTTE has never actually been declared a terrorist organization in Australia.

In the case at bar the prosecution initially charged the accused for offenses contrary to the Criminal Code Act 1993 for membership, support and provision of resources to the LTTE as a terrorist organization. The Judge said had this charge remained "it would have been necessary for the prosecution to prove that the LTTE was in fact a terrorist organization," and that it would have been a "complex task," providing an indication that the Judge thought the charges were "less serious" than terrorism charges under Australian law.

Commenting on the behavioral characteristics of the LTTE, the Judge says, "[i]n the period of the indictment, or at least for most of it, there was a cease-fire in Sri Lanka between the LTTE and the government of Sri Lanka. Dr Smith [expert witness] in his reports and evidence at the committal has said much about the development of the LTTE. Many, if not most of the supporters of the LTTE, would have regarded themselves as having been involved in a civil war and from the period 1990 to 1994, the structure of the LTTE was somewhat like a military force," contrasting the LTTE with other organizations such as Al-Qaeda which is often used for comparison of terrorist acts.

Evidence from the expert witness was then read out by the Judge to bring home the point that LTTE can be also regarded as a defacto government in the North East of Sri Lanka. Pertinent questioning related to reasonably establishing LTTE as a defacto government, equal in status to the elected government of Sri Lanka is illustrated below. Here, note also that, during the peace process held under the Government of Norway leadership. LTTE has insisted on "parity of status."

Judge: The government does not provide medical facilities or hospitals, do they?

Dr. Smith [Expert witness]: ---I'm not sure about medical facilities and hospitals. Certainly I mean the LTTE provides a good deal of the welfare supports – a good deal of the welfare requirements for the people within the uncleared areas. I mean, I think that's fairly accepted as well.

There is in effect a de facto state in existence in the north of Sri Lanka, is there not?---The LTTE, particularly since the ceasefire in 2002, has put a tremendous effort into building a state within a state. I mean in Kilinochi I understand there is – the civil service is operating, a police force is operating, a tax collection system is operating. I mean basically yes, they are trying to kind of touch all the bases required to build a state within the state in the event that some kind of confederal or independent homeland will be achieved. They wish to be seen to be a state in waiting.

Indeed, this state in waiting has its own police force, as you just mentioned, does it not?---It does, yes.

It has its own court system, does it not?---It does.

It has its own banking system, does it not?---It does.

It has a series of hospitals, does it not?---I am not entirely sure about hospitals, but I would imagine so, yes.

Orphanages?---Yes.

There are education facilities in this area, are there not?---I think so, yes.

Including colleges to teach technical skills?---Yes. It would be unsurprising if there weren't to a certain extent because the Tamil commitment to education – in fact the commitment to education across Sri Lanka is phenomenal and one would expect the LTTE in the areas that it controls to set up these education systems. It would be extremely surprising if they didn't.

Yesterday you talked about the existence of basically a proto state in Kilinochi, are there members of the police force in the Kilinochi members of the LTTE?---I would say there are.

Why do you say that?---Because they would be under the – they would be line managed by the LTTE, they would be – their resources, their training, their day to day activities would be – they would be answerable to – and therefore line managed by the LTTE commanders.

If there is a proto state, the commanders are in essence the governors of the state, are they not?---They are – they are in control of it, I mean, it's well known and you will be extremely aware yourself that the uncleared areas constitute areas of territory that are under the – particularly in the north, not so necessarily in the south – in the east rather, but in the north, the uncleared areas are sharply delineated as areas that are not under the control of the Sri Lanka state but are under the control of the LTTE, and from there has followed efforts to build a state within a state within Sri Lanka.

Basically any person carrying out a function of government in the uncleared areas is line managed, to use your term as officials of the LTTE; correct?

---Yes, I would say so.

There must be literally thousands of people carrying out civil duties and welfare duties in those uncleared areas, correct?---Yes, quite correct.

Nor would they have the capacity to participate in decisions about what should happen; right?---Sorry, sorry, could you repeat that?

They would not have the capacity to contribute towards policy making decisions would they?---No, no.

Do you agree with that?---No, I mean the LTTE is authoritarian hierarchical – there isn't much bottom buck decision making, if any.

One of the major features described by Dr Smith is that during the relevant period, the LTTE operated largely as the de facto government in the northern part of Sri Lanka. The role that might be played by the LTTE and to be played by the LTTE and how it is to be viewed and viewed in the Tamil community, particularly the Tamil community outside Sri Lanka, can also be observed in the evidence presented.

The judge also notes that the pleas of guilty "have a significant utilitarian value and have avoided a trial of six to eight weeks."

Judge lays out the context in which Aruran Vinayagamoorthy violated the Australian material support laws, and draws on the following mitigating circumstances:

- **Suffered under Sri Lanka Government violence**: "You, Vinayagamoorthy, are 35 years of age, having been born in Jaffna, Sri Lanka on 11 May 1974. You grew up in difficult circumstances because of the internal strife and your family, particularly your father, suffered as a result of the dislocation. Your own education was interrupted and your personal freedom restricted by curfew and other conditions imposed in Jaffna. You observed the result of Government gunfire in the streets of Jaffna where people known to you were killed. You were able to come to Australia in 1996 as a refugee, relying upon your position as a Tamil in Jaffna and your support

for the LTTE. You were accepted and you became an Australian citizen in January 1998."

- **No prior conviction**: "You have no prior convictions and you have spent 78 days in custody. I do not regard that period as being insignificant."
- **Other uses for the material sent to the LTTE**: In relation to the radiometric devices, the subject of Count 2, you did arrange for the sending of those devices and at least one of them finished up in a landmine. I am satisfied that the material before me is sufficient to establish that fact. It does not follow, however, that you intended that to occur. I accept that there are other uses to which such devices may be put.
- **Police would not have allowed the material to be sent if they were lethal**: "One feature of the case is that the AFP knew about at least part of the transactions involving the components and photographed them. They allowed the components to be sent. I would not want this observation to be taken too far but I assume that if the immediate assumption was made that the components were to be used in explosive devices, there might at least have been some reticence about allowing the components to be shipped."
- **Good character reference**: "A character reference from Dr Nagarajah was tendered on your behalf and he gave evidence before me. He spoke well of your contribution to the Sri Lankan community, particularly for the young. He said that you had become isolated from many parts of the community because of these charges. I also received a written reference from Dr Tharamarajah who spoke well of you."

Judge's view of the mitigating circumstances for the second defendant, Sivarajah Yathavan.

- **Suffered under Sri Lanka Government violence:** "Up until 1993 your upbringing was largely unremarkable. Your family were not politically active. Between 1983 and 1987, you saw and experienced firsthand the result of the internal strife in Sri Lanka. You observed the plight of refugees and life in Jaffna was difficult with properties being frequently shelled and your family was regularly displaced. Your general lifestyle was disrupted. When you were 15, one of your school friends was killed by the authorities and his body dumped near your home. You were not politically active at that time.

  In 1987, your father was shot and died from injuries some three days later. The best medical facilities were not available. Your father had been no more than seeking to secure the school records for which he was responsible. The circumstances of his death have never been satisfactorily investigated or explained.
- **Volunteer work in Sri Lanka**: You returned to Sri Lanka for a visit in 1993. Among other things, you did some volunteer work for an artificial limb institute in northern Sri Lanka.
- **Circumstances in Sri Lanka required external support**: In relation to the general matters on the plea, a number of witnesses were called. Dr Whitehall to whom I have previously referred, gave evidence of his visits to Sri Lanka in December 2004 both before and after the tsunami and his return to Sri Lanka in

> September 2005. No one could help but be moved by his evidence concerning the general circumstances as he found them. His evidence demonstrated both the positive medical assistance in the Tamil areas of Sri Lanka and the need for support. He gave evidence that the LTTE did provide a de facto government which was highly organised. He was also able to say that in physical development terms, children in the north of Sri Lanka were at the very lowest end of the Senathirajah and Mr Arumughasamy were tendered on your behalf.

Similar reasoning was expressed for the other two defendants, indicating that the Judge is attempting to exert his discretion giving weight to the context in which the material support law violation occurred.

The approach to how the Judge arrived at the sentences are clearly articulated in the following thread of statements, which the Judge states as his principal findings. Judge notes here the U.K. case considered in this paper and asserts that the factual details are similar in both cases.

> I am satisfied that each of you were directly connected to and knew that you were dealing with the LTTE. You knew that the LTTE had, at various times during its existence, the reputation of a terrorist organization. I accept that you did not necessarily accept that characterisation.
>
> I accept that your motivation was to assist the Tamil community in Sri Lanka and thought that the only real vehicle to do so was by dealing with the LTTE. I am satisfied that the general motivation, although having a humanitarian bent, was not solely confined to humanitarian work. I am satisfied that you did not intend to support any activity which you would have regarded as terrorist.
>
> I am satisfied that the seriousness of the offending must, to a large degree, be judged by reference to the prevailing circumstances in Sri Lanka at the time of the offending. It is a peculiar feature of this case that during all, or at least most of the time of the offending, there was a ceasefire in place in Sri Lanka and at that time the LTTE was not a proscribed organization in Sri Lanka. I accept that the LTTE was for many purposes the de facto Government in the North, while keeping and maintaining its military capability.
>
> I have already observed that there is substantial evidence in the case which describes the relationship between the Tamil Diaspora and the LTTE itself, that is, the view of the Diaspora may well have been more reserved and less terrorist-related than the view held by people in Sri Lanka itself.
>
> The situation in Sri Lanka was complicated and driven in part by the proposition that there was really no one else to deal with in the North. The conduct you engaged in is prohibited by Australian Law.

> There are some matters that are relevant to you all. You are previously of good character. I regard your prospects of re-offending as extremely low and your positive prospects of rehabilitation to be high. You have had these matters hanging over your head in one way or another since November 2005. You, Vinayagamoorthy, and you, Yathavan, have served 78 days imprisonment and you, Rajeevan, have served eight days. You reported on bail for a significant period of time. I do not regard the extended period relating to you, Rajeevan, as being of any significance for the purpose of the sentence which I will impose.

Judge also points to the sentence imposed in the Central Criminal Court in England. The case was R v Chrisantha Kumar. The major offence which that accused was convicted was not dissimilar on its facts from these offences. One major difference was the U.K case there was breach of the actual Terrorist Act in the United Kingdom because the LTTE was a proscribed organization for the purposes of that Act. It followed that the offence was a significantly more serious offence and carried a substantially higher maximum term, and the defendant received an actual sentence of two years. The accused had served 95 days and was required, "To serve, in all, a year." That case does point up the real tension involved in sentencing exercises of this kind.

(iii) Sentences:

Defendant 1 plead guilty to charges 1 and 2. Defendants 2 and 3 plead guilty to charge 2.

Defendant 1: Aruran Vinayagamoorthy
Count-1: 1 year
Count-2: 18 months
Released immediately on a recognizance release order in the sum of $1000 to be of good behavior for four years.

Defendant 2: Sivarajah Yathavan
1-year sentence. Released immediately on a recognizance release order in the sum of $1000 to be of good behavior for three years

Defendant 3: Armugan Rajeevan
1-year sentence. Released immediately on a recognizance release order in the sum of $1000 to be of good behavior for three years

(iv) Comments

C. United Kingdom: U20090424 Regina v. Chrishanthakumar

Central Criminal Court, Old Bailey, London

Four men of Sri Lankan origin were arrested and charged under the UK Terrorism Act 2000. Chrishanthakumar was accused of giving support to the Liberation Tigers of Tamil Eelam (LTTE). Jegatheswaran Muraleetharan, Jeyatheswaran Vythyatharan, and Murugesu Jegatheeswaran were accused of receiving electronic items for use in terrorism.

The complaint alleged that over a three year period from March 2003 to June 2006 Shanthan coordinated the sending of goods to the LTTE in Sri Lanka. Money used to buy goods had been obtained by Shanthan from members of the Tamil diaspora resident in this country and some by the LTTE, the complaint said. The equipment included Toughnote computers, dual use (can be used by military as well as civilians), electrical goods, high power torches, speed guns etc. There were no guns or explosives included in the goods, according to the complaint**.**

(i) Summary of Charges

Count-1: Violation of Section 12 (3), which refers to "support for a proscribed organization," and Sections 2 & 6 which refers to "providing material support for a proscribed organization" of the Terrorism Act 2000.

- Between January 17, 2006, and June 22, 2007, in London receiving a quantity of literature and manuals including underwater warfare systems, explosive ordnance disposal and naval weapons systems, six trenching spades, 39 compasses and a piece of ballistic body armor in the knowledge they may be used for terrorism
- Helping to arrange a meeting which knew was to support the LTTE between June 1, 2006 and July 26, 2006
- Addressing an LTTE meeting in Hyde Park, London, to encourage support for the group
- Receiving £1,500 in London on January 24 with the knowledge that it would be used for the purposes of terrorism

Count-3: Related to receiving Jane's manuals, knowing or having reasonable grounds to suspect that they would be used for a terrorist purpose.

This was a jury trial where the jury convicted the defendant on both counts.

(ii) Summary of Sentencing Arguments:

Points relevant to sentencing raised by the Judge can summarized from the Sentencing memorandum.

- Intent to help the FTO-LTTE: Judge was not fully convinced that if the goods sent by Shanthan to Sri Lanka were used by the LTTE armed forces rather than by civilian agencies of the LTTE. That is still an offence because, as the jury have found, to Shanthan's knowledge the goods were for the benefit of the LTTE.
- Defendant co-operated with the special branch prior to getting involved in illegal activities: He was in regular contact with Special Branch throughout this period. He told them in detail of his contacts with and relationship with the LTTE, and was undoubtedly helpful to the British government in understanding the views and position of the LTTE. But he was deliberately keeping from Special Branch that he was supplying the LTTE with goods and was deliberately deceiving Special Branch, having built up their trust.

- Did not try to cover-up that he was sending goods to the LTTE. Shanthan had no means of controlling what the LTTE did with these goods once they were in their possession. .

Judge pointed out that "while it is true that the LTTE have not threatened this country, I do not believe that that is a mitigating feature when one is considering the purpose of the Terrorism Act itself."

The British Judge in the sentencing opinion goes over the mitigating circumstances, and says that the "case presents me with an enormously difficult sentencing problem," implying that he has to exercise discretion giving proper weight to violations as well as the mitigating circumstances associated with this specific case of terrorism support.

- Violations committed during peace talks: There are, however, powerful mitigating features relating to the facts of these offences. They were committed during the peace negotiations between the Sri Lankan government and the LTTE, which was sponsored by the Norwegian government and which went on throughout the period of the conspiracy. The LTTE controlled the civilian administration of several areas of Sri Lanka perfectly legally during this period of time. The LTT were not proscribed in Sri Lanka over this period. It was a precondition of the peace process that proscription should be removed in Sri Lanka, although it was maintained in this country, in the European Union and in America, and, no doubt, other countries.
- British Government supported and committed aid to the peace process: The solution favoured by the British government, and the international community, was a federal state in which the LTTE governed parts of Sri Lanka as autonomous states within a federal organization. To help achieve this the British government gave aid, at least part of which was to improve the infrastructure of the areas of Sri Lanka administered by the LTTE.
- Judge distinguishes between a sovereign state giving aid, and an individual violating the law, but sympathizes with the Defendant's acts. "There is, of course, a clear distinction between a government giving aid and an individual arranging it in contravention of the law. Governments are able to attach conditions to their gifts to ensure that they are only used in limited ways and they may be able to have inspections to ensure that that is done. Governments can also use aid to bring pressure to bear to achieve favourable outcomes. Nevertheless, when considered fairly, these matters do, in my judgment, reduce the seriousness of the offences committed. Shanthan was doing no more, although illegally, than the international community were doing."
- Judge satisfied that Defendant is committed to the peace process: "I am also satisfied that Shanthan was wholly committed to the peace process. He did not wish the peace process to fail and civil war to reconvene, as tragically happened. Whatever he did for the Tamils and the LTTE, he did not do it in order to assist them in war. He did them to assist in maintaining the peace process."

Judge provides his thoughts on why he should exercise discretion:

- Case is difficult: “This case presents me with an enormously difficult sentencing problem, one of the most difficult that I have ever had to face. I have been given great assistance by both the prosecution and the defence as to the appropriate bracket for sentencing in these kinds of offences.”

- Justice demands Judge’s discretion: “Having considered all that has been put to me and all the authorities, I do take the view that the factual variations in this type of case are so great that, if it is possible to give a bracket at all, the bracket proposed by the prosecution is too narrow. But even if it is possible to give a bracket, there will always be exceptional cases where justice demands that a judge goes outside the bracket.”

- The LTTE is not involved in armed struggle put engaged in peace process: Of course these are very serious offences, which attract substantial sentences of imprisonment. The terrorist law has to be obeyed as part of our obligations internationally. Where a judge does decide to go outside the bracket, then it is necessary for him to explain in detail why he has done that. I hope I have done so in this case. The principal difference, as I have indicated, between this case and others to which I have been referred is that the proscribed organization in this case, the LTTE, at this particular time, at the time of the supply, were not actively involved in an overt armed struggle against Sri Lanka. That is not the position in relation to the other cases which are put before me, where assistance had been given to terrorist organizations which were actively engaged in terrorist activities. As I say, overtly at this time the LTT were involved in the peace process; although there were, it has to be said, occasional lapses, on the evidence I have heard, on both sides.

- Delivers minimum sentence: “So, at the end of the day, I have to decide on a suitable sentence. I am afraid to say that the nature of the offence, the what I take deliberate breach of the trust of the United Kingdom authorities, the length of time over which the offences were committed, the quantity of goods involved, mean I cannot avoid an immediate prison sentence. I regret that, but I fear that it is necessary. “

(iii) Sentence

Count 1 - 2 years' imprisonment

Count -3 - Concurrent sentence with one year on count 3.

Judges additional comment: “In view of all that has been said about Mr Shanthan and all that he has done, I make it the very shortest that I can, so I can hope that you can resume the humanitarian work that you undoubtedly do for Tamils in this country. They will need your help more now than ever before, perhaps.

“You have already served, I am told, 195 days. You have to serve, in all, a year. I am sure it will seem a long time, but it could have been a great deal longer. That is all I can

assure you of. At the end of that time I am sure you will resume the good work you have always done."

(iv) Comments

Judge is sympathetic to the defendant and wishes that he continues the good work.

D. Her Majesty The Queen v. Prapaharan Thambithurai

Sentencing: 6 months:

Communication from MR Thambithurai's attorney, [53]Mr. Peck is out of town right now, and he asked me to respond to your request. I am attaching a copy of the Information (the charging document), and our Admissions of Fact (which were filed as an exhibit at the sentencing hearing).

The judge has not issued Reasons for Sentencing. Mr. Thambithurai received a sentence of 6 months jail.

Charges:

> Count 1: Prapaharan Thambithurai , between 11th day of March 2008 and the 14th day of March 2008 ncludsive, at or near the City of Vancourver, in the Province of British of Columbia, did, directly or indirectly, collect property, provide or invite a person to provide, or make available property or financial or other related services, knowing that, in whole or in part, they would be used by or would benefit a terrorist group, to wit: the Liberation Tigers of Tamil Eelam (LTTE), contrary to s. 83.03(b) of the Criminal Code.

Sentencing approach:

Pursuant to section 655 of the Criminal Code of Canada, the accused, Prapaharan Thambithurai, by his counsel, admits the following facts against him for the purposes of dispensing with proof thereof at his trial of the charges set forth on dicitment 24958-1, or any amended or substituted version thereof:

ON March 13, 2008, at approximately 8:00 p.m. Thambithurai went to the residence of Sri Thevendram at 7228 Boundary Road in Burnaby. Thambithurai asked him to contribute money for humanitarian aid to help the Tamil people in Sri Lanka but did not mention LTTE. Thevendram gave Thambithurai $600 in $20 bills. Thambithurai then gave him a pledge form bearing serial number 5588 which thevendram filled out, signed and returned to Thambithurai. Thambithurai then gave Thevendram a receipt bearing serial number 3743 for the donated amount.

6. SUMMARY OF OBSERVATIONS

* the national security establishment's reaction to 9/11 provided a legislative climate which created an anti-terrorism material support statutory framework, operating with sentencing guidelines and plea bargaining, that provided excessive discretion to judges

[53] Defence counsel Richard Peck at 604-669-0208, Kathleen Bradley [KBradley@peckandcompany.ca]

and prosecutors, delinking punishment from crime.

* 10 years after 9/11, the recognition of freedom fighters in Libya, and the death of bin Laden, US sentencing only recently has reached an equilibrium with the terrorism-related sentences in UK, Canada, Australia, ...

* the threat of terror should not serve as a vehicle to justify the issuance of sentences which reflect less the dictates of retribution and incapacitation that define the logic of criminal law, and more a political response to a catastrophic event.

* while the sentences in US for terrorism-related crimes have normalized with the international norm, the breadth of discretion which permits grossly disproportionate sentences for these crimes should be constricted, and narrowly tailor to a US response which exists with in the law ..