

ALTERNATIVE APPROACHES TO PURSUING AND DISRUPTING TERRORIST FINANCING

Cambridge International Symposium on Economic Crime

Parallel Session 4a: Pursuing and disrupting terrorist's finance
September 4, 2018 – 13:45

Stefan D. Cassella
Asset Forfeiture Law, LLC

I. INTRODUCTION

Our topic is Pursuing and Disrupting Terrorist Financing

- I want to look at the various ways the Justice and Treasury Departments in the United States have attempted to do that in both judicial and non-judicial proceedings
- And then to step back and ask whether there might be alternatives to Government action
- That is, to look at how it might be possible to enlist and empower private litigants to take on the task of pursuing and disrupting terrorist financing in ways that Governments have been unable or unwilling to do

II. GOVERNMENT ACTIONS

Let's start with what the US Government has been able to do using its law enforcement and regulatory powers and resources

1. Criminal prosecution for providing (or conspiring to provide) material support for terrorism

The first and perhaps most obvious approach is to indict, prosecute and convict a person or entity for providing material support for terrorism

A recent example of that approach is *United States v. Elshinawy*, No. 16-cr-0009-ELH (D. Md. 2018)

The defendant in that case was a newspaper deliveryman of Egyptian descent living in Maryland,

- Over a period of time, he declared his allegiance to ISIS and in return received instructional videos on how to make a bomb and a small amount of money (\$8700) to finance attacks on federal buildings in Baltimore.
- The money came to the US from a computer equipment company in Cardiff, Wales operated by a Bangladeshi national who had gone to Syria to support ISIS, and who directed his employees in Wales to send the money to Elshinawy in the US.

Elshinawy pled guilty to conspiracy to provide material support in violation of 18 U.S.C. § 2339B(a)(1), and was sentenced to 20 years.

So, that's the simple approach:

- Identify the person or persons who are sending or receiving money to be used to undertake a terrorist attack, convict them, and put them in jail
- Without a doubt, that has the effect of disrupting terrorist financing

2. Criminal prosecution for providing (or conspiring to provide) material support with forfeiture of assets as part of the sentence

A second approach takes that a step further

There is a federal statute, 18 U.S.C. § 981(a)(1)(G), that authorizes the forfeiture of all assets, real or personal, tangible or intangible, foreign or domestic, of any person engaged in planning or perpetrating any terrorist act, whether or not the assets were connected in any way to the offense.

- So, if a person is convicted, for example, of providing (or conspiring to provide) material support for terrorism, the court may not only send him to jail for a long time, but may order, as part of his sentence, the forfeiture of all of his property.
- An example of how that has been used was this case, *United States v. Saade*, 2013 WL 6847034 (S.D.N.Y. Dec. 30, 2013).

In *Saade*, two defendants – Orbach and Pouryan -- an Israeli who became a naturalized US citizen and a former US Army interpreter -- were convicted of conspiring to acquire and sell over \$25 million worth of weapons, including anti-aircraft missiles, to the Taliban.

- They were convicted of conspiracy to provide material support to terrorists, 18 U.S.C. § 2339A, and conspiracy to acquire and transfer missiles, 18 U.S.C. § 2332g, and was sentenced to 25 years in prison
- In addition, Pouryan was ordered to forfeit a treasure trove of jewelry and gold and \$13,831.29 in cash pursuant to § 981(a)(1)(G)

He complained that it was unconstitutional to deprive him of property that had no connection to his offense, but the court did not agree.

3. Non-conviction based forfeiture of assets used to finance terrorism

Now, as we all know, it is not always possible to lay hands on the person financing a terrorist attack

- The same statute, however, Section 981(a)(1)(G), can be used as a non-conviction-based forfeiture statute to recover property when there is no conviction for a terrorism-related offense or for anything else
- The Government needs only to identify the property and prove, on a balance of the probabilities, that it is the asset of a person or entity engaged in terrorism
- That the person cannot be apprehended or haled into a US court is no obstacle

A recent example of that, which I mentioned last year here at the Symposium, is a case called *United States v. One Gold Ring with Carved Gemstone, Two Roman Coins, and One Neo-Assyrian Stela*, No. 16-cv-02442 (District of Columbia Dec. 15, 2016)

- In that case, US forces conducted a raid against Abu Sayyaf, leader of ISIS, in Syria in May 2015

- Documents and electronic records that were seized at that time revealed that ISIS was using cultural property to fund its terrorist activity
- The property included items taken from World Heritage sites and other locations in areas that ISIS controls in Syria and Iraq

It was established that ISIS was selling some of these items directly

- And was extorting 20 percent of the sale price from merchants and dealers who were selling items on their own

Now, the records seized in the raid included photographs of four particular items being offered for sale on the international market

- These items included
 - A gold ring from 4th Century B.C. in Syria
 - Two Roman gold coins from 2nd Century A.D.
 - carving containing ancient cuneiform inscriptions from 9th Century BC in Syria

Because the specific items could be identified, the Government was able to bring an NCB forfeiture action against the four items and forfeited them as the assets of ISIS, a terrorist organization

4. Civil Forfeiture for IEEPA

NCB forfeiture actions can be brought under a variety of statutes

- They do not necessarily have to be brought under the terrorism statute even in a terrorism case

For example, in *United States v. Two General Electric Aircraft Engines*, 2018 WL 2926155 (D.D.C. Jun. 11, 2018), the Government filed a civil forfeiture action against two aircraft engines, that were intended to be delivered to a terrorist organization: the Islamic Revolutionary Guard Corps-Qods Force.

- The shipment violated the Iran Sanctions Regulations, which made the property subject to forfeiture under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. § 1701

At the time the action was filed, the engines were in Turkey

- The company that claimed to own the engines contested the forfeiture action,
- but instead of returning them to the United States from Turkey as the court ordered it to do, it shipped them on to China, where they were disassembled and used for parts.
- At which point, the company said, sorry, we can't comply

In response the court ordered the company to pay \$4 million in compensation for the loss of the forfeitable property, plus \$2 million in fines for disobeying the court's repatriation order

5. OFAC / IEEPA Freezing of Terrorist Assets

All of the cases I've discussed so far were brought by the Justice Department as law enforcement actions

Alternatively, the Office of Foreign Asset Control (OFAC), an agency of the Treasury Department, has the authority to freeze or block the assets of designated terrorist organizations,

- In such cases, the assets remain frozen indefinitely without the Justice Department having to commence any formal forfeiture action to extinguish title to the property
- The owner retains title to the property, but the property isn't going anywhere
 - *Holy Land Foundation v. Ashcroft*, 333 F.3d 156, 162-63 (D.C. Cir. 2003) (finding Office of Foreign Asset Control acted in conformance with statutory authority); *Global Relief Foundation, Inc. v. O'Neill*, 315 F.3d 748, 750 (7th Cir. 2002);

These two approaches – freezing and forfeiture -- can be used in tandem

- A case could start out with OFAC freezing the assets and it could then refer the case to the Justice Department to commence a formal NCB forfeiture action

In *United States v. All Funds on Deposit with R.J. O'Brien & Assoc.*, 783 F.3d 607 (7th Cir. 2015), OFAC used its statutory authority to block \$6.2 million in an investment account in Chicago that was held by a person who provided financial support for Al Qaeda.

- The Justice Department then entered the case, and the blocking order was removed to allow the Government to file the forfeiture action under the forfeiture statute for terrorism, 18 U.S.C. § 981(a)(1)(G), and to take control of the account with judicial process.

III. PRIVATE ACTIONS

All of these actions were actions taken by the Government in one way or another

- But there is another way
- And that is to authorize private parties to bring private civil actions to recover damages caused by terrorist organizations
- The law in the US appears to be somewhat unique in permitting such private actions, but there have been quite a few of them in recent years

Here is a partial list of the plaintiffs that have filed such actions:

- Victims of suicide bombings and other terrorist attacks in Israel
- Victims of the September 11 attacks in New York and Washington
- Victims of the Paris café attacks
- Victims of the FARC and other guerilla organizations in Colombia

Here are some of the defendants that have been named in those actions:

- Banks allegedly providing financial services to terrorists
- The Palestinian Authority and the PLO
- Entities (including charities) allegedly funding Al Qaeda and HAMAS
- National governments (Afghanistan, Iran and Israel)
- Corporations allegedly providing material support
- Guerrilla organizations (FARC, ELN)
- Individual members of terrorist organizations

And here are some of the statutes on which they relied for their cause of action:

- Anti-Terrorism Act, 18 U.S.C. § 2333

Allows any US national injured by international terrorism to sue and recover treble damages in federal court

- Alien Tort Statute, 28 U.S.C. § 1350

Allows any **non-US person** to file a tort action in a federal court for violations of the law of nations (also called “customary international law”) including, as a general matter, war crimes and crimes against humanity—crimes in which the perpetrator can be called “*hostis humani generis*, an enemy of all mankind.”

There is a great deal of debate as to whether such private civil actions are effective

- Often, they result in uncollectable default judgments
- And they sometimes conflict with official forfeiture actions brought by the Government
- For example, if the Government convicts a terrorist of a particular act and obtains an order forfeiting his assets, plaintiffs with uncollected judgments arising out of unrelated incidents involving the same defendant may attempt to intervene and use the case to collect their judgment
- This often conflicts with the Government’s desire to apportion the forfeited assets more broadly among all victims of terrorism and not only those who obtained civil judgments in private actions
 - *United States v. Holy Land Foundation for Relief and Development*, 722 F.3d 677 (5th Cir. 2013) (victims of terrorism who have obtained judgments against the defendant terrorist organization are not entitled to use the forfeited funds to satisfy their judgments; claimants must satisfy the requirements of § 853(n) because the Terrorism Risk Insurance Act (TRIA) does not trump forfeiture law);
 - *United States v. All Funds on Deposit with R.J. O’Brien & Assoc.*, 783 F.3d 607 (7th Cir. 2015) (TRIA trumps forfeiture law only if the assets remain

blocked; because OFAC granted DOJ license to file forfeiture action, and Government took possession with an arrest warrant *in rem*, funds were no longer blocked so TRIA doesn't apply);

- *United States v. BNP Paribas, S.A.*, 2015 WL 1962882, *3 (S.D.N.Y. Apr. 30, 2015) (denying TRIA based claim on the ground that the forfeited property was not blocked by OFAC);

Nevertheless, such private actions can supplement official actions by governments and can be useful when, for whatever reason, governments lack the political will to bring such actions on their own.