
MEMORANDUM

From: The Lawfare Project

Re: Legal implications of the BAKA fundraising event for USTOGAZA at Rutgers University

Date: May 11, 2011

NOTE

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The Memo explains how releasing funds raised at Rutgers University, to support USTOGAZA's outfitting of a vessel aimed at breaking the Israeli counter-terror blockade of Gaza, may consist of material support (as defined by 18 U.S.C. § 2339B, and § 953) to a designated Foreign Terrorist Organization, namely Hamas.

The issue is USTOGAZA as much as it is to BAKA, the former is directly connected to IHH which has extensive connections with Hamas (and which may be a designated FTO itself in the near future), and is also works with FGM, which has coordinated with Hamas. The material support statute should be read in accordance with Congressional intent, and is not meant to tie the hands of law enforcement when terrorists and their sympathizers are "smart" enough set up fundraising organizations once, twice and thrice "removed."

Moreover, USTOGAZA has been active throughout the United States, including in the State of New York.¹ As stated on its website, all donations made to USTOGAZA go through one of two New York-based organizations,² since USTOGAZA does not have status as a 501c3 non-profit entity. Tax-deductible donations of \$150 or more are directed to:

¹ The USTOGAZA site currently states that "we have collected donations from \$5 to \$55,000, raising to date over \$300,000 and support from people all over the country, from Maine to Florida, Texas to California, Wisconsin to Alaska **and from New York** back to Michigan, where we return to Detroit on February 25th, for one of two of the largest events to date for the U.S. BOAT TO GAZA, the concert GAZA STRIP TO DETROIT."

<http://ustogaza.org/> [Emphasis added. Last visited February 28, 2011]

² <http://ustogaza.org/donate/> [Last visited February 28, 2011]

Institute for Media Analysis
143 West 4th Street #2F
New York, NY 10012
Attn: Stand for Justice

Contributions of less than \$150, which are stated as not tax-deductible are directed to:

Stand for Justice
PO Box 373
Bearsville, NY 12409

Moreover, USTOGAZA has conducted fundraising events within New York State, and plans to conduct additional such events. USTOGAZA Fundraising Events Held in New York include:

- 1) Fundraising Dinner Cruise around Manhattan. USTOGAZA sailed around Manhattan on August 5, 2010 and claimed to have raised \$50,000³ from that dinner cruise, which began at and returned to the Marco Polo Marina in New York City. <http://ustogaza.org/wp-content/uploads/2010/07/NYFundraiser9.pdf>
- 2) Fundraiser in Woodstock, NY to be held on Thursday. Although its website is not comprehensive, USTOGAZA continues to fundraise in New York, with a fundraiser scheduled for Thursday March 3, 2011 in Woodstock NY. <http://ustogaza.org/events/report-back-from-the-jewish-boat-to-gaza-fundraiser-for-u-s-boat-to-gaza-the-audacity-of-hope/>

Legal implications of the BAKA fundraising event for USTOGAZA at Rutgers University

I. Questions Presented

(1) Whether Rutgers, a state university, may be found criminally liable under federal law [primarily 18 U.S.C. § 2339B] for sponsoring, providing a forum for, and/or otherwise facilitating a fundraising event⁴ conducted by a student organization in order to raise funds to furnish and outfit a vessel that will seek to break Israel's counter-terrorist naval blockade of Gaza and thereby provide material support to Hamas, a designated Foreign Terrorist Organization

³ See Richard Pollock, "'U.S. to Gaza' Fundraising Arm Linked to CIA Traitor Philip Agee" *Pajamas Media*, December 2, 2010. <http://pajamasmedia.com/blog/us-to-gaza-fundraising-arm-linked-to-cia-traitor-phillip-agee/>

⁴ Rutgers provided a forum in the form of the university-owned Busch Campus Center as well as provided \$2,500 in funding derived from mandatory student activity fees for the fundraising event at issue.

(FTO) and the target of Israel's counter-terror blockade, regardless of stated humanitarian purposes to the contrary.

(2) Whether Rutgers may be found criminally liable under 18 U.S.C. § 2339B and/or 18 U.S.C. § 953 for releasing funds collected at a student event when Rutgers knows, or should reasonably suspect, that said funds would, in whole or in part, be used to further the agenda of a designated FTO so as to constitute material support, in light of the Supreme Court's ruling in *Holder v. Humanitarian Law Project*.⁵

II. Short Answers

(1) Rutgers may be held liable under 18 U.S.C. § 2339B for the provision of material support to a FTO if it is shown that Rutgers knew or should have known that the event was meant to raise funds that would materially assist a terrorist organization. Federal case law has indicated that it is not necessary that money or other material support be directly transferred to the FTO for liability to attach pursuant to 18 U.S.C. § 2339B. Since the agenda of the so-called "freedom flotillas" is public knowledge, it is conceivable that the university could be held to have reasonably known that the event could ultimately aid the FTO Hamas, especially due to concerns raised prior to the event. Moreover, any defense based on ignorance would likely not be applicable to similar events held henceforth.

(2) Should Rutgers release any funds collected after being informed that the funds may be used to benefit the activities and political position of a designated FTO, it is likely that Rutgers will be acting in violation of 18 U.S.C. § 2339B because event proceeds will be used to furnish and

⁵ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

outfit a vessel that will seek to break Israel's counter-terrorist naval blockade of Gaza and thereby provide material support to Hamas, and 18 U.S.C. § 953 because USTOGAZA will be in correspondence with foreign governments and foreign officials in order to influence foreign government policies regarding the blockade.

III. Statement of Facts

BAKA, a student group at Rutgers University,⁶ applied for and received \$2,500 from the university's student run allocations committee (RUSA) to hold a fundraiser for USTOGAZA on the university's Piscataway campus,⁷ which it held on November 4, 2010, and featured Colonel Ann Wright, Adam Shapiro, Fida Qishta, and Nada Khader as "special guests."⁸

USTOGAZA is a "coalition of organizations and a grassroots campaign of individuals who together are joining to launch a U.S. BOAT TO GAZA," in order to break Israel's counter-terror naval blockade of the Gaza Strip, to be named *The Audacity of Hope*.⁹ As USTOGAZA states on its website, "When the U.S. boat, THE AUDACITY OF HOPE, sails it will take its place in the next Freedom Flotilla to participate in the great international effort to break the blockade of Gaza and to end the occupation of Palestine."¹⁰

⁶ Rutgers University is a public school. *Who We Are*, Rutgers, The State University of New Jersey, <http://www.rutgers.edu/about-rutgers/who-we-are> (last visited Jan. 6, 2011).

⁷ Press Release, Andrew Getraer, Rutgers Hillel, Rutgers University Organization Funding Illegal Gaza Flotilla, (Nov. 1, 2010), <http://democracy-project.com/?p=4552> [hereinafter Rutgers Hillel Press Release].

⁸ The flyer for the event is available at *Rutgers Fundraiser for US Boat to Gaza*, Gaza Freedom March, http://gazafreedommarch.org/cms/en/Events/View/10-11-04/Rutgers_Fundraiser_for_US_Boat_to_Gaza.aspx (last visited Feb. 15, 2011). Note that the BAKA Facebook page for the event is more detailed, and mentions that Qishta is a filmmaker and not a panelist. *USTOGAZA Fundraiser*, Facebook, <http://www.facebook.com/event.php?eid=158021590898212> (last visited Feb. 15, 2011).

⁹ *Who We Are*, USTOGAZA, <http://ustogaza.org/about/who-we-are/> (last visited Jan. 6, 2011). USTOGAZA is also known as "U.S. Boat to Gaza," and the two designations are used interchangeably.

¹⁰ *Id.*

The naval blockade of the Gaza Strip has been put in place by the Israeli Government to limit Hamas's access to weapons.¹¹ Hamas is a Foreign Terrorist Organization (FTO) as designated by the U.S. Department of State.¹² The blockade was instituted and is maintained in accordance with international law,¹³ including principles set forth in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*¹⁴ and other sources of customary international law.¹⁵ Israel is a friend and ally of the United States.¹⁶ The U.S. government acknowledges Hamas's political control of Gaza¹⁷ but maintains that Hamas is a terrorist organization and accordingly does not recognize Hamas as a legitimate government or peace partner.¹⁸ The U.S. Department of State strongly urges citizens not to enter the Gaza Strip, and advises that "[t]he ability of the U.S. Government to assist U.S. citizens in Gaza is extremely limited," underscoring Hamas' effective control of Gaza, while the U.S. Government "does not permit its personnel to enter the Gaza Strip."¹⁹ The White House Press Secretary has publicly

¹¹ *MFA Legal Expert Sarah Weiss Maudi on the Legal Aspects of Gaza Aid*, Israel Ministry of Foreign Affairs (May 26, 2010), http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Legal_aspects_Gaza_aid_26-May-2010.htm.

¹² *Foreign Terrorist Organizations*, U.S. Dep't of State (Nov. 24, 2010), <http://www.state.gov/s/ct/rls/other/des/123085.htm>.

¹³ The Israeli naval blockade of Gaza is legal under international law. *See Key Legal Facts Relating to the Confrontation Between the M.S. Mavi Marmara and Israeli Forces on May 31st, 2010*, The Lawfare Project (June 18, 2010), <http://www.thelawfareproject.org/166/key-legal-facts-relating-to-the-confrontation> [hereinafter *Key Legal Facts*].

¹⁴ Specifically, points 93-104 thereof. *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, International Review of the Red Cross (June 12, 1994), <http://www.icrc.org/ihl.nsf/FULL/560?OpenDocument>. *See also Key Legal Facts*, *supra* note 10.

¹⁵ *See generally* The Turkel Commission, *The Public Commission to Examine the Maritime Incident of 31 May 2010: Report Part I*, January 2010 Chapter A, at 25-112, available at <http://www.turkel-committee.gov.il/files/wordocs/8808report-eng.pdf> [hereinafter *Report Part I*].

¹⁶ *Netanyahu: U.S., Israel Alliance is Not Faltering*, FoxNews.com (July 11, 2010), <http://www.foxnews.com/politics/2010/07/11/netanyahu-change-policy-israel/>.

¹⁷ *See Obama Announces New Initiatives for West Bank, Gaza*, U.S. Dep't of State (June 9, 2010), <http://www.america.gov/st/peacesec-english/2010/June/20100609183547SBlebahC0.3736187.html>.

¹⁸ *Remarks by Secretary Clinton, French Foreign Minister Kouchner, America.gov* (Feb. 5, 2009), <http://www.america.gov/st/texttrans-english/2009/February/20090205181025xjsnommis0.2475397.html> (Secretary Clinton: "... I would only add that our conditions respecting Hamas are very clear: We will not in any way negotiate with or recognize Hamas until they renounce violence, recognize Israel, and agree to abide by, as the foreign minister said, the prior agreements entered into by the PLO and the Palestinian Authority.").

¹⁹ *Israel, the West Bank and Gaza: Country Specific Information*, Travel.State.Gov (Nov. 30, 2010), http://travel.state.gov/travel/cis_pa_tw/cis/cis_1064.html.

stated, “We urge all those wishing to deliver goods to do so through established channels so that their cargo can be inspected and transferred via land crossings into Gaza.”²⁰ The U.S. Department of State noted that, while it is concerned with the humanitarian situation in Gaza, “Israel has a very legitimate interest in being able to inspect and, to some extent, control the flow of materials into Gaza to make sure that that doesn’t include further rockets, missiles, arms that pose a real threat to Israeli citizens. Israel feels that the blockade is the most effective way of doing that. We understand that.”²¹

USTOGAZA is affiliated with Stand for Justice, a registered New York corporation, and the non-profit Institute for Media Analysis.²² According to USTOGAZA’s website, it is working to organize *The Audacity of Hope* (hereinafter “USTOGAZA vessel”), a U.S.-flagged ship scheduled to sail in the next international flotilla to Gaza, Freedom Flotilla II.²³ Freedom Flotilla II “solidarity ships” will be sailing to the Gaza Strip next spring.²⁴ The International Middle East Media Center (IMEMC) reported that, during a press conference in Rome on December 13, 2010, “Flotilla organizers said that activists from twenty countries, mainly from Europe, will be participating in the convoy [Freedom Flotilla II].”²⁵ USTOGAZA has stated that *The Audacity of Hope* will “take its place in the next Freedom Flotilla,” in which it will join “a flotilla of ships

²⁰ *White House on Israel’s Announcement on Gaza*, America.gov (June 20, 2010), <http://www.america.gov/st/texttrans-english/2010/June/20100621130216eaifas0.1754267.html>.

²¹ Philip J. Crowley, Assistant Secretary, U.S. Dep’t of State, *Daily Press Briefing* (June 3, 2010), <http://www.state.gov/r/pa/prs/dpb/2010/06/142651.htm>. Mr. Crowley used the term “legitimate” six times in his briefing, five of which were in reference to Israeli interests or concerns. *Id.*

²² USTOGAZA provides that donations under \$150 can be made to Stand for Justice, and tax deductible donations of \$150 or more can be made to the Institute for Media Analysis (with “Stand for Justice” in the memo line).²² *Donate*, USTOGAZA, <http://ustogaza.org/donate/> (last visited Jan. 6, 2011). *See also Institute for Media Analysis Inc.*, TaxExemptWorld.com, <http://www.taxexemptworld.com/organization.asp?tn=135095> (last visited Jan. 6, 2011).

²³ *Who We Are*, *supra* note 4. Note: “Freedom Flotilla II” is also referred to as “Freedom Flotilla 2.”

²⁴ *Freedom Flotilla 2 to Sail to Gaza Next Spring*, IMEMC, <http://www.imemc.org/article/60162> (last visited Jan. 6, 2011).

²⁵ *Id.*

from Europe, Canada, India, South Africa and parts of the Middle East.”²⁶ As USTOGAZA organizer Ann Wright has explained, the ship “will be in the name of the people of the United States.”²⁷ USTOGAZA states that its “mission is to challenge U.S. foreign policy and affirm the universal obligation to uphold international law and human rights.”²⁸ The group plans to purchase a boat,²⁹ use the boat to deliver to Gaza ‘humanitarian aid’³⁰ as well as other materials including “construction materials,”³¹ since “vital building materials and other supplies are banned.”³²

The Free Gaza Movement (FGM) is an umbrella organization responsible for coordinating past flotillas aimed at breaking the blockade of Gaza and/or delivering humanitarian aid.³³ “The organization began dispatching flotillas to the Gaza Strip in 2008, and was behind the dispatching of eight flotillas, five of which succeeded in reaching the Gaza Strip (in August

²⁶ *Statement*, USTOGAZA, <http://ustogaza.org/about/statement/> (last visited Jan. 6, 2011).

²⁷ *U.S. Boat to Gaza – Audacity of Hope*, YouTube (Dec. 21, 2010), http://www.youtube.com/watch?v=Yib8_3CIKy4.

²⁸ *Who We Are*, *supra* note 6.

²⁹ *As U.S. Activists Prepare Boat to Gaza, Israel Threatens To Use Snipers, Dogs*, USTOGAZA (Nov. 1, 2010), <http://ustogaza.org/as-u-s-activists-prepare-boat-to-gaza-israel-threatens-to-use-snipers-dogs/>.

³⁰ Although the “Statement” and “Who We Are” pages on USTOGAZA’s website do not mention the goal of providing humanitarian aid, USTOGAZA’s original website states that USTOGAZA is “working to purchase a boat, secure a sailing crew, gather humanitarian aid, and set sail for Gaza.” US TO GAZA, <http://ustogaza.blogspot.com> (last visited Jan. 6, 2011). Additionally, the flyer for USTOGAZA’s most recent fundraiser, which took place on January 22, 2011 in Dearborn, Michigan, provides the following:

Our Mission is twofold: To break the illegally imposed blockade on Gaza and to send much-needed humanitarian aid to the impoverished people living within an area now known as an “open- air prison”. The boat, The Audicity [sic] Of Hope, which is organized by the group called US BOAT TO GAZA, is set to sail in March; however, we have not yet reached out goal of \$100,000 and we need your help!!!!

Sail to Break the Siege on Gaza Fund Raising Dinner, USTOGAZA, <http://ustogaza.org/latest/sail-to-break-the-siege-on-gaza-fund-raising-dinner/> (last visited Jan. 25, 2011) [hereinafter *Sail to Break the Siege*]. See also Nima Shirazi, ‘Hope’ Floats: Hey Hollywood, Time To Put Your Money Where Your Morality Is, USTOGAZA (July 14, 2010), <http://ustogaza.org/uncategorized/hope-floats-hey-hollywood-time-to-put-your-money-where-your-morality-is-nima-shirazi-wide-asleep-in-america-07-14-10/>.

³¹ *Between the Lines: Groups Raise Funds to Launch U.S.-Gaza Aid Ship*, Indybay (Sept. 27, 2010), <http://www.indybay.org/newsitems/2010/09/27/18660041.php>.

³² *Statement*, *supra* note 23.

³³ *A Simple Idea*, Free Gaza Movement (Jan. 5, 2009), <http://www.freegaza.org/en/boat-trips>.

2008, in October 2008, in November 2008, and two in December 2008)...”³⁴ including the May 31st, 2010 flotilla, organized in partnership³⁵ with the European Campaign to End the Siege on Gaza (ECESG) and Insani Yardim Vakfi (IHH),³⁶ the latter an organization banned by the State of Israel since 2008 for being part of “the global network which assists Hamas in raising funds.”³⁷ On June 21, 2010, a bipartisan group of 87 U.S. Senators sent a letter to the President expressing concern regarding IHH, Turkey and Iran, and “recommend[ing] that your administration consider whether the IHH should be put on the list of foreign terrorist organizations, after an examination by the intelligence community, the State Department, and the Treasury Department.”³⁸ When asked about the matter on July 7, 2010, a State Department Spokesman stated that, “I believe we’re looking at the IHH, but it’s a long process to designate something – an organization a Foreign Terrorist Organization and there’s nothing to announce on that.”³⁹

The USTOGAZA vessel will be part of a Free Gaza Movement flotilla designed to sail in late May, 2011.⁴⁰ The Free Gaza Movement’s Gaza Advisory Council includes Gaza City

³⁴ *Report Part 1*, *supra* note 12, at 204.

³⁵ *Palestine Our Route Humanitarian Aid Our Load Flotilla Campaign Summary Report*, Insani Yardim Vakfi, www.ihh.org.tr/uploads/2010/insaniyardim-filosu-ozet-raporu_en.pdf (last visited Feb. 15, 2011).

³⁶ Richard Spencer, *Gaza Flotilla: The Free Gaza Movement and the IHH*, *Telegraph* (May 31, 2010), <http://www.telegraph.co.uk/news/worldnews/middleeast/israel/7790919/Gaza-flotilla-the-Free-Gaza-Movement-and-the-IHH.html>.

³⁷ *See Defense Minister Signs Order Banning Hamas-Affiliated Charitable Organizations*, Israel Ministry of Foreign Affairs (July 7, 2008), <http://www.mfa.gov.il/MFA/Government/Communiques/2008/Defense+Minister+signs+order+banning+Hamas-affiliated+charitable+organizations+7-Jul-2008.htm>. IHH is the 36th and last organization listed in the order.

³⁸ *See Bipartisan Group Of 87 Senators, Led by Reid And McConnell, Send Letter To President Obama In Support Of Israel's Right To Self-Defense*, *Democrats.Senate.Gov.* (June 23, 2010), <http://democrats.senate.gov/newsroom/record.cfm?id=325856> (the entire text of the June 21 letter is reproduced therein).

³⁹ Mark C. Toner, Acting Dep’t Spokesman, *Daily Press Briefing*, U.S. Dep’t of State (July 7, 2010), <http://www.state.gov/r/pa/prs/dpb/2010/07/144116.htm>.

⁴⁰ At the February 2011 meeting of the International Coalition of the Freedom Flotilla II, the last two weeks of May were identified as the sailing date for the flotilla. *See The Freedom Flotilla 2 Will Sail to Gaze During the Last Two Weeks of May 2011*, *Shiptogazasweden’s Blog*, (Feb. 7, 2011),

Legislative Council member Jamal Khoudary and Dr. Eyad Sarraj of the Gaza Community Mental Health Program (GCMHP).⁴¹ USTOGAZA has stated that it will be working with Palestinian groups and individuals, including the Popular Committee Against Siege (PCAS), Khoudary, and Sarraj.⁴² The “pro-Hamas”⁴³ PCAS coordinates its activities with Hamas⁴⁴ and has organized past blockade-breaking attempts at Hamas’s direction,⁴⁵ including the May 25, 2010 Flotilla organized by FGM in coordination with IHH.⁴⁶ Khoudary, the chairman of PCAS,⁴⁷ is a former Hamas minister,⁴⁸ a current Hamas-endorsed member of the Palestinian Legislative Council (PLC),⁴⁹ and has expressed support for Hamas as the legitimate representative of the

<http://shiptogazasweden.wordpress.com/2011/02/07/the-freedom-flotilla-2-will-sail-to-gaza-during-the-last-two-weeks-of-may-2011/>.

⁴¹ *Board of Advisors*, Free Gaza Movement, (Oct. 8, 2009), <http://www.freegaza.org/en/about-us/who-we-are/1089-advisors>. Note: that USTOGAZA will be part of a Free Gaza Movement flotilla has been removed from USTOGAZA’s website.

⁴² Note: the page providing this information has been removed from USTOGAZA’s website.

⁴³ *Israel Warns Hamas Over Protest*, Al-Jazeera (Feb. 25, 2008), <http://english.aljazeera.net/news/middleeast/2008/02/200852514151537648.html>.

⁴⁴ See, e.g., *id.* (Hamas schools close to allow students to join PCAS protest).

⁴⁵ *An interview with MP Jamal El-Khoudary on Al Jazeera Channel*, YouTube (Dec. 21, 2010), http://www.youtube.com/watch?v=2Wx9t9Z_Jhs. See, e.g., *Hamas: Israel on Alert for Asia One Aid Ship*, Maan News Agency (Dec. 27, 2010), <http://maannews.net/eng/ViewDetails.aspx?ID=345364> (“Hamas officials in Gaza told the coastal enclave’s Popular Committee Against the Siege on Sunday to prepare for the arrival of a South-Asian convoy bringing aid via sea . . .”). Similarly, in 2008, Khoudary issued a public statement that the “successful arrival of the dignity boat confirms the Palestinian people’s right to use their territorial waters to transport goods and passengers [sic] to break the Israeli unjust siege.” *Hamas: The Arrival of the Dignity Boat in Gaza is a Triumph for the Palestinians*, Palestinian Information Center (Oct. 29, 2008), <http://www.palestine-info.co.uk/en/default.aspx?xyz=U6Qq7k%2bcOd87MDI46m9rUxJEPMO%2bi1s7m6JVx3j59aEIFUi%2fRX7RaIBwj1t%2bm%2fpanbbR0dvu0CbWz8OP3rrp025tu6OudKc5xDsFQ6llur18ixuKrPFzr2rArPJubQNEekvTIVESowE%3d>.

⁴⁶ In a May 25, 2010 press statement, Khoudary said that the delayed departure of “Fleet of Freedom” (i.e., Freedom Flotilla I) was “due to tactical purposes”—that is, “coordination between the nine ships, especially as they contains [sic] cargo ships and other ships for transporting passengers in addition to the differences in the speed and mechanism of action . . .” *El-Khoudary: “Modifying Schedule of “Fleet of Freedom” Due to Tactical Purposes,”* Free Gaza Movement (May 25, 2010), <http://www.freegaza.ps/en/more.php?view=79YOcy0nNs3Du69tjVnyyumlu1jfxPKNuunzXkRpKQNzUpe8TTTG>. Note: the words “Popular Committee Against Siege” and what appears to be PCAS’s logo appear at the top of this article, which is hosted on Free Gaza Movement’s website.

⁴⁷ *PCAS: Libyan Ship Sailed to Gaza Carrying 3,000 Aid Tons*, Free Gaza Movement (Nov. 25, 2008), <http://www.freegaza.org/he/home/56-news/543-pcas-libyan-ship-sailed-to-gaza-carrying-3-thousand-aid-tons>.

⁴⁸ *The Gaza Flotilla: A Collapse of Israel’s Political Firewall*, Reut Institute (Aug. 2010), available at <http://www.reut-institute.org/gazaflotillacasestudy.pdf>.

⁴⁹ Ken Ellingwood, *Premiership Offered to Hamas Leader*, L.A. Times (Feb. 2, 2006), <http://www.almubadara.org/new/edetails.php?id=793>.

Palestinians,⁵⁰ though he was elected in 2006 as an independent⁵¹ and is not named in the Treasury Department's list of PLC members elected on the party slate of a FTO.⁵² Sarraj founded GCMHP and currently serves on its board.⁵³ GCMHP "welcomed" comments by Hamas leader Ismael Haniyeh, in which Haniyeh stated that Hamas weapons would be used for "occupation resistance."⁵⁴ Sarraj also advocates for international recognition of Hamas.⁵⁵

USTOGAZA is also on the steering committee of Freedom Flotilla II, and is "part of the international team planning for the next mission."⁵⁶ The international team includes IHH, the European Campaign to End the Siege of Gaza (ECESG), and the Free Gaza Movement.⁵⁷ Together, the groups reportedly plan to bring "thousands of tons of building materials"⁵⁸ to Hamas controlled Gaza. Hamas has been found to use building materials for terrorist activities, such as constructing bunkers for Hamas terrorists and manufacturing rockets with which to

⁵⁰ *Gaza MP's Appeal to Westminster*, inthenews.co.uk (Mar. 21, 2009), [http://www.inthenews.co.uk/comment/world/middle-east/gaza-mp-s-appeal-to-westminster-\\$1281890.htm](http://www.inthenews.co.uk/comment/world/middle-east/gaza-mp-s-appeal-to-westminster-$1281890.htm).

⁵¹ See *Central Elections Commission – Palestine*, The Second PLC Elections-2006 (Feb. 15, 2006), http://www.elections.ps/pdf/PLC_2006_members_in_alphabetical_order_-EN.pdf

⁵² See *PLC List*, U.S. Dep't of the Treasury (Apr. 12, 2006), http://www.treasury.gov/resource-center/sanctions/Terrorism-Proliferation-Narcotics/Documents/plc_list.pdf.

⁵³ *Dr. Eyad El Sarraj Received International Award in Psychiatry for the Year 2010*, Free Gaza Movement (March 26, 2010), <http://www.freegaza.org/en/home/56-news/1156-dr-eyad-el-sarraj-received-international-award-in-psychiatry-for-the-year-2010->.

⁵⁴ *Gaza Community Health Programme Appraises Hamas the Singularity of the Declarations Regarding PA and Call for National Unity*, Gaza Community Mental Health Programme (Aug. 15, 2005), http://www.gcmhp.net/File_files/press15Aug2k5.html.

⁵⁵ *Mideast Peace Talks Stir Hope But Few Illusions*, CNN Politics (Sept. 02, 2010), http://articles.cnn.com/2010-09-02/politics/mideast.talks.outlook_1_peace-talks-top-foreign-policy-goals-direct-talks/3?_s=PM:POLITICS.

⁵⁶ *Update*, USTOGAZA, <http://ustogaza.org/we-will-keep-coming-until-the-illegal-blockade-of-gaza-and-the-occupation-of-palestine-ends/> (last visited Dec. 31, 2010).

⁵⁷ *Freedom Flotilla II*, European Campaign to End the Siege on Gaza (June 2, 2010), <http://savegaza.eu/eng/index.php?id=434>.

⁵⁸ *The Freedom Flotilla is Expected to Set Sail During the Spring of 2011*, European Campaign to End the Siege on Gaza (Nov. 11, 2010) <http://www.savegaza.eu/eng/index.php?id=512>. See also *Gaza TV News, Freedom Flotilla II to Set Sail During the Spring of 2011*, Facebook (Feb. 16, 2011), http://www.facebook.com/note.php?note_id=187629534610876.

attack civilians.⁵⁹ In addition, Hamas appropriates much of the aid that enters Gaza and sells it for profit.⁶⁰

Connections between Freedom Flotilla II's international team and designated FTO Hamas are extensive. The U.S. Department of State has stated that, while IHH has not yet been designated as an FTO, "We know that IHH representatives have met with senior Hamas officials in Turkey, Syria, and Gaza over the past three years. That is obviously of great concern to us."⁶¹ According to the U.S. Treasury Department, IHH is "part of a Saudi-based, Hamas-created umbrella group of Muslim charities called Union of Good,"⁶² created "to transfer funds to the terrorist organization" via "a web of charitable organizations."⁶³ The Treasury Department has stated that "[i]n addition to providing cover for Hamas financial transfers, some of the funds transferred by the Union of Good have compensated Hamas terrorists by providing payments to the families of suicide bombers," and that "[t]he Union of Good's executive leadership and board of directors includes Hamas leaders."⁶⁴ The Union of Good was designated a FTO in 2008 by the Treasury Department.⁶⁵

⁵⁹ *Behind the Headlines: The Israeli Humanitarian Lifeline to Gaza*, Israel Ministry of Foreign Affairs (May 25, 2010), http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Israeli_humanitarian_lifeline_Gaza_25-May-2010.htm.

⁶⁰ Roee Nahmias, *Report: Hamas Stealing Aid Supplies to Sell to Residents*, Ynetnews (Jan. 6, 2009), <http://www.ynetnews.com/articles/0,7340,L-3651783,00.html>.

⁶¹ Philip J. Crowley, Assistant Secretary, U.S. Dep't of State, *Daily Press Briefing* (June 2, 2010), <http://www.state.gov/r/pa/prs/dpb/2010/06/142591.htm>.

⁶² Carol Migdalovitz, *Israel's Blockade of Gaza, The Mava Marmara Incident, and Its Aftermath*, Congressional Research Service (June 16, 2010), available at <http://fpc.state.gov/documents/organization/145109.pdf> [hereinafter Migdalovitz, *Israel's Blockade*].

⁶³ *Union of Good*, U.S. Dep't of the Treasury (Feb. 2, 2009), <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-union-of-good.aspx>.

⁶⁴ *Id.*

⁶⁵ *See Treasury Designates the Union of Good*, U.S. Dep't of the Treasury (Nov. 12, 2008), <http://www.treasury.gov/press-center/press-releases/Pages/hp1267.aspx>.

Furthermore, David Cohen, recently nominated by President Obama⁶⁶ to replace Stuart Levey as Under Secretary of the Treasury for Terrorism and Financial Crimes, and former U.S. Treasury Assistant Secretary for Terrorist Financing, has said that IHH provides “material assistance” to Hamas.⁶⁷ A list of contributions on IHH’s website reveals that IHH gave millions of dollars in cash to Hamas officials at the Gaza Health Ministry.⁶⁸ At a fundraiser for IHH, a Hamas official stated, “The donations you sent us through aid agencies are more valuable to us than our demolished homes.”⁶⁹ At the same IHH function, Hamas official Abu Haris Mustafa stated, “[The] war is not over yet. . . . This war will not end until [the] embargo is lifted and [the] Rafah border gate is wide open.”⁷⁰ Leaders of IHH met with Hamas leaders following the May 2010 flotilla to Gaza, in which IHH participated.⁷¹ At the meeting, Hamas thanked IHH for its help, and IHH President Yildirim promised to “make [the] embargo meaningless by bringing aid to Palestine in ships.”⁷²

The European Campaign to End the Siege of Gaza also has connections to Hamas. As reported by the Dutch newspaper *De Telegraaf*, an intelligence source stated that one of ECESG’s founders, Amin Abu Rashed,⁷³ is a “top official in the Hamas terror organization” and

⁶⁶ See Office of the Press Secretary, *President Obama Announces More Key Administration Posts*, The White House (Jan. 24, 2011), <http://www.whitehouse.gov/the-press-office/2011/01/24/president-obama-announces-more-key-administration-posts>.

⁶⁷ *Cable: U.S. Warned Turkey on Iran Trade, Gaza-linked Group*, NOW Lebanon (Dec. 7, 2010) <http://www.nowlebanon.com/NewsArchiveDetails.aspx?ID=221463>.

⁶⁸ *What Has IHH Been Doing for Gaza*, Insani Yardim Vakfi, <http://www.ihh.org.tr/gazze-icin-neler-yapiyoruz/en/> (last visited Dec. 7, 2010).

⁶⁹ *‘We Will Never Surrender,’* Insani Yardim Vakfi, <http://www.ihh.org.tr/nobet-yerimizi-asla-terketmeyecegiz/en/> (last visited Dec. 7, 2010).

⁷⁰ *Id.*

⁷¹ *Haniyeh Thanks Palestine Convoy*, Insani Yardim Vakfi, <http://www.ihh.org.tr/12692/en/> (last visited Dec. 7, 2010).

⁷² *Id.*

⁷³ *European Campaign Appeals to Libya to Insist on Boat Reaching Gaza*, European Campaign to End the Siege on Gaza (Apr. 18, 2010), <http://savegaza.eu/eng/index.php?id=338>.

“leader of Hamas in the Netherlands.”⁷⁴ The Palestinian Return Centre (PRC) is listed as the first of thirty-four NGOs and civil society organizations across Europe that form the ECESG,⁷⁵ and ECESG’s Chair, Arafat Shoukri, serves as executive director of PRC.⁷⁶ PRC “was founded and is managed by former Hamas members and is linked to the ‘Union of Good’ network of Hamas in the UK.”⁷⁷ Additionally, in an interview posted on the Muslim Brotherhood’s website, Shoukri stated, “ECESG delegations have met with Hamas representatives during our visits to Gaza.”⁷⁸

The Free Gaza Movement has had more than incidental interaction with Hamas. As Israeli Deputy Foreign Minister Daniel Ayalon has stated, “The organisers [of the Free Gaza Movement] are well-known for their ties with global Jihad, al-Qaeda and Hamas,” and that “[t]hey have a history of arms smuggling and deadly terror.”⁷⁹ Key organizers of the Free Gaza Movement, Adam Shapiro, and Huwaida Arraf,⁸⁰ were previously among the founding members of the International Solidarity Movement (ISM). In an event held at Duke University on October 15, 2004, Arraf, reportedly, not only “defended the terrorist activities of Hamas and the [FTO] Popular Front for the Liberation of Palestine” but acknowledged “that the ISM cooperates with

⁷⁴ English translation is available at *Netherlands: Dutch Hamas Leader One of Gaza Flotilla Organizers*, Islam in Europe (June 2, 2010), <http://islamineurope.blogspot.com/2010/06/netherlands-dutch-hamas-leader-one-of.html#more>. For the original Dutch article, see Bart Olmer, *Hollandse Hamasleider was erbij*, Telegraaf (June 2, 2010), <http://www.telegraaf.nl/binnenland/article6841211.ece>.

⁷⁵ *NGOs Forming the Campaign*, European Campaign to End the Siege on Gaza (July 26, 2010), <http://www.savegaza.eu/eng/index.php?view=13>.

⁷⁶ Shoukri, Dr. Arafat (Palestine, UK), Free Gaza Movement, <http://www.freegaza.org/en/boat-trips/passenger-lists/59-third-trip-to-gaza/227-shoukri-dr-arafat-palestine-uk> (last visited Dec. 14, 2010).

⁷⁷ *The Gaza Flotilla: A Collapse of Israel’s Political Firewall*, Reut Institute (Aug. 2010), <http://www.reut-institute.org/gazaflotillacasestudy.pdf>.

⁷⁸ Arafat Shoukri: “Conditions Are Ripe to Make This Flotilla the Tipping Point,” IKHWANWEB: The Muslim Brotherhood Official Website (Apr. 25, 2010), <http://www.ikhwanweb.com/article.php?id=24485>.

⁷⁹ *Profile: Free Gaza Movement*, BBC News (June 1, 2010), <http://www.bbc.co.uk/news/10202678>.

⁸⁰ Muaz Shabandri, *Freedom Flotilla to Set Sail for Gaza Again*, Khaleej Times Online (Oct. 7, 2010), http://www.khaleejtimes.com/DisplayArticleNew.asp?section=theuae&xfile=data/theuae/2010/october/theuae_october173.xml; *Meet With Huwaidi Arraf, Co-Founder of FGM, Dubai This*, PNGOF, <http://www.pngof.org/2010/07/06/meet-with-huwaida-arraf-co-founder-of-fgm-dubai-this/> (last visited Feb. 15, 2011).

the terror organizations Hamas and Islamic Jihad, [and] encouraged students to join the group and instructed them on how to enter Israel surreptitiously and how to deal with possible arrest and deportation.”⁸¹

Another ISM figure, Richard David Hupper, a U.S. citizen, was sentenced to 46 months in prison and a \$15,000 fine on August 25, 2008 after he pled guilty to one count of providing material support to Hamas, in violation of 18 U.S.C. § 2339B.⁸² During numerous trips to the Middle East, Hupper met and worked with individuals in the ISM and “gradually became interested in assisting Hamas.”⁸³ Hupper “became friendly with a major figure in the ISM and a suspected Hamas member” and, on several occasions over an approximate two-year-period, Hupper provided money “with knowledge that the funds he gave were going directly to Hamas.”⁸⁴ Moreover, a senior Islamic Jihad terrorist, Shadi Sukiya, was arrested while hiding in ISM’s Jenin office in 2003.⁸⁵ In its communiqué regarding the arrest, the Israel Ministry of Foreign Affairs specifically noted that, not only was Sukiya hiding at the ISM office, but “[t]wo foreign women activists of the organization helped Sukiya hide from IDF forces.”⁸⁶ More generally, ISM “operates within the framework of the FGM” and “has adopted the goal of supporting Palestinian popular resistance activities and opposing Israeli policy in the West Bank and Gaza Strip.”⁸⁷

⁸¹ Eric Adler & Jack Langer, *The Intifada Comes to Duke, Commentary*, Jan. 2005, at 56-58 (available for purchase and to subscribers at <http://www.commentarymagazine.com/viewarticle.cfm/the-intifada-comes-to-duke-9841>).

⁸² 2009 INCSR: *Law Enforcement Cases*, U.S. Dep’t of State (Feb. 27, 2009), <http://www.state.gov/p/inl/rls/nrcrpt/2009/vol2/116549.htm>.

⁸³ *Id.*

⁸⁴ *Id.* Transfers of funds were made in person and via Western Union, and these funds were to be used by Hamas to assist the families of Israeli-imprisoned Hamas members, as well as for other purposes. *Id.*

⁸⁵ *Senior Islamic Jihad Terrorist Arrested While Hiding in the Offices of the International Solidarity Movement in Jenin*, Israel Ministry of Foreign Affairs (Mar. 27, 2003), <http://www.mfa.gov.il/MFA/Government/Communiques/2003/Senior%20Islamic%20Jihad%20terrorist%20arrested%20while%20hidi>.

⁸⁶ *Id.*

⁸⁷ *Report Part I*, *supra* note 15, at 204.

In addition, FTO Hamas sent a personal invitation to the Free Gaza Movement in 2007, encouraging the organization to “help lift the siege.”⁸⁸ The letter asked that the organization “advise [Hamas] of the prospective dates of [the] trip and the names of the persons coming, in order to facilitate the necessary arrangements for [the] trip.”⁸⁹ Following the arrival of Free Gaza Movement members to Gaza in August 2008, the activists met with Hamas leaders – including Prime Minister Haniyeh – at a photographed ceremony, at which Hamas presented the activists with medals.⁹⁰ Hamas also bestowed honorary Palestinian citizenship upon Jeff Halper, one of the trip’s organizers.⁹¹ Participants in the second Free Gaza Movement ship to Gaza in October 2008 were similarly greeted by Hamas police and met with top Hamas officials, who thanked them and presented them with gifts and Palestinian passports.⁹²

IHH, ECESG, and the Free Gaza Movement all participated in the organization and execution of the May 2010 flotilla.⁹³ Prior to the May 2010 flotilla, Hamas made “receiving efforts,” including plans to accompany the boats with unarmed Hamas naval police, to protect foreigners upon arrival, to find them accommodations, and to coordinate the unloading and distribution of cargo.⁹⁴ Journalists who wished to ride in the boats registered with Hamas’s

⁸⁸ Martha O’Connor, *Smoking Gun: The Free Gaza Movement and Hamas*, American Thinker (June 13, 2010), http://www.americanthinker.com/2010/06/smoking_gun_the_free_gaza_move.html.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ Richard Silverstein, *The Free Gaza Movement*, The Nation (Sept. 18, 2008), <http://www.thenation.com/article/free-gaza-movement>.

⁹² Mairead Maguire, *Hope as Palestinians Use Nonviolence in Their Struggle For Human Rights and Freedom*, The Peace People (Nov. 7, 2008), <http://www.peacepeople.com/2008/Boat.htm>.

⁹³ Angela Lano, *Towards Gaza, Live from Freedom Flotilla*, European Campaign to End the Siege on Gaza (Oct. 18, 2010), <http://savegaza.eu/eng/index.php?id=511>.

⁹⁴ Ashley Bates, *Hamas Prepares Welcome for Activists*, Jerusalem Post (May 28, 2010), <http://www.jpost.com/Israel/Article.aspx?id=176697>; *Gaza Prepares for Freedom Flotilla*, Ezzedeen Al-Qassam Brigades (May 26, 2010), http://www.qassam.ps/news-2882-Gaza_prepares_for_Freedom_Flotilla.html.

Ministry of Information.⁹⁵ On its website, IHH stated that the May 2010 flotilla's cargo was to be delivered to "official authorities in the region,"⁹⁶ which presumably meant Hamas.

Moreover, Israeli armed forces obtained an internal FGM legal document while boarding FGM's May 2010 flotilla vessel the *Challenger 1* that, "apparently, was intended to be conveyed to the boat's passengers."⁹⁷ The Turkel Commission's analysis of the document is damning:

This information explicitly states that the organization is aware of the fact that the transfer of supplies to the Hamas constitutes a crime under the laws of the United States, and also that the United Nations added the Hamas to its black list of terrorist organizations. Therefore, the Americans and citizens of other nationalities were warned "to avoid even the appearance of material support" for the Hamas or its leadership.⁹⁸

Representatives of the Freedom Flotilla team have stated that communications have been ongoing with a number of foreign governments in order to change their policy:

The Free Gaza Movement and its partners in the Freedom Flotilla Coalition have always had ongoing, open talks with governments around the world to generate support for breaking the blockade and siege on Gaza. Before each of the previous eight sailings of the Free Gaza Movement, and the launch of the Freedom Flotilla, we held talks with government officials from the United States, Cyprus, Greece, Sweden, Ireland, the United Kingdom and Turkey to generate open support for the mission and to call for ending the (sic) Israel's policies of collective punishment on Palestinians in Gaza.⁹⁹

Freedom Flotilla II planning team members have also communicated with foreign governments and foreign government officials who support their cause. IHH, for example, has close connections with the Turkish government. During the May 2010 flotilla, IHH members publicly thanked the AKP, the ruling Turkish party, for its support.¹⁰⁰ Turkish government

⁹⁵ Bates, *supra* note 93.

⁹⁶ *FAQ*, Insani Yardim Vakfi, <http://www.ihh.org.tr/rotamizfilistin-sss/en/> (last visited Dec. 7, 2010).

⁹⁷ *Report Part I*, *supra* note 12, at 204.

⁹⁸ *Id.* at 204-05.

⁹⁹ Free Gaza Team, *Theft, Lies, and Videotape*, Free Gaza Movement (Oct. 22, 2010), <http://www.freegaza.org/en/home/56-news/1260-theft-lies-and-videotape>.

¹⁰⁰ Migdalovitz, *Israel's Blockade*, *supra* note 62.

officials facilitated IHH's purchase of its ship and its departure from Turkish ports.¹⁰¹ Turkish Prime Minister Recep Tayyip Erdogan has declared that Freedom Flotilla II will be carrying Turkish aid contributions and that future flotillas will be accompanied by a Turkish military escort.¹⁰² ECESG's Arafat Shoukri has stated that Freedom Flotilla II will depart from Turkey's ports.¹⁰³

An organizer of the BAKA event stated that the event's purpose was to "spread awareness and fundraise" for USTOGAZA.¹⁰⁴ The event hosted four speakers: the Free Gaza Movement's Adam Shapiro, Gaza Strip Coordinator for ISM Fida Qishta,¹⁰⁵ WESPAC Foundation¹⁰⁶ Executive Director Nada Khader, and Ann Wright, who is associated with CODEPINK.¹⁰⁷ Wright participated in a CODEPINK delegation to Gaza in 2009,¹⁰⁸ whose members met with a Hamas representative, Huda Naim, a member of the Palestinian Legislative Council in Gaza, and a representative of the Hamas Party.¹⁰⁹ Qishta, Khader, and Wright have all

¹⁰¹ *Id.*

¹⁰² *Organizers: Freedom Flotilla 2 in a Few Weeks*, Maan News Agency (June 2, 2010), <http://www.maannews.net/eng/ViewDetails.aspx?ID=289111>

¹⁰³ *Id.* A press release on USTOGAZA's website states that its ship will be departing from "a Mediterranean port." *As U.S. Activists Prepare Boat to Gaza, Israel Threatens To Use Snipers, Dogs*, USTOGAZA (Nov. 1, 2010), <http://ustogaza.org/uncategorized/as-u-s-activists-prepare-boat-to-gaza-israel-threatens-to-use-snipers-dogs/>.

¹⁰⁴ Joseph Schulhoff, *USTOGAZA Fundraiser*, The Daily Targum (Nov. 8, 2010), <http://www.dailytargum.com/multimedia/2.12020/ustogaza-fundraiser-1.2397610>.

¹⁰⁵ *Israeli Attacks Kill Over 310 in Gaza in one of Israel's Bloodiest Attacks on Palestinians in 1948*, Democracy Now (Dec. 29, 2008), http://www.democracynow.org/2008/12/29/israeli_attacks_kill_over_310_in

¹⁰⁶ WESPAC Foundation's stated purpose is, "To provide a meeting space along with material, organizational and moral support for groups and individuals in the greater Westchester Community to organize, educate and work toward peace, justice and a sustainable environment for the planet and for all people." *Mission Statement*, WESPAC Foundation, <http://wespac.org/index.php/about-us/52-mission> (last visited Feb. 15, 2011).

¹⁰⁷ *Event: 'USTOGAZA Fundraiser @ Rutgers, New Brunswick, NJ,'* US4Arabs.com, http://www.us4arabs.com/component/option,com_jcalpro/Itemid,26/extmode,view/extid,9003/ (last visited Dec. 14, 2010).

¹⁰⁸ Ann Wright, *With the Women of Gaza on International Women's Day: We Will Not Be Silent!*, Huffington Post (March 9, 2009), http://www.huffingtonpost.com/ann-wright/with-the-women-of-gaza-on_b_173021.html.

¹⁰⁹ Kim Elliot, Meagan Perry, *An Interview With Hamas Member of Parliament Huda Naim*, Rabble.ca (March 16, 2009), <http://www.rabble.ca/podcasts/shows/needs-no-introduction/hamas-party-member-parliament-huda-naim>.

expressed support for Hamas as the legitimate representative of the Palestinians.¹¹⁰ One attendee of the BAKA event stated that Khader “said outright that the Palestinian Authority does not represent the Palestinian people” and “stopped just short of proclaiming her allegiance to Hamas.”¹¹¹

Also noteworthy are USTOGAZA’s suspect practices with respect to donations. USTOGAZA’s website directs donations under \$150 to Stand for Justice, and tax deductible donations of \$150 or more to the Institute for Media Analysis (with “Stand for Justice” in the memo line).¹¹² The flyer for USTOGAZA’s recent fundraising dinner in Dearborn, MI provides that checks should be made payable to “Palestinian Aid Society, Memo: Detroit US Boat to Gaza.”¹¹³ Information on another USTOGAZA fund raising dinner, scheduled for January 26, 2011 in Walnut Creek, CA, provides the following: “All donations will go to the U.S. Boat to Gaza project (see USTOGAZA.org). Details for donations will be explained at the event.”¹¹⁴

When combined with the fact that flotilla activities interact with at least one FTO and other organizations with connections to terrorism, the lack of transparency regarding donations should have raised red flags even before the November 4, 2010 event took place, above and beyond concerns raised by Rutgers Hillel Executive Director Andrew Getraer prior to the event

¹¹⁰ Fida Qishta, *Fida Qishta: About My Daily Life in Gaza Strip, Rafah*, International Solidarity Movement (Jan. 2, 2009), <http://palsolidarity.org/2009/01/3760/> (Qishta: “This government was elected and democratically chosen”); Michael Nassberg, *One-Sided Panel Discussion Receives Mixed Reaction at BU*, The Reporter Group, <http://www.thereporter.org/Article.aspx?aID=702> (last visited Dec. 21, 2010) (“Khader explained that Hamas was a democratically elected body . . .”); Ann Wright, *Can Gaza be Rebuilt Through Tunnels? The Blockade Continues – No supplies, No Rebuilding*, Huffington Post (Feb. 27, 2009), http://www.huffingtonpost.com/ann-wright/can-gaza-be-rebuilt-throu_b_170585.html (Wright: “The U.S., Israeli, and other countries have designated Hamas as a terrorist organization...even though the people of Gaza elected the Hamas government.”).

¹¹¹ Aaron Marcus, *Disallow BAKA Fundraising*, Daily Targum (Nov. 8, 2010), <http://www.dailytargum.com/opinions/disallow-baka-fundraising-1.2398288>

¹¹² *Donate*, *supra* note 19.

¹¹³ *Sail to Break the Siege*, *supra* note 27.

¹¹⁴ JANET KOBREN: *Eye Witness Report from a Passenger on the Gaza Freedom Flotilla*, USTOGAZA, <http://ustogaza.org/events/janet-kobren-eye-witness-report-from-a-passenger-on-the-gaza-freedom-flotilla/> (last visited Jan. 25, 2011).

(regarding the fact that USTOGAZA is not certified as a 501(c)(3) non-profit entity by the IRS which is relevant to compliance with Rutgers University standards.)¹¹⁵

In sum: Rutgers University provided a forum for, and is holding funds raised by the student group BAKA intended for USTOGAZA. USTOGAZA is working in coordination with IHH, FGM and ECESG as part of the International Planning Team for the Freedom Flotilla II, and who together are planning to bring thousands of tons of cargo to Gaza as well as sail a ship to break the Israeli counter-terror blockade against designated FTO Hamas. IHH is a terrorist organization with extensive connections to Hamas, provides material assistance and funds to Hamas and organized and executed similar past flotillas with Hamas. ECESG likewise has extensive connections to Hamas, was founded by a Hamas top official, and coordinated past similar flotillas with Hamas. FGM, of which USTOGAZA is part, has received correspondence from and met with Hamas officials, coordinated the May 2010 Flotilla with IHH and Hamas, and has recognized that transferring supplies to Hamas is material support and criminal under the laws of the United States.¹¹⁶

IV. Discussion

This memorandum does not engage in retrospective analysis in order to determine whether Rutgers knew or should have known that sponsoring, hosting and/or facilitating the fundraising event in question may give rise to criminal liability, though it is certainly possible to make that determination based on the facts. Rather, the memorandum will consider relevant statutes¹¹⁷ as applicable to Rutgers henceforth, specifically (1) releasing funds collected at the fundraising event; and (2) sponsoring future events of this nature, including but not limited to events by the organizations in question.

A. Sponsoring or Otherwise Subsidizing a Fundraiser for USTOGAZA Likely Provides Material Support to Hamas, a U.S.-designated FTO

¹¹⁵ Rutgers Hillel Press Release, *supra* note 7.

¹¹⁶ *Report Part 1*, *supra* note 12, 204-05.

¹¹⁷ Most importantly, 18 U.S.C. §2339B.

i. Material Support Includes ‘Humanitarian Aid’ and Activities Coordinated with an FTO

18 U.S.C. § 2339B provides:

(a)(1) Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.

The term “[m]aterial support or resources,” as it is used in section 2339B, “has the same meaning given that term in section 2339A.”¹¹⁸ 18 U.S.C. § 2339A (§ 2339A) defines “material support or resources” as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.”¹¹⁹

As the Supreme Court stressed in *Holder v. Humanitarian Law Project*,¹²⁰ Congress deliberately crafted a broad description for material support because it found that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct *that any contribution to such an organization facilitates that conduct.*”¹²¹

In *Holder*, the Supreme Court noted that section 2339A had initially excluded “humanitarian assistance to persons not directly involved in [terrorist activity]” from the definition of material support, but Congress removed that exception when section 2339B was

¹¹⁸ 18 U.S.C. §2339B(g).

¹¹⁹ 18 U.S.C. §2339A(b)(1).

¹²⁰ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹²¹ *Holder*, 130 S. Ct. at 2712 (emphasis added).

enacted in 1996 as part of the Anti-Terrorism and Effective Death Penalty Act (AEDPA).¹²² “That repeal,” the court stated, “demonstrates that Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.”¹²³ Accordingly, the court found that any activity that is “directed to, coordinated with, or controlled by” an FTO is material support to an FTO under section 2339B.¹²⁴

Citing a description of Hamas’s fundraising activities, the Court explained that, “funds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.”¹²⁵ This is because FTOs “systematically conceal their activities behind charitable, social, and political fronts.”¹²⁶

The *Holder* case litigation covered over a decade.¹²⁷ As the Ninth Circuit Court of Appeals held in 2000, in *Humanitarian Law Project v. Reno*,

When someone makes a donation to [an FTO], there is no way to tell how the donation is used. Further, . . . even contributions earmarked for peaceful purposes can be used to give aid to the families of those killed while carrying out terrorist acts, thus making the decision to engage in terrorism more attractive. More fundamentally, money is fungible; giving support intended to aid an organization's peaceful activities frees up resources that can be used for terrorist acts.¹²⁸

The *Holder* court further specified that material support includes “advocacy performed in coordination with, or at the direction of, a foreign terrorist organization”¹²⁹ as well as teaching

¹²² *Id.* at 2724 (emphasis added).

¹²³ *Id.*

¹²⁴ *Id.* at 2728.

¹²⁵ *Id.* at 2726.

¹²⁶ *Id.* at 2725.

¹²⁷ The case involved two organizations designated as FTOs, the Tamil Tigers (LTTE) and the Kurdistan Workers’ Party (PKK). The case began when, “On November 6, 1997, the LTTE sought judicial review of the Secretary’s designation [as an FTO].” *Humanitarian Law Project v. Reno*, 9 F.Supp.2d 1176, 1180 (C.D. Cal 1998).

¹²⁸ *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1136 (9th Cir. 2000).

¹²⁹ *Holder*, 130 S. Ct. at 2710.

FTO members how to petition representative bodies such as the U.N. for relief, particularly in monetary form.¹³⁰

The *Holder* court detailed other ways that material support meant to “promot[e] peaceful, lawful conduct” can further terrorism. First, material support lends legitimacy to FTOs, “legitimacy that makes it easier for these groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.”¹³¹ In addition, “[p]roviding foreign terrorist groups with material support in any form . . . furthers terrorism by straining the United States’ relationship with its allies and undermining cooperative efforts between nations to prevent terrorist attacks.”¹³²

Federal courts have specified that furnishing medical supplies to an FTO can constitute material support under § 2339B.¹³³

Moreover, “an individual who furnishes weaponry or equipment with clear military applications can claim no such uncertainty as to whether he has provided ‘material support’ to an FTO within the meaning of § 2339B.”¹³⁴

ii. USTOGAZA’s Actions Likely Constitute Material Support

As more fully detailed in the statement of facts above, USTOGAZA’s actions likely constitute material support in two ways.

First, USTOGAZA has stated publicly that its purpose in outfitting a vessel is twofold, “To break the illegally imposed blockade on Gaza *and to send much-needed humanitarian aid to*

¹³⁰ *Id.* at 2711.

¹³¹ *Id.* at 2725.

¹³² *Id.* at 2726.

¹³³ *United States v. Warsame*, 537 F.Supp.2d 1005, 1019 (D. Minn. 2008), citing *United States v. Shah*, 474 F.Supp.2d 492, 495 (S.D.N.Y. 2007).

¹³⁴ *United States v. Assi*, 414 F.Supp.2d 707, 718 (E.D. Mich. 2006).

the impoverished people living within an area now known as an “open- air prison” [sic].”¹³⁵

Federal courts have specified that even medical supplies can constitute material support under § 2339B.¹³⁶

Moreover, “an individual who furnishes weaponry or equipment with clear military applications can claim no such uncertainty as to whether he has provided “material support” to an FTO within the meaning of § 2339B.”¹³⁷ Israel has released the cargo manifests from three vessels boarded while part of the 2010 ‘freedom flotilla,’ and each contained numerous items with clear military applications, including concrete and other construction materials¹³⁸ forbidden or strictly controlled by Israel¹³⁹ for that reason. Under *Holder* providing otherwise non-violent, even socially useful and productive aid to a designated FTO through direct or indirect coordination with the designated FTO is a violation of 2339B. In order to launch a flotilla to enter Gaza and to bring into Gaza supplies invariably and necessarily requires coordination with the governing authority in Gaza, which is Hamas. By coordinating the importation of goods with Hamas both directly and through various affiliated organizations that include PCAS and ECESG, these organizations are likely providing “material support” to Hamas in violation of federal law.

Second, both directly or indirectly, USTOGAZA’s participation in a flotilla rises above permissible “independent advocacy” due to a) ongoing communications between the flotilla’s key organizing entities, including IHH and Free Gaza Movement, and Hamas; and b)

¹³⁵ *Sail to Break the Siege*, *supra* note 30 (emphasis added).

¹³⁶ *United States v. Warsame*, 537 F. Supp. 2d 1005, 1019 (D. Minn. 2008), citing *United States v. Shah*, 474 F. Supp. 2d 492, 495 (S.D.N.Y. 2007).

¹³⁷ *United States v. Assi*, 414 F.Supp.2d 707, 718 (E.D. Mich. 2006).

¹³⁸ *Report Part I*, *supra* note 15, at 289-91.

¹³⁹ When such materials have been permitted entry, it has generally been on condition that their use be approved by Israel, coordinated with the Palestinian Authority, and sponsored or under the aegis of third parties, such as the German government or World Bank. *See, e.g., Construction Equipment to Upgrade Gaza Sewage Treatment Facilities*, Israel Ministry of Foreign Affairs (Sept. 13, 2010), http://www.mfa.gov.il/MFA/HumanitarianAid/Palestinians/Upgrade_Gaza_sewage_treatment_13-Sep-2010.htm.

coordination that will necessarily take place if and when the vessel docks at the Hamas-controlled Port of Gaza.

Additionally, the overt political act of breaking the Israeli (and, collaterally, the Egyptian) blockade of the Gaza Strip directly assists Hamas' military and political position, *and* inherently contains a noncommunicative aspect of conduct that may be regulated irrespective of free speech considerations.¹⁴⁰

For the foregoing reasons, it is substantially likely that the participation of USTOGAZA in a flotilla designed to break the Israeli blockade and deliver purportedly 'humanitarian aid' constitutes an attempt to provide material support to Hamas, a designated FTO, within the parameters of §2339B as interpreted by the United States Supreme Court in *Holder*.¹⁴¹

iii. The Knowledge/Intent Requirement for Providing Material Support

Under U.S. law, criminal statutes require some level of intent before criminal liability may be attached. Accordingly, § 2339B prohibits the *knowing* provision, or attempted provision, of material support or resources to a designated FTO, as well as conspiracy to provide such support.¹⁴²

A conspiracy exists if there is an agreement to engage in criminal activity, an overt act is taken to implement the agreement, and the defendant has the requisite intent to commit the

¹⁴⁰ See, generally, *United States v. O'Brien*, 391 U.S. 367, 381-83 (1968). In the present instance, the act of sailing with intent to break the blockade represents a fundamental shift past independent advocacy as well as speech.

¹⁴¹ Note that, upon a determination that facilitating the vessel constitutes material support for terrorism, several other federal statutes may apply as well, including 18 U.S.C. §960, which prohibits knowingly providing, furnishing money for, or participating in, a "naval expedition or enterprise" against "the territory or dominion of any foreign prince or state, or of any colony, district, or people with whom the United States is at peace;" and 18 U.S.C. § 962, which criminalizes the arming of any vessel meant "to cruise, or commit hostilities" against a nation friendly to the United States. Much of the case law derived from these two statutes is well over a century old, and not clearly applicable to the facts of this matter. However, these statutes may be judicially construed to apply to modern cases of asymmetric warfare, including terrorism, with attendant risk of liability.

¹⁴² 18 U.S.C. §2339B(a)(1).

substantive crime.¹⁴³ Conspiracy is an inchoate crime; it is justiciable at the moment that the overt act is taken in pursuit of the agreement, regardless of whether the agreed-upon crime is committed.¹⁴⁴ Moreover, a corporation can conspire with its officers, directors, and employees, for “[t]he [corporate entity] was never intended to prohibit the imposition of criminal liability by allowing a corporation or its agents to hide behind the identity of the other.”¹⁴⁵

By providing BAKA with funds and space¹⁴⁶ to hold the USTOGAZA fundraising event, Rutgers may have already unwittingly participated in a conspiracy to provide material support to Hamas, a U.S.-designated FTO.

Section 2339B defines “knowingly” as having knowledge that the organization that will receive the material support is (a) a designated terrorist organization or (b) has engaged or engages in terrorist activity.¹⁴⁷ As the Supreme Court acknowledged in *Holder*, the statute thus plainly rejects a specific intent requirement.¹⁴⁸ In *Holder*, the plaintiffs planned to provide services for designated FTOs but “[did] not intend to further the unlawful conduct” of those organizations.¹⁴⁹ The court concluded that the plaintiffs’ knowledge of the organizations’ connections to terrorism was sufficient to satisfy the *mens rea* required by section 2339B.¹⁵⁰ It was not necessary for the plaintiffs to have specifically intended to further the organizations’ terrorist activity.

Although courts have not yet explicitly considered how to define the chain of liability when multiple organizations transmit funds to ultimately aid an FTO, Judge Richard Posner of

¹⁴³ *United States v. Iribe*, 564 F.3d 1155 (9th Cir. 2009).

¹⁴⁴ *United States v. Feola*, 420 U.S. 671 (1975).

¹⁴⁵ *McAndrew v. Lockheed Martin Corp.*, 206 F.3d 1031 (11th Cir. 2000).

¹⁴⁶ Had Rutgers not provided BAKA with a space in order to conduct the fundraising event, BAKA would have had to secure a forum elsewhere, possibly having to pay for it.

¹⁴⁷ 18 U.S.C. §2339B(a)(1).

¹⁴⁸ *Holder*, 130 S. Ct. at 2717.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

the Seventh Circuit Court of Appeals has provided a formula that is likely to prove persuasive to any courts considering the issue:

Nor should donors to terrorism be able to escape liability because terrorists and their supporters launder donations through a chain of intermediate organizations. **Donor A gives to innocent-appearing organization B which gives to innocent-appearing organization C which gives to Hamas. As long as A either knows or is reckless in failing to discover that donations to B end up with Hamas, A is liable.** Equally important, however, if this knowledge requirement is not satisfied, the donor is not liable. And as the temporal chain lengthens, the likelihood that a donor has or should know of the donee's connection to terrorism shrinks. But to set the knowledge and causal requirement higher than we have done in this opinion would be to invite money laundering, the proliferation of affiliated organizations, and two-track terrorism (killing plus welfare). Donor liability would be eviscerated, and the statute would be a dead letter.¹⁵¹

If Rutgers were to now release the funds raised at the BAKA event, Rutgers may be deemed to have knowingly participated in a conspiracy and attempt to provide material support to Hamas. Similarly, if Rutgers were to sponsor future events on behalf of USTOGAZA or similarly oriented groups, it is difficult to conceive of a circumstance that would allow Rutgers to plead ignorance sufficient to satisfy the §2339B knowledge/intent requirement as defined in *Holder*.

B. Releasing Funds Raised for USTOGAZA May Constitute Conspiracy to Violate Section 953 Because USTOGAZA will be in Correspondence with Foreign Governments and Foreign Government Officials to Influence Foreign Government Policy Regarding the Blockade and Directly Challenge U.S. Policy Regarding the Blockade

Rutgers University could be found to have participated in a conspiracy to violate 18 U.S.C. § 953 if it releases funds raised by the BAKA fundraiser to USTOGAZA. Section 953

¹⁵¹ *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 701-02 (7th Cir. 2008). Note that Judge Posner was considering civil liability that may arise under 18 U.S.C. § 2339B and related statutes, though he noted elsewhere that the analysis was similar for criminal and civil liability for material support claims. Generally, it is easier to prove civil liability than criminal, which should be considered if Rutgers were to release funds to BAKA.

prohibits U.S. citizens from directly or indirectly commencing or carrying on correspondence without the authority of the United States

with any foreign government or any officer or agent thereof, with intent to influence the measures or conduct of any foreign government or of any officer or agent thereof, in relation to any disputes or controversies with the United States, or to defeat the measures of the United States.¹⁵²

18 U.S.C. § 11 defines the term “foreign government” as it is used in Title 18 of the United States Code: “The term ‘foreign government’ . . . includes any government, faction, or body of insurgents within a country with which the United States is at peace, irrespective of recognition by the United States.”¹⁵³ The Ninth Circuit analyzed the section 11 definition of the term “foreign government” in *United States v. Gertz*.¹⁵⁴ In *Gertz*, the court determined that “includes,” as it is used in this statute, is a term of enlargement that broadens the definition of “foreign government.”¹⁵⁵ For example, “foreign government includes not only that of a country ‘with which the United States is at peace’ but also that of a country with which the United States is at war.”¹⁵⁶

Because section 11 states that recognition is unnecessary for a government, faction, or body of insurgents to be considered a “foreign government,” it can be inferred that “foreign government” also includes governments and factions within stateless territories, regardless of U.S. policy towards the territory. Therefore, Hamas is a “foreign government” within the meaning of 18 U.S.C. § 953 because it is the governing faction in Gaza, even though its government is not recognized by the United States.

¹⁵² 18 U.S.C. § 953.

¹⁵³ 18 U.S.C. § 11.

¹⁵⁴ *United States v. Gertz*, 249 F.2d 662 (9th Cir. 1957).

¹⁵⁵ *Id.* at 666

¹⁵⁶ *Id.*

USTOGAZA will likely be in direct and indirect contact with at least two foreign governments¹⁵⁷ and numerous government officials, and it is more likely than not that USTOGAZA is already in contact with those governments and officials either directly or under the aegis of FGM, IHH et al. USTOGAZA may also be in direct contact with Hamas if and when the organization's ship reaches Gaza's port.

As consistent with past blockade-breaking operations, Hamas will presumably be present to welcome the ships, help unload the cargo, and coordinate related activities. As Hamas stated in its letter to the Free Gaza Movement in 2007, Hamas requires groups to provide the FTO with details of their plans to reach Gaza "in order to facilitate the necessary arrangements."¹⁵⁸

Additionally, USTOGAZA is on the steering committee of Freedom Flotilla II, which, as stated above, is planned to leave from Turkish ports¹⁵⁹ (and will potentially be accompanied by a Turkish military escort). If *The Audacity of Hope* departs from a Turkish port, USTOGAZA will necessarily correspond with the Turkish government and its officials probably in violation of 18 U.S.C. § 953. USTOGAZA's necessary correspondence with a foreign government and foreign government officials is part of the organization's attempt to influence Israel to end its blockade of Gaza; that is, USTOGAZA is acting with the intent to influence the measures and conduct of a foreign government.

Please note that the statute does not specify that the government with which USTOGAZA corresponds must be Israel, whose targeted "measures or conduct" the flotillas seek to influence.

¹⁵⁷ Namely, Turkey and Hamas. As explained more fully below, the flotilla is scheduled to leave from a Southern Turkish port, and is designed to land at the Port of Gaza, as part of a deliberate plan to alter the foreign policy of the State of Israel.

¹⁵⁸ O'Connor, *Smoking Gun*, *supra* note 88.

¹⁵⁹ Reports state that the flotilla will depart from "southern Turkey." See, e.g., Tania Kepler, *Freedom Flotilla II to Commemorate 1st Anniversary of Deadly Raid*, Alternative Media Center (Feb. 9, 2011), <http://www.alternativenews.org/english/index.php/topics/news/3273-freedom-flotilla-ii-to-commemorate-1st-anniversary-of-deadly-raid>.

Rather, due to the breadth of the statute, USTOGAZA may be engaging in an unlawful act by corresponding with Turkey and Hamas in order to influence or otherwise alter the “measures or conduct” of another foreign government, namely Israel.

The blockade is in place to weaken Hamas, a designated FTO by the United States government. Consequently, the blockade and blockade-breaking attempts are part of a dispute relating to the United States and its fight against terrorist organizations. USTOGAZA is also planning to “challenge U.S. foreign policy” regarding the blockade. In this way, USTOGAZA is clearly trying to defeat measures taken by the United States vis-à-vis Hamas, Gaza, and the Middle East Peace Process, including the counter-terror blockade. Successive presidential administrations have stated that the disruption of the Middle East Peace Process constitutes “an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States.”¹⁶⁰ Note also that the United States Code expressly states that, “the United States regards as vital to the national interest and world peace the preservation of the independence and integrity of the nations of the Middle East.”¹⁶¹

Under 18 U.S.C. § 371, the crime of conspiracy comprises three elements: “(1) an agreement to engage in criminal activity, (2) one or more overt acts taken to implement the agreement, and (3) the requisite intent to commit the substantive crime.”¹⁶² Rutgers is presumably aware that USTOGAZA is likely in contact with the foreign governments of Hamas and Turkey as well as officers or agents of those governments regarding the use of the BAKA-

¹⁶⁰ President William J. Clinton, Executive Order 12947, January 23, 1995, “Prohibiting Transactions With Terrorists Who Threaten To Disrupt The Middle East Peace Process,” *available at* <http://www.treasury.gov/resource-center/sanctions/Documents/12947.pdf>. Note that Hamas was specifically named as such a threat in the appended annex. The identical phrase was used by President George W. Bush in his Communication to Congress on January 18, 2007, extending the national emergency declared by President Clinton in Executive Order 12947, *available at* <http://www.gpo.gov/fdsys/pkg/CDOC-110hdoc8/pdf/CDOC-110hdoc8.pdf>.

¹⁶¹ 22 U.S.C. § 1962, which allows the President to undertake military assistance programs, and use armed forces upon a presidential determination of necessity.

¹⁶² *United States v. Sullivan*, 522 F.3d 967, 976 (9th Cir.2008) (per curiam) (internal quotation marks omitted).

raised funds, possibly in violation of section 953. Therefore, if Rutgers releases the funds raised on its campus by BAKA, it may be found to have implicitly agreed to engage in activity criminalized under section 953. Releasing the funds, which will necessarily require correspondence (as the term is used in section 953), satisfies the “overt act” requirement because the release will “implement the agreement.”

V. Conclusion

For the foregoing reasons, there is a substantial likelihood that Rutgers could be held criminally liable if it were to release funds collected at the BAKA fundraiser to USTOGAZA under multiple federal statutes. Additionally, Rutgers should exercise extreme caution in agreeing to sponsor and/or host similar events in the future, as this memorandum details how such events likely constitute material support to Hamas, a designated FTO. Several of the flotilla’s other organizing entities have connections to other FTOs, notably IHH and its connection to the Union of Good. When coupled with the inconsistencies and lack of transparency on the part of USTOGAZA and its acceptance of donations, facilitating its agenda becomes still more questionable for a respected institution.

There are ample ways in which humanitarian aid may be efficiently – and legally – sent to the Palestinian residents of the Gaza Strip without engaging in potentially criminal conduct. As the U.S. State Department stated on May 31st 2010, “Mechanisms exist for the transfer of humanitarian assistance to Gaza by governments and groups that wish to do so. These mechanisms should be used for the benefit of all those in Gaza.”¹⁶³ There is no legitimate reason to support non-transparent organizations that seek to embark on expeditions in concert with

¹⁶³ Philip J. Crowley, Assistant Secretary, Bureau of Public Affairs, *Press Statement: Free Gaza Flotilla*, U.S. Dep’t of State (May 31, 2010), <http://www.state.gov/r/pa/prs/ps/2010/05/142386.htm>.

Hamas and other FTOs, and voluntarily assuming liability for providing material support would be a grave, and thoroughly avoidable, mistake on the part of Rutgers.

