United States of America, Holder v. Humanitarian Law Project

[**Source**: Supreme Court of the United States, Holder v. Humanitarian Law Project, 561 U.S. (2010), Nos 08-1498 and 09-89, 21 June 2010; available at http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf.]

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

[**N.B.** In 1996, following the attacks on the World Trade Center in New York in 1993 and on a federal building in Oklahoma City in 1995, the US Congress adopted the *Antiterrorism and Effective Death Penalty Act.* In particular, it made it a federal crime to provide "material support or resources to a foreign terrorist organization" in paragraph 2339B of Title 18, Part I, Chapter 113B of the *United States Code*. In 1998, the human rights defence organization The Humanitarian Law Project (HLP), together with five other organizations and two American citizens, considering that paragraph 2339B(a)(1) prevented them from carrying out their work to support the political and humanitarian activities of two groups deemed to be terrorist by the American Secretary of State – the Kurdistan Workers' Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE) – filed a writ against the unconstitutionality of the paragraph. The District Court upheld the argument by which the terms used in the definition of "material support" in the litigious paragraph were unconstitutional because they were too vague, a decision which was upheld by the Appeal Court in 2000. In 2001, the US Congress amended that definition in the Patriot Act to include the words "expert advice or assistance." The plaintiffs again appealed in 2003, arguing that those terms were not in keeping with the Constitution. The District Court once again deemed that the terms used were imprecise. In 2009, the Appeal Court confirmed that the terms "training," "expert advice or assistance" and "service" should be considered unconstitutional because they were too vague.

The decision below was taken following the submission of the case to the Supreme Court of the United States in 2009 by the US Government, which challenged the verdict.]

SUPREME COURT OF THE UNITED STATES Nos. 08–1498 and 09–89 ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL., PETITIONERS 08–1498 v. HUMANITARIAN LAW PROJECT ET AL. HUMANITARIAN LAW PROJECT, ET AL., PETITIONERS 09–89 v. ERIC H. HOLDER, JR., ATTORNEY GENERAL, ET AL. ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT [June 21, 2010]

[…] [P]laintiffs claim that §2339B is invalid to the extent it prohibits them from engaging in certain specified activities.[…]

Most of the activities in which plaintiffs seek to engage readily fall within the scope of the terms “training” and “expert advice or assistance.” Plaintiffs want to “train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes,” and “teach PKK members how to petition various representative bodies such as the United Nations for relief.” […] A person of ordinary intelligence would understand that instruction on resolving disputes through international law falls within the statute's definition of "training" because it imparts a "specific skill," not "general knowledge." Plaintiffs' activities also fall comfortably within the scope of "expert advice or assistance" : A reasonable person would recognize that teaching the PKK how to petition for humanitarian relief before the United Nations involves advice derived from, as the statute puts it, "specialized knowledge."

Plaintiffs also contend that they want to engage in “political advocacy” on behalf of Kurds living in Turkey and Tamils living in Sri Lanka. […] They are concerned that such advocacy might be regarded as “material support” in the form of providing “personnel” or “service[s],” and assert that the statute is unconstitutionally vague because they cannot tell. […]

The […] issue before us […] is whether the Government may prohibit what plaintiffs want to do – provide material support to the PKK and LTTE in the form of speech. Everyone agrees that the Government’s interest in combating terrorism is an urgent objective of the highest order. […] Plaintiffs’ complaint is that the ban on material support, applied to what they wish to do, is not “necessary to further that interest.” […] The objective of combating terrorism does not justify prohibiting their speech, plaintiffs argue, because their support will advance only the legitimate activities of the designated terrorist organizations, not their terrorism. […] When it enacted §2339B in 1996, Congress made specific findings regarding the serious threat posed by international terrorism. One of those findings explicitly rejects plaintiffs’ contention that their support would not further the terrorist activities of the PKK and LTTE: “[F]oreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” […] Congress’s use of the term “contribution” is best read to reflect a determination that any form of material support furnished “to” a foreign terrorist organization should be barred, which is precisely what the material-support statute does. Indeed, when Congress enacted §2339B, Congress simultaneously removed an exception that had existed in §2339A(a) (1994ed.) for the provision of material support in the form of “humanitarian assistance to persons not directly involved in” terrorist activity. That repeal demonstrates that

Congress considered and rejected the view that ostensibly peaceful aid would have no harmful effects.

We are convinced that Congress was justified in rejecting that view. […] Material support meant to "promot[e] peaceable, lawful conduct," […] can further terrorism by foreign groups in multiple ways. "Material support" is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups – legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds – all of which facilitate more terrorist attacks.

[…]

Providing foreign terrorist groups with material support in any form also furthers terrorism by straining the United States' relationships with its allies and undermining cooperative efforts between nations to prevent terrorist attacks. […] The material-support statute furthers th[e] international effort by prohibiting aid for foreign terrorist groups that harm the United States' partners abroad […].

For example, the Republic of Turkey – a fellow member of NATO – is defending itself against a violent insurgency waged by the PKK. […] That nation and our other allies would react sharply to Americans furnishing material support to foreign groups like the PKK, and would hardly be mollified by the explanation that the support was meant only to further those groups "legitimate" activities. From Turkey's perspective, there likely are no such activities. See 352 F. 3d, at 389 (observing that Turkey prohibits membership in the PKK and prosecutes those who provide support to that group, regardless of whether the support is directed to lawful activities)."

[…]

The material-support statute is, on its face, a preventive measure – it criminalizes not terrorist attacks themselves, but aid that makes the attacks more likely to occur.

[…]

We turn to the particular speech plaintiffs propose to undertake. First, plaintiffs propose to "train members of [the] PKK on how to use humanitarian and international law to peacefully resolve disputes." […] Congress can, consistent with the First Amendment, prohibit this direct training. It is wholly foreseeable that the PKK could use the "specific skill[s]" that plaintiffs propose to impart, […] as part of a broader strategy to promote terrorism. The PKK could, for example, pursue peaceful negotiation as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks. […] A foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote.

Second, plaintiffs propose to "teach PKK members how to petition various representative bodies such as the United Nations for relief." […] The Government acts within First Amendment strictures in banning this proposed speech because it teaches the organization how to acquire "relief," which plaintiffs never define with any specificity, and which could readily include monetary aid. […] Indeed, earlier in this litigation, plaintiffs sought to teach the LTTE "to present claims for tsunami related aid to mediators and international bodies," […] which naturally included monetary relief. Money is fungible […] and Congress logically concluded that money a terrorist group such as the PKK obtains using the techniques plaintiffs propose to teach could be redirected to funding the group's violent activities."

In responding to the foregoing, the dissent fails to address the real dangers at stake. It instead considers only the possible benefits of plaintiffs' proposed activities in the abstract. […] The dissent seems unwilling to entertain the prospect that training and advising a designated foreign terrorist organization on how to take advantage of international entities might benefit that organization in a way that facilitates its terrorist activities. In the dissent's world, such training is all to the good. Congress and the Executive, however, have concluded that we live in a different world: one in which the designated foreign terrorist organizations "are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." One in which, for example, "the United Nations High Commissioner for Refugees was forced to close a Kurdish refugee camp in northern Iraq because the camp had come under the control of the PKK, and the PKK had failed to respect its 'neutral and humanitarian nature.'" […] Training and advice on how to work with the United Nations could readily have helped the PKK in its efforts to use the United Nations camp as a base for terrorist activities.

We hold that, in regulating the particular forms of support that plaintiffs seek to provide to foreign terrorist organizations, Congress has pursued that objective consistent with the limitations of the First and Fifth Amendments. […]

It is so ordered.

JUSTICE BREYER, with whom JUSTICES GINSBURG and SOTOMAYOR join, dissenting.

I cannot agree with the Court's conclusion that the Constitution permits the Government to prosecute the plaintiffs criminally for engaging in coordinated teaching and advocacy furthering the designated organizations' lawful political objectives. In my view, the Government has not met its burden of showing that an interpretation of the statute that would prohibit this speech- and association-related activity serves the Government's compelling interest in combating terrorism. And I would interpret the statute as normally placing activity of this kind outside its scope.

[…]

The proposition that the two very different kinds of "support" are "fungible," […] is not obviously true. There is

no obvious way in which undertaking advocacy for political change through peaceful means or teaching the PKK and LTTE, say, how to petition the United Nations for political change is fungible with other resources that might be put to more sinister ends in the way that donations of money, food, or computer training are fungible. It is far from obvious that these advocacy activities can themselves be redirected, or will free other resources that can be directed, towards terrorist ends. Thus, we must determine whether the Government has come forward with evidence to support its claim. The Government has provided us with no empirical information that might convincingly support this claim. […]

[Majority] argues that speaking, writing, and teaching aimed at furthering a terrorist organization's peaceful political ends could "mak[e] it easier for those groups to persist, to recruit members, and to raise funds." […] But this "legitimacy" justification cannot by itself warrant suppression of political speech, advocacy, and association. Speech, association, and related activities on behalf of a group will often, perhaps always, help to legitimate that group. Thus, were the law to accept a "legitimating" effect, in and of itself and without qualification, as providing sufficient grounds for imposing such a ban, the First Amendment battle would be lost in untold instances where it should be won. Once one accepts this argument, there is no natural stopping place. The argument applies as strongly to "independent" as to "coordinated" advocacy. […] That fact is reflected in part in the Government's claim that the ban here, so supported, prohibits a lawyer hired by a designated group from filing on behalf of that group an amicus brief before the United Nations or even before this Court.[…]

What is one to say about these arguments – arguments that would deny First Amendment protection to the peaceful teaching of international human rights law on the ground that a little knowledge about "the international legal system" is too dangerous a thing; that an opponent's subsequent willingness to negotiate might be faked, so let's not teach him how to try? What might be said of these claims by those who live, as we do, in a Nation committed to the resolution of disputes through "deliberative forces"? […]

The majority, as I have said, cannot limit the scope of its arguments through its claim that the plaintiffs remain free to engage in the protected activity as long as it is not "coordinated." That is because there is no practical way to organize classes for a group (say, wishing to learn about human rights law) without "coordination." Nor can the majority limit the scope of its argument by pointing to some special limiting circumstance present here. That is because the only evidence the majority offers to support its general claim consists of a single reference to a book about terrorism, which the Government did not mention, and which apparently says no more than that at one time the PKK suspended its armed struggle and then returned to it.[…]

I believe that a construction that would avoid the constitutional problem is "fairly possible." In particular, I would read the statute as criminalizing First-Amendment protected pure speech and association only when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions. Under this reading, the Government would have to show, at a minimum, that such defendants provided support that they knew was significantly likely to help the organization pursue its unlawful terrorist aims.

Discussion

1. What consequences could the Supreme Court decision have on the provision of humanitarian aid by humanitarian organizations for the people in a territory that is controlled by an armed group defined as terrorist? Can a State refuse access to humanitarian aid on the pretext that it can provide “material support” for a terrorist organization? In its own territory? In the territory of another State? (P II, Art. 18(2); CIHL, Rule 55)
2.
    a. Can the dissemination of the rules of international humanitarian law (IHL) be included in the category of “training, expert advice or assistance” in question in the present case? Are the parties to an armed conflict under an obligation to disseminate the rules of IHL? Can a State not respect that obligation on the grounds that it might provide “material support” for terrorist activities? Can a State invoke its national legislation to avoid compliance with IHL? (P II, Art. 19; CIHL, Rules 142-143)
    b. Can a third State abstain from disseminating the rules of IHL to the parties to a non-international armed conflict outside its territory if that is likely to “cause tensions in inter-State relations”?
3.
    a. Do you agree with the Supreme Court that teaching and sensitization activities among armed terrorist groups can legitimize such groups? Can that encourage the groups to continue to fight? To make use of knowledge gained to “promote terrorism” or to abuse the international system? If such risks exist, does that justify refraining from teaching them the rules of IHL?
    b. If an armed group that is recognized as being a party to an armed conflict is defined by one or more States as “terrorist” or if it has committed terrorist acts, does that justify not urging it to comply with IHL?
    c. Does IHL recognize the concept of a “terrorist group”? In IHL, is there a difference between armed groups that comply with IHL and those that do not comply with it? What consequences are planned for conflict parties that do not show respect for IHL? Is a ban on asking for humanitarian aid, training or expert advice on IHL part of those consequences?
    d. Under section 2339B(a)(1), and according to the Supreme Court, do groups taking part in armed conflicts but not defined as terrorists by the United States have the right to receive material assistance? Doesn’t the a priori exclusion of certain groups, often on the basis of their political claims, derive from jus ad bellum?
4. Doesn’t refusing an armed terrorist group access to IHL training while the States that are fighting those groups are able to be given that training and “expert advice” in the field violate the principle of the equality of belligerents enshrined in IHL?
5. By virtue of Article 3(3) common to the Geneva Conventions, the ICRC, as well as other humanitarian organizations, can offer its services to the parties to non-international armed conflict. In the light of the Supreme Court decision, could its activities among armed groups be considered criminal?
6. Do you agree with the Supreme Court, in its example of the Kurdish refugee camp established by the High Commissioner for Refugees (HCR), that training the PKK to cooperate with the United Nations would have helped it in its terrorist activities? Conversely, might one not think that better knowledge of the HCR’s role could have encouraged the PKK to show respect for the neutral, humanitarian nature of the camp? Why?
7. Why is it necessary to disseminate the rules of IHL, particularly to non-State armed groups? Shouldn’t

the United States consider making an exception to paragraph 2339B of the law for IHL dissemination activities? Make a list of arguments that you could present to the Supreme Court in favour of that.