Holder, Attorney General v Humanitarian Law Project 561 US (2010)

Does Training in International Humanitarian Law and Human Rights Law Constitute 'material support to terrorism'?

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I Introduction

Since 11 September 2001, there has been nationally and internationally a continued expansion in the scope of criminal offences related to terrorism. Specific acts of terrorism — ranging from, inter alia, offences against aircrafts to taking of hostages — have been defined and criminalised in 16 specific international conventions against terrorism.

Attempts to commit particular terrorist offences, and complicity in carrying out a specific terrorist offence — for example, in terms of providing financial support to a terrorist organisation — have also increasingly been criminalised in national and international law.

Recent instruments have gone even further and criminalised acts that potentially can lead to a terrorist act, including incitement, justification or glorification (*apologie*) of terrorist acts.[1] Incitement to terrorism is likewise prohibited in the Council of Europe's 2005 *Convention on the Prevention of Terrorism*.[2] This Convention refers to direct, as well as indirect, advocacy for a terrorist offence.[3] According to the Explanatory Report of the Convention, 'presenting a terrorist offence as necessary and justified *may* constitute the offence of indirect incitement'.[4]

A decision handed down on 21 June 2010 by the United States (US) Supreme Court concerns the question of whether an even more remote, and arguably legitimate, form of assistance to a terrorist organisation is to be considered a criminal offence.[5] The assistance in question in *Holder* was training in the use of international law to peacefully resolve disputes. Such assistance was to be provided with the indirect intention to *avoid* possible future terrorist acts.

As will be seen, after 12 years of complicated litigation, the Court rejected the plaintiffs' claims by a 6–3 decision. The underlining perception is that *any contribution* to a foreign terrorist organisation furthers its criminal activities. Such a broad decision, of course, gives rise to concern.

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1 See, eg, SC Res 1624, UN SCOR, 60th sess, 5261st mtg, UN Doc SC/RES/1624 (14 September 2005).

2 *Council of Europe Convention on the Prevention of Terrorism*, opened for signature 16 May 2005, CETS No 196 (entered into force 1 June 2007).

3 Ibid, art 5 (Public provocation to commit a terrorist offence).

4 Council of Europe, *Convention on the Prevention of Terrorism: Explanatory Report*, 98 (emphasis added).

5 *Holder, Attorney General v Humanitarian Law Project* 561 US (2010) ('*Holder*').

II The facts

The plaintiffs, two American citizens and six organisations, brought two actions to challenge the constitutionality of § 2339A and B — what is known as the '*Material Support Statute*' — in title 18 of the United States Code. These provisions makes it a federal crime (punishable now by up to 15 years' imprisonment) to knowingly provide 'material support or service' to any foreign organisation designated as a terrorist organisation by the US Secretary of State.

Amongst the plaintiffs were the Humanitarian Law Project, a human rights organisation with consultative status to the UN, and five non-profit groups dedicated to the interests of persons of Tamil descent. These private organisations in the past had supported and wished to continue to support, the lawful political and humanitarian activities of the Liberation Tigers of Tamil Eelam (LTTE) and the Kurdistan Workers' Party in Turkey (PKK). Both the LTTE and PKK were, amongst a total of 30 groups, designated as foreign terrorist groups by the US Secretary of State in 1997.

The plaintiffs contended that they intended only to facilitate the lawful, non-violent purposes of the LTTE and PKK by providing different kinds of non-financial legal and political support, including to:

1) train PKK members on how to use humanitarian and international law to peacefully resolve disputes;
2) teach PKK members how to petition various representative bodies, such as the United Nations (UN), for relief; and
3) engage in political advocacy on behalf of Kurds who live in Turkey and on behalf of the Tamils who live in Sri Lanka.

The *Material Support Statute* is defined so as to include 'any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials'.[6]

The proposed activities fell potentially under four types of material support: 'personnel', 'training', 'expert advice and assistance' and 'service'.

III The plaintiffs' arguments

The plaintiffs claimed that § 2339B was invalid as it prevented them from undertaking these activities out of fear of prosecution. This claim was based on three separate grounds, discussed below.

A The Material Support Statute *was unconstitutionally vague*

It was first argued that the *Material Support Statute* was unconstitutionally vague in violation of the due process clause of the Fifth Amendment.[7]

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6 18 USC § 2339A(b)(1).

7 *US Constitution* amend V.

Under the *Material Support Statute*, 'training' is defined as 'instruction or teaching designed to impart a specific skill, as opposed to general knowledge'.[8] 'Expert advice or assistance' means 'advice or assistance derived from scientific, technical or other specialized knowledge'.[9] Material support in terms of providing 'personnel' requires that the 'person works under the terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization'.[10]

The Court rejected the vagueness claim with reference primarily to the statutory definition of terms mentioned above.[11] Thus, whether or not the proposed activities were covered by the *Material Support Statute* should be clear.

In regard to the proposed legal training activities, these were found obviously to fall within the scope of the terms 'training' and 'expert advice or assistance'.[12]

The question was, then, whether the proposed political advocacy activities were to be regarded as 'material support' in form of providing 'personnel' or 'service' to terrorist groups. The answer to that question was clear according to the Court, as *independent* advocacy is exempted expressly from the scope of providing 'personnel'.[13] However, the circumstances in which advocacy may be considered as rendering a 'service' to a foreign terrorist organisation was less clear-cut. The Court stressed that this would require some 'connection' between the service provided and the foreign group, without specifying further what this would imply.[14] Whether or not the intended advocacy work would or would not in fact be punishable could not, however, be decided on the basis of the facts before the Court.

B *Freedom of speech under the First Amendment*

Secondly, it was contended that the *Material Support Statute* violated the right to freedom of speech,[15] because it banned their 'pure political speech' without requiring specific intent on their behalf to further the illegal activities of the organisations.[16]

The Court dismissed this claim as a person under the *Material Support Statute* may speak and write freely on any topic whatsoever. The ambit of § 2339B is (on the face of it) the provision of 'material support'.[17]

The Court rejected also the argument that § 2339B, when applied to speech, requires specific intent on behalf of the defendant to further the organisation's illegal activities. According to a textual reading, the prohibition expressly requires merely 'knowledge' about the organisation's connection to terrorism as the mens rea for a violation.[18]

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8 18 USC § 2339A(b)(2).
9 18 USC § 2339A(b)(3).
10 18 USC § 2339B(h).
11 *Holder* 561 US (2010), 15–16.
12 Ibid.
13 Ibid 18.
14 Ibid 18–19.
15 *US Constitution* amend I.
16 *Holder* 561 US (2010), 20.
17 Ibid 20–1.
18 Ibid 11–12.

C Freedom of association under the First Amendment

The plaintiffs also claimed that the *Material Support Statute* violated their right to freedom of association.[19] This claim was likewise clearly rejected by the Court, as the disputed provision did not criminalise mere association or membership in a designated terrorist organisation.[20]

IV Analysis

It is noteworthy that there was no discussion of, or even references to, international law in the judgment. The decision seems to be based exclusively on US law. Nonetheless, the judgment raises pertinent questions of international law.

A 'Lawfare' or peaceful settlement of international disputes

The concept of 'lawfare' has emerged as a new and controversial concept in recent years. Lawfare can be defined as the use of the law as a weapon of war, or more specifically, the abuse of the law and legal systems for strategic political or military ends. Lawfare is waged via the use of domestic or international law with the intention of damaging an opponent.[21]

Proponents of the term lawfare are concerned about the use — and, as they argue, abuse — of legal mechanisms to, inter alia, frustrate and hinder the ability of democracies to defend themselves against terrorism.[22]

Although not expressly stated, it seems that the majority of judges in the US Supreme Court perceived the involved organisations potential use of the legal system and mechanisms as an illegal act of lawfare. Such a sentiment may be discerned in the majority comment: 'A foreign terrorist organisation introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt. This possibility is real, not remote'.[23]

However, there exists a delicate balance between lawfare, on the one hand, and peaceful settlement of international disputes, on the other. States should be, and actually are, obliged under international law to settle international disputes in at peaceful way, including by the use of judicial means if negotiation and conciliation efforts prove unable to solve the conflict.

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19 *US Constitution* amend I.

20 *Holder* 561 US (2010), 12.

21 The concept of 'lawfare' was introduced in the book *Unrestricted Warfare* (PLA Literature and Arts Publishing House, 1999) written by two Chinese air force political officers from the People's Liberation Army: Senior Colonel Qiao Liang and Senior Colonel Wang Xiangsui. The book discusses how a nation can defeat a technologically superior opponent. Rather than focusing on direct military confrontation, a variety of other means are examined, including using international law to place one's opponent in a bad position and circumvent the need for direct military action: Qiao Liang and Wang Xiangsui, *Unrestricted Warfare* (Pan American Publishing Company, 2002) [translation]. For a US perspective on 'lawfare', see Charles Dunlap, 'Legal Issues in Coalition Warfare: A US Perspective' in Anthony M Helm (ed) *The Law of War in the 21st Century: Weaponry and the Use of Force* (2006) 82 *International Law Studies* 221, US Naval War College, Newport, Rhode Island; and Charles Dunlap, 'Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts' (Paper presented at the Humanitarian Challenges in Military Intervention Conference, Carr Center for Human Rights Policy Kennedy School of Government, Harvard University, 29 November 2001).

22 See, eg, The Lawfare Project, *The Lawfare Project* <http://www.thelawfareproject.org> and ibid.

23 *Holder* 561 US (2010), 32.

For instance, article 2(3) of the *UN Charter* requires all members of the UN to settle their international disputes by peaceful means. This obligation is also perceived to be applicable in relation to disputes between States and non-state actors.[24] It is standard practice for the UN Security Council and the UN General Assembly to call upon the States concerned to seek a peaceful solution in negotiations with their non-state opponents.[25]

The means for peaceful conflict resolution are enumerated in article 33 of the *UN Charter* and include making use of international tribunals. Consequently, the use of the law and the legal system to address and resolve conflicts and international disputes should not be characterised as illegal 'lawfare', but rather as a legitimate means of peaceful settlement of disputes.

As regards the proposed activity to train PKK members on international law to peacefully resolve disputes, the Court held that such activity 'might buy time …, lulling opponents into complacency', and that the members might use the information about 'the structures of the international legal system … to threaten, manipulate, and disrupt' and that these arguments justified the criminalisation of these activities.[26] Effectively, this view means that peaceful teaching in international law is criminalised on the basis of the assumption that knowledge about the international legal system is a dangerous thing. This line of argumentation cannot, of course, be accepted.

Also, when it comes to the second proposal to 'teach PKK members how to petition various representative bodies such as the United Nations for relief', the views of the Court were misguided. The argument of the Court was that the relief obtained 'could readily include monetary aid', which the PKK could use to buy weapons.[27] As noted in the dissent, the word 'relief' implied in the actual context recognition under the Geneva Conventions, not money.[28]

In assessing the justification of the criminalisation of the proposed activities, the Court stressed that § 2339B was based on the finding that *any contribution* to a terrorist organisation facilitates its criminal conduct.[29] It remains, however, unclear that the proposed activities can themselves be redirected, or will free other resources that may be redirected, towards terrorist ends. At best, training in international law ensures a degree of respect for fundamental principles of international law.

This important goal outweighs concerns that involvement with a terrorist organisation may — perhaps unavoidably — lend some legitimacy to the group, and thus facilitate the

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24 Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) Vol 1, 108.

25 See, eg, SC Res 322, UN SCOR, 27th sess, 1677th mtg, UN Doc SC/RES/1677 (22 November 1972) requesting Portugal, with regard to its African colonies, to 'enter into negotiations with the parties concerned', ie the liberation movements; SC Res 389, UN SCOR, 31st sess, 1908th mtg, UN Doc SC/RES/1908 (22 April 1976) concerns the situation in East Timor whereby all States 'and other parties concerned' are called upon to 'cooperate fully with the United Nations to achieve a peaceful solution to the existing situation'. See also more recent resolutions making appeals to 'all parties concerned' including non-state actors concerning: Afghanistan (SC Res 1333, UN SCOR, 55th sess, 4251st mtg, UN Doc SC/RES/4251 (19 December 2000) and GA Res 52/211, UN GAOR, 52nd sess, 78th plen mtg, UN Doc A/RES/52/211 (19 December 1997)); Congo (SC Res 1304, UN SCOR, 55th sess, 4159th mtg, UN Doc SC/RES/4159 (16 June 2000)); Georgia (SC Res 1287, UN SCOR, 55th sess, 4094th mtg, UN Doc SC/RES/4094 (31 January 2000)); Sierra Leone (SC Res 1334, UN SCOR, 55th sess, 4253rd mtg, UN Doc SC/RES/4253 (22 December 2000)).

26 *Holder* 561 US (2010), 32.

27 Ibid.

28 Ibid 15 (Breyer J).

29 *Holder* 561 US (2010), 24–7.

group's ability to attract funds etc. The legitimacy argument is, in itself, insufficient reason to undermine the rights of expression and association (as discussed further below). Moreover, it is difficult to understand that independent advocacy, which is a permitted activity under the *Material Support Statute*, should not confer legitimacy upon the group, as opposed to 'coordinated speech' and training activities.[30]

Teaching in international law is not a fungible donation such as money or arms, which the *Material Support Statute* was primarily intended to prohibit. Nor can such legal training reasonably be held to actually further terrorist activities, or to undermine foreign policy concerns or efforts to combat terrorism.

B The State obligation to raise awareness of international humanitarian law and international human rights law, and to ensure equal access to courts

Criminalising education and training in international humanitarian law and human rights law could ultimately be inconsistent with a State's obligation to disseminate and train its population in international humanitarian law both in peacetime and times of armed conflict. States are to ensure that international humanitarian law 'principles may become known to their entire population, in particular to the armed fighting forces, the medical personnel and the chaplains'.[31]

Also, in relation to human rights awareness, there is a growing concern and commitment by the international community that all members of society should be informed and educated in human rights.[32]

Furthermore, individuals must be entitled to invoke human rights and humanitarian law in court proceedings. Effectively preventing terrorist and terrorist organisations from having their claims heard in court proceedings may arguably conflict with the right to a fair trial, which typically includes a right to equal access to courts. States are obliged to take positive measures to organise the judicial system so that everybody can, in fact, turn to the courts for adjudication of a civil dispute and States must refrain from creating obstacles for persons who wish to initiate court proceedings.[33] Indeed, pursuant to the *Rome Statute of the International Criminal Court*, it is a war crime in international armed conflicts to 'declar[e] abolished, suspended or inadmissible in a court of law the rights and actions of the nationals of the hostile party'.[34]

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30 See also *Holder* 561 US (2010), 13 (Breyer J).

31 See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) art 47 ('*First Geneva Convention*') and the similar *Geneva Convention relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 127 ('*Third Geneva Convention*') and also the *Geneva Convention relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) art 144 ('*Fourth Geneva Convention*').

32 See Office of the United Nations High Commissioner for Human Rights, *The Right to Human Rights Education: A compilation of provisions of international and regional instruments dealing with human rights education*, UNHCHR HR/Pub/Decade/1999/2 (1999).

33 Manfred Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (Kehl am Rhein: Engel, 2nd revised ed, 2005) 311. See also the *International Covenant on Civil and Political Rights*, signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*') art 2(3) on the right to an effective judicial remedy.

34 *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) art 8(2)(b)(xiv).

C *The right to freedom of expression and association in international law*

Another pertinent issue is whether the interference in question with the right to freedom of expression and association was in accordance with international law.

Assuredly, the legislative branch has a large margin of appreciation in determining the necessary measures for combating terrorism due to the legitimate interests of national security and foreign affairs that are in play. Where such concerns are relevant, the interference with the right to expression and assembly is only permissible when it is necessary and provided by law.[35]

Under article 19 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), the right to freedom of expression includes freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media. The UN Human Rights Committee has found that article 19 is also applicable in relation to teaching and training activities in schools, universities etc.[36] The right may only be restricted if such restriction is provided by law and are necessary, inter alia, for the protection of national security.

Similarly, under article 21 of the *ICCPR*, the right to freedom of association can only be restricted, amongst other conditions, when necessary in a democratic society. This provision is generally understood as entailing that there should be a 'pressing social need' to interfere with the right to freedom of expression and association, and that the interference should be proportionate to the legitimate aim pursued.[37]

In assessing the necessity requirement, it is important to pay due regard to the obligations under international law, such as the obligation to ensure respect for humanitarian law. It should here be recalled that international humanitarian law equally binds both State and non-state parties to a non-international armed conflict.[38]

The European Court of Human Rights and other human rights bodies have held that certain restrictions on messages that might constitute an indirect incitement to violent terrorist offences — such as, presenting a terrorist offence as necessary and justified — are in keeping with the right to freedom of expression.[39]

However, providing training in humanitarian and human rights law, for example, can hardly qualify as indirect incitement to terrorism. On the contrary, the purpose is to avert further terrorist offences. In any event, the decision to interfere with and limit the right must be based on a careful individual assessment of the facts and circumstances in each concrete case.

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35 See *ICCPR* art 19(3) regarding restrictions in right to expression and art 22(2) on restrictions in the right to association.

36 See Human Rights Committee, *Views: Communication No 550/1993*, 58th sess, UN Doc CCPR/C/58/D/550/1993 (8 November 1996) ('*Faurisson v France*') and Human Rights Committee, *Views: Communication No 736/1997*, 70th sess, UN Doc CCPR/C/70/D/7361997 (26 October 2000) ('*Ross v Canada*').

37 *ICCPR* art 22(2). See also Nowak, above n 33, 490–1.

38 Dieter Fleck (ed), *The Handbook of International Humanitarian Law* (Oxford University Press, 2nd ed, 2008) 620.

39 See, eg, *Leroy v France* (European Court of Human Rights, Grand Chamber, Application No 36109/03, 2 October 2008). See also analysis of the case by Stefan Sottiaux, 'Leroy v France: Apology of terrorism and the Malaise of the European Court of Human Rights' free speech jurisprudence' [2009] (3) *European Human Rights Law Review* 275, 426:

> Experience has shown [...] that judges tend to overvalue security concerns at the cost of individual rights. It is often argued that flexible standards, such as the art. 10 [the right to freedom of expression] incitement test and, a fortiori, the democratic necessity test, are unable to preserve human rights in stressful times.

V Final remarks

Material Support Statute effectively bars teaching and training of certain non-state actors in international law, including in humanitarian law and human rights law.

The decision thus has the potential to chill important humanitarian work, such as peaceful engagement and dialogue with certain non-state actors, under the risk of prosecution. This result is undesirable as the dissemination of humanitarian norms is ever important as non-state actors play an increasing role in contemporary warfare and are responsible for many abuses.

In light of the foregoing, there is reason — at least from the point of view of international law — to question the conclusion that advocacy, coordinated teaching and peaceful legal training activities should be considered to fall within the scope of material support to terrorism. The justifications for criminalisation of the proposed activities — and the wider implications of such an extreme broad criminalisation of support to prohibited terror organisations — seem not to have been sufficiently examined by the US Supreme Court and, ultimately, by the US Congress.