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When Is International Peacemaking Illegal? Implications of the 2010 Supreme Court Decision in Holder v. Humanitarian Law Project

Summary

- The June 21st Supreme Court decision in Holder v. Humanitarian Law Project affirmed the constitutionality of the material support statue which makes it illegal for U.S. citizens and organizations to provide material support, including expert advice or assistance, service or personnel, to designated terrorist organizations regardless of whether the support is intended to promote nonviolence and peace.
- The material support law and the process of listing terrorist groups provides the U.S. government with an enhanced legal structure to arrest alleged terrorists and prevent terrorist acts.
- However, it is unclear that the process is effective in practice or that enhancing the government's legal power to prevent acts of terrorism outweighs the unintentional consequences of prohibiting nongovernmental organizations (NGOs) from working on the front lines of conflict zones to promote conflict resolution.
- Looking to the future, NGOs can work with the State Department and Congress to find ways to allow peacebuilding and humanitarian organizations to continue their operations legally, while also not threatening national security.

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Introduction

On June 21st 2010, the Supreme Court upheld the constitutionality of the material support statute. This law makes any U.S. citizen or organization that supports a designated terrorist organization—including through the provision of expert advice or training on how to promote nonviolent solutions and peace—criminally liable. The Holder v. Humanitarian Law Project ruling has serious ramifications for the international peacemaking community: could President Jimmy Carter be brought up on criminal charges for providing advice to all parties in Lebanon on fair elections practices? Are organizations trying to release hostages from rebel forces in Colombia acting illegally? Could a U.S. citizen involved in back-channel diplomacy to bring parties together for peace talks get arrested?

To better understand the implications of the Holder v. Humanitarian Law Project (HLP) decision, USIP's Center for Mediation and Conflict Resolution held a public workshop on September 10,

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2010 featuring David Cole, who argued the case on behalf of the Humanitarian Law Project; Alistair Millar, the director of the Center on Global Counterterrorism and Cooperation; Ken Wainstein, a partner in O'Melveny and Meyers, former assistant attorney general for National Security and a former Homeland Security adviser; Chester Crocker, a board member at the U.S. Institute of Peace and former U.S. assistant secretary of state for African affairs; and Kay Guinane, program manager of the Charity and Security Network.

The Decision

The decision in Holder v. Humanitarian Law Project (HLP) affirmed the constitutionality of 18 U.S.C. 2339B(a)(1), or the material support statute, which prohibits "knowingly provid[ing] material support or resources to a foreign terrorist organization."[1] Of utmost importance to the international peacemaking community, the Court upheld the definition that "material support," includes the provision of training, expert advice or assistance, service or personnel, regardless of whether these services are intended to combat terrorism or promote negotiation, nonviolent solutions and peace.

The case of Holder v. HLP originated in 1998, when the Humanitarian Law Project, a nonprofit organization dedicated to promoting the peaceful resolution of conflict, was providing training to the Kurdistan Workers' Party (PKK) on human rights enforcement and peaceful conflict resolution. Other plaintiffs to the Supreme Court case included several organizations and individuals who engaged with the Liberation Tigers of Tamil Eelam (LTTE) to provide humanitarian support to civilians in Sri Lanka affected by the civil war and the 2004 tsunami. Both the PKK and LTTE are designated as Foreign Terrorist Organizations (FTOs) by the U.S. Department of State and therefore the plaintiffs' training and assistance programs could be found illegal under the material support law.

David Cole argues that one of the key precedents for this case is the United States' experiences with communism in the 1940s and 1950s when the government attempted to prevent the insidious threat of communism by criminalizing advocacy, membership and association of the Communist Party. These measures led to the McCarthy investigations, which the Supreme Court would overrule as unconstitutional, recognizing that while the government can criminalize support to the unlawful activities of the Communist Party, prohibiting lawful engagement with it would violate the First Amendment.

In a departure from this precedent, the majority decision in Holder v. HLP found that while the law does regulate speech, the Court would defer to the expertise of Congress because the issue involves national security. Moreover, the Court found that there could be situations in which teaching terrorist organizations how to address their grievances through peaceful means could actually empower them to engage in harassing or disruptive behavior; working with these groups could provide a delay during which they could rearm; and, the mere act of interacting with these organizations could give them a degree of legitimacy that they could then use to enhance their terrorist activities. Thus, the Court ruled that the government has the right to regulate free speech with regard to support to terrorist organizations.

The FTO Policy in Practice: Is It Working?

While Holder v. HLP reaffirmed the constitutionality of the material support law, there remains debate as to whether the law and the practice of creating lists of proscribed organizations and individuals are actually effective in preventing terrorism.

On one side of the argument, terrorism is a threat to national security—one in which the traditional prosecutorial tools do not meet the government's needs to prevent terrorism. This

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argument asserts that the potential scale of suffering from a terrorist attack demands that the government has the tools to prevent acts of terrorism before they happen, rather than just deter them from happening again through traditional criminal law and punitive measures. One such tool is the material support legislation, and the listing of proscribed armed groups under the FTO list maintained by the Department of State and the Department of Treasury's Specially Designated National and Blocked Persons (SDN) list under the Office of Foreign Assets Control (OFAC) sanctions program.

Designating terrorist groups through these lists provides the Department of Justice with a basis to prosecute those found to be supporting people or organizations who actively threaten the security of the United States and provides the Treasury Department with the legal foundation to freeze the assets of such groups. The designation process is intended to stigmatize organizations engaged in terrorism, deter others from supporting them, and heighten public awareness about the groups that threaten us. However, it is not clear that these enhanced tools are effective, that the list serves as a deterrent, or what the process is for groups and individuals to appeal their designation and be removed from the lists.

With his experience as a prosecutor, Wainstein sees that the material support law is effective in preventing terrorism. Arresting someone who supports a designated terrorist organization degrades the organization's capabilities, slows down their planned activities and exposes the people in the terrorist network. This makes it easier for the government to detect them and gives the government a way to delegitimize their actions among a general public of potential recruits. While the material support law has been used most often to counteract traditional types of support—like money and arms—from reaching terrorist organizations, there have been several cases of U.S. citizens supporting terrorist groups by providing expert advice and services such as facilitating visas or providing satellite transmission services. Moreover, Wainstein argues that there is no firewall in place that money or advice contributed to terrorist organizations for peaceful ends will be guaranteed to support only peaceful and legal activities, and not violence.

While the intentions of the material support law and the designation of terrorist organizations align in spirit with what we know about how to combat terrorism, Alistair Millar argues that the unintended consequences are complicated and potentially counterproductive. As support from the population is one of the strongest tools terrorist organizations have, the foremost tactic for combating terrorism, as agreed upon by academics and the uniformed military alike, is to peel away the general population and pragmatists from the radicals. This tactic isolates the violent radicals and provides ways for the pragmatists to address their grievances through lawful means. This is how the Irish Republic Army (IRA)—which enjoyed widespread popularity in the 1970s, 1980s and 1990s—lost public support, with only the most radical "Real IRA" active today, though no longer a security threat on the same scale. Moreover, as Paul Wilkinson notes in the USIP Special Report "How Terrorism Ends," "A political agreement can . . . attract the support of a large segment of a population, and that support can be a very important component in ending the cycle of violence."[2] However, to pull the population away from the radical core, or work with parties to reach a political agreement—you have to interact with them.

When the government—for political or logistical reasons—cannot work directly with proscribed groups or the general population, nongovernmental organizations play a vital role. Yet, the material support law unintentionally prevents nongovernmental organizations from working on the front lines of conflict resolution and mediation. Moreover, American law schools have stopped giving advice to individuals and organizations outside the U.S., and American philanthropic funding sources are refusing to give money to humanitarian and human rights groups involved in such work.

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Implications for International Peacemaking

According to Crocker, the material support law will reduce American effectiveness and influence in the work of building peace and providing humanitarian aid. Americans cannot change the hearts and minds of those in proscribed groups if we cannot engage them.

Mediation and Diplomacy

One of the main activities that the material support law hinders is mediation. Of course, there are both pros and cons to consider when governments or third parties engage with proscribed armed groups. Accordingly, while in some cases the act of engaging in negotiations with a terrorist organization provides it with legitimacy, such risks must be calculated against the possible gains from what those talks can achieve and the change in behavior of the group that "controls the guns" in conflict situations. Moreover, as Kay Guinane notes, the laws create potential criminal liability for U.S. citizens to engage in back-channel communications in order to bring conflicting groups to the table in an official peace process, the logistics of which would involve too many concrete communications not to make those actions proscribed.

A recent USIP Special Report outlines a number of factors that should go into the calculations of whether or not to engage with a proscribed group:[3] Do the potential mediators see that the parties are genuine in wanting peace? Are the parties authentic representatives of their movement or their population? Do they have the capacity to deliver on a peace agreement? Does talking with them have some possibility of changing the behavior within the movement? According to Crocker, analysis of whether it is in the strategic national interest to engage with terrorist organizations will not be the same for all groups, and needs to be considered by experts on the situation, not in blanket legislation.

Other Humanitarian Activities

Outside of mediation, Guinane noted that the material support law has broad implications for humanitarianism and peacebuilding, and anticipates that there will be a "chill on peacebuilding and humanitarian activities." Among them:

- Grantmaking to organizations working to support peacemaking activities and provide humanitarian aid;
- Providing legal services to proscribed clients wishing to bring their grievances into the court system;
- Negotiating the release of hostages or child soldiers; and
- Talking with proscribed groups to enter territories in order to remove land mines or provide humanitarian relief.

Peacemaking Going Forward

In its Holder v. HLP decision, the Supreme Court deferred to Congress and the executive branch on the material support issue as it pertains to national security. Therefore, as we look to the future there are a number of ways in which the peacemaking community can work with the government to make room for the vital work of NGOs.

First, ask the State Department to re-analyze the FTO list to see if all 47 groups on it warrant the same designation, or if it is possible to have a more refined list or set of lists. Not all armed actors are the same. While it makes sense to have extreme restrictions on support, training and advice to

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About This Brief

The June 2010 Supreme Court decision in Holder v. Humanitarian Law Project upheld the constitutionality of the material support law which makes it illegal for U.S. citizens and organizations to provide support, including expert advice and training, to designated terrorist organizations regardless of whether that support is intended to promote peace. This Peace Brief captures the discussion from a public event convened by the U.S. Institute of Peace on September 10, 2010 to better understand how the decision affects the peacebuilding community. The author, Stephanie Schwartz, is a program specialist in the Institute's Center for Mediation and Conflict Resolution.

groups like al-Qaida, many of those 47 groups do not consider themselves to be at war with the United States. As Crocker noted, it is one thing to limit contact with anti-U.S. organizations, but the current lists include a number of groups that do not fit this description and could be important participants in future peacemaking efforts.

Another avenue is to work with the executive branch and Congress to undertake a fact-finding exercise to learn what is the actual impact of providing expert advice and training intended only for peaceful and nonviolent purposes. It is not clear that listing terrorist organizations actually delegitimizes those organizations, or that providing advice on human rights enforcement is fungible and frees up resources for unlawful actions. According to Guinane, such a fact-finding mission would enable the U.S. government to figure out how we can fulfill our obligations under international humanitarian law, while still preventing violent activity.

Finally, the U.S. secretary of state has the power to make exceptions for expert training, advice and training if it is in the national interest. Therefore, peacemaking organizations may want to work with the State Department to more rigorously pursue a waiver for peacebuilding activities which would ultimately advance our national interests to create a more peaceful global environment.

Endnotes

1. 18 U.S.C. 2339B(a)(1).
2. Jon B. Alterman and Sara Simon. "How Terrorism Ends." USIP Special Report, May 1999.
3. Véronique Dudouet. "Mediating Peace with Proscribed Armed Groups." USIP Special Report, May 2010.

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