

# Darfur and the flaws of *Holder v HLP*

Christopher Thornton

**When US Chief Justice Roberts handed down the judgment in *Holder v Humanitarian Law Project (HLP)*, he revealed the Supreme Court's tragic under-estimation of the potential of engagement with non-state armed groups.**

In *Holder v HLP* the Supreme Court was asked to respond to complaints filed in 1998 and 2003 by several humanitarian organisations who felt that the US legal code's prohibitions under the Material Support statute (18 U.S.C § 2339B) were overly vague and violated the right to freedom of speech and association, protected under the First Amendment to the US Constitution:

"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."

Rejecting the humanitarian organisations' claims, the Supreme Court found that the prohibition of engagement with "terrorist" organisations, even for humanitarian purposes, was entirely constitutional. In doing so it denied the possibility of assistance to millions of victims of human rights abuses. This assistance may come in many forms, for example, in advice provided to the leaders of non-state armed groups (NSAGs) regarding the peaceful resolution of disputes, or the negotiation of humanitarian agreements with NSAGs, such as that agreed between the Justice and Equality Movement (JEM), a Darfurian NSAG, and UNICEF in July 2010.

In most cases, under international law NSAGs cannot become parties to treaties which codify humanitarian and human rights norms. Although technically states are required to enforce their treaty obligations throughout their territory, in reality NSAGs often exert de facto control over swathes of territory, removing millions of people from the protection offered by these legal instruments. Humanitarian agreements are a

means to bypass this legal obstacle by allowing NSAGs to voluntarily subscribe to these norms.

For example, under the terms of the JEM-UNICEF agreement, the JEM agreed to abide by the requirements of a number of national and international human rights instruments prohibiting the use of child soldiers and protecting children generally. In another prominent example, many NSAGs have signed a Deed of Commitment which contains provisions akin to those found in the Ottawa Landmine Treaty, prohibiting the use of anti-personnel mines and agreeing to conduct and facilitate de-mining activities.<sup>1</sup> Although the statute is unlikely to be strictly enforced, *Holder v HLP* implies that the humanitarian workers and human rights advocates who negotiate these agreements may be subject to prosecution in the US under the 'material support' statute. Why?

## Fungibility

The Supreme Court's first argument focuses on the supposed fungibility (i.e. ability to be traded or converted) of all forms of 'assistance' provided to "terrorist" organisations, including advice and training. The argument goes that any assistance frees up resources which can then be used for violent ends.

This argument does not withstand closer scrutiny. Humanitarian agreements often involve a significant commitment of personnel and resources. For example, under the terms of the JEM-UNICEF agreement, JEM agreed to designate a senior official to be responsible for oversight of its implementation, another official to liaise with the UN, and a number of officials to serve as emergency contacts for the UN and other external actors. It also agreed to facilitate monitoring of the agreement and to report periodically on its implementation.

As JEM is estimated to have fewer than 5,000 fighters, these officials constitute a significant proportion of its high-level personnel. Additionally, JEM guaranteed full security and access for UNICEF staff: another drain on resources and personnel.

Similarly, Geneva Call reported in 2007 that, out of 35 signatories to its Deed of Commitment, 29 fulfilled reporting requirements. Additionally, 20 groups facilitated monitoring missions, and most undertook and/or cooperated with mine action.<sup>2</sup> In return, the only assistance provided to these groups was related to mine action. None of these measures can be identified as directly freeing up resources that could then be put to violent ends.

Chief Justice Roberts worried that "terrorist" organisations would find it easier to recruit members and raise funds, if they were publically engaged with reputable humanitarian organisations. In fact, the reverse is often the case. These agreements expose NSAGs to external scrutiny and may thus prevent groups who do not honour their commitments from presenting themselves as moral humanitarian organisations. Violations under the watchful eye of humanitarian workers will not go unreported and therefore transgressors risk jeopardising their reputation and support. The monitoring conducted by the organisations who work with NSAGs can also strengthen the case for international criminal liability, if the group clearly violates the agreement.

## Legitimacy and misuse

If we are concerned that negotiation confers some legal legitimacy or status on NSAGs, we should not be. The instruments which NSAGs conclude with NGOs or international organisations do not officially transform their legal status and most, if not all, agreements contain a clause to this effect. For example, the JEM-UNICEF agreement states in Article 4.5 that "This Memorandum of Understanding shall not affect the legal status of any party to the armed conflict."

If instead we are concerned that these negotiations confer political legitimacy on the group, I would suggest that, to the contrary, these negotiations send a clear message to NSAGs that if they want to be treated as legitimate actors, they must agree to abide by humanitarian and human rights norms. Is conveying the message that political legitimacy is contingent on respect for human rights a bad thing? I think not. Providing advice and guidance to this effect is a clear contribution to convincing NSAGs to renounce 'terror tactics'.

"The hang-up with legitimacy is a major stumbling block in peacemaking today."

Dennis McNamara, Senior Humanitarian Adviser at the Centre for Humanitarian Dialogue (involved in brokering the JEM-UNICEF agreement)<sup>3</sup>

Another of Justice Robert's arguments flies in the face of the prevailing trend in international relations since the end of the Second World War. He worries that, by informing these groups about mechanisms for the peaceful resolution of disputes, we will provide them with another avenue of attack or a stalling tactic to allow them to re-arm. Of course, these mechanisms may be abused but does this justify criminalising efforts to inform NSAGs of the existence of such mechanisms? It is our responsibility to make it clear that the world has human rights standards to which all actors, both state and non-state, are equally accountable.

"States may fear the legitimacy that such commitments seem to imply – but from a victim's perspective such commitments may indeed be worth more than the paper they are written on."

Andrew Clapham, Professor, International Law, Graduate Institute<sup>4</sup>

### The value of engagement

One might argue that my examples are rather conveniently selected. JEM do not appear on the list of "terrorist" organisations and have demonstrated a willingness to improve their



human rights record,<sup>5</sup> and indeed it is more difficult to find a basis for engagement with some NSAGs, for example the Lord's Resistance Army. However, this list does contain organisations which have conducted political and humanitarian activities: the FARC in Colombia, the LTTE in Sri Lanka, Hezbollah in Lebanon and the PKK in Turkey. Furthermore, the seeming irrationality of a particular NSAG should not be held necessarily to preclude engagement.

The ICRC has repeatedly demonstrated that improving respect for human rights and IHL is a process of persuasion and attrition. In dealing with the LRA, the ICRC recognised that beginning with the issue of child soldiers would be counter-productive, as abductions were integral to the LRA's methods of functioning. Instead, respect for the emblem of the Red Cross provided an entry-point into negotiations and allowed for the dramatic improvement of assistance to victims of the conflict.<sup>6</sup> An NSAG's refusal to accept all humanitarian and human rights norms immediately does not justify the disqualification of this group as irredeemable; small steps can be made towards greater compliance over time.

Prohibiting any engagement with NSAGs that are considered terrorist organisations precludes the greatest gains which can be made from humanitarian negotiation. How can we get the worst organisations to improve their compliance with human rights and humanitarian norms if we do not talk to them? Successes like the JEM-UNICEF

agreement and the many Deeds of Commitment negotiated by Geneva Call demonstrate that this is possible without encountering the dangers of fungibility, legitimacy and misuse which Chief Justice Roberts fears. I hope that, despite the risk of prosecution, people will continue to dare to engage with proscribed groups, encouraging them to renounce brutal methods and strive towards the peaceful resolution of disputes. And, moreover, I hope that the US Supreme Court and Government will reconsider their definition of 'material support'.

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1. This initiative is conducted by Geneva Call; see article on pp10-12.

2. Bongard, Pascal, 'Engaging Armed Non-State Actors on Humanitarian Norms: The Experience of Geneva Call and the Landmine Ban' in *Exploring Criteria and Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law and Human Rights Law*, p114, <http://tinyurl.com/GenevaCallConf2007>

3. Personal interview with Dennis McNamara, January 2010, Geneva.

4. <http://www.coricle.com/clapham/publications.html>

5. See JEM-UNICEF memorandum of understanding <http://tinyurl.com/JEM-UNICEFmou>

6. Bangerter, Olivier, 'The ICRC and Non-State Armed Groups' in *Exploring Criteria and Conditions for Engaging Armed Non-State Actors to Respect Humanitarian Law & Human Rights Law*, p81.