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## APPLYING *HOLDER* IN AN IRREGULAR WAR

by ELLEN PORTER

“Military aircraft bombed a town held by insurgents . . . killing more than 40.”<sup>1</sup> “Artillery gunners shelled a bread bakery full of workers and customers . . . killing at least 20.”<sup>2</sup>

As the conflict in Syria rages on, we question what the international community – specifically humanitarian organizations – can do to alleviate the devastating effects of civil war. Is direct aid the most effective form of assistance?<sup>3</sup> *Holder v. Humanitarian Law Project* complicates the US’s ability to provide humanitarian aid during irregular warfare.<sup>4</sup>

## CURRENT STATE OF AID

After a series of student revolts in March 2011, violence in Syria morphed into full-blown civil war.<sup>5</sup> At a meeting of the General Assembly in Autumn 2012, United Nations Secretary General Ban Ki-moon called the crisis “grave and deteriorating,” noting that the situation had taken a “particularly brutal turn” in August, 2012.<sup>6</sup>

Recent numbers from the U.N. approximate that 2.5 million Syrians inside the country are in need of aid and 1.2 million are internally displaced.<sup>7</sup> Nevertheless, the international community has taken little action to combat the situation.<sup>8</sup>

The U.N. Security Council has not been able to make substantial progress towards a solution.<sup>9</sup> All members of the Security Council need to approve any U.N.-authorized action in Syria, but Russia and China are stalling attempts to move forward.<sup>10</sup> In August 2012, Kofi Annan retired from his position as UN Arab League envoy to Syria, citing inaction and a “lack of unity” among members of the Security Council as his main reasons for stepping down.<sup>11</sup> Annan claimed the Council was too preoccupied with “finger-pointing and name calling” and not focused on quelling the escalating violence.<sup>12</sup>

U.S. action has not proven much more effective. The U.S. has formally condemned Syrian president Bashar al-Assad, but the condemnation was primarily an act of geopolitical significance and had little actual consequence in Syria.<sup>13</sup>

While it is clear that humanitarian organizations can do more, a recent Supreme Court case may force them to reconsider their next steps.

*HOLDER V. HUMANITARIAN LAW PROJECT*

In the 2010 case, *Holder v. Humanitarian Law Project*, the Supreme Court upheld a federal law that made it a crime to “knowingly provid[e] material support or resources to a foreign terror organization (FTO).”<sup>14</sup> Critics of the opinion fear that prosecution under this law will deter sources of aid.<sup>15</sup> The American Civil Liberties Union claims that the holding, “hinders the ability of human rights and humanitarian aid organizations to do their work” in that it

“thwarts the efforts” of those groups to use their resources to persuade and influence violent actors.<sup>16</sup>

Complicating the holding is the fact that, while the Court ultimately held that “the plaintiffs’ claims of vagueness lack merit,”<sup>17</sup> transcripts from the oral argument expose the Justices’ reluctance to fully consider all of the possible permutations of the ruling.<sup>18</sup> As a result, the decision ultimately favors national security over humanitarian interests.<sup>19</sup>

#### *HOLDER* AND SYRIA

Applied to Syria, *Holder* certainly complicates the future of foreign aid from the U.S.<sup>20</sup> Currently, there are no Syrian organizations on the list of foreign terrorist organizations,<sup>21</sup> and therefore no risk of prosecution for agencies and organizations directing aid into the country.<sup>22</sup>

However, the situation in Syria is an example of an irregular war, a new form of warfare characterized by “a method of fighting . . . linked to many different agendas, including revolutionary, separatist, or purely opportunistic” in which the actors are difficult to identify, and the battle lines are blurred and fluid.<sup>23</sup>

Humanitarian groups face an identification problem and are often unable to clearly distinguish between ally and enemy.<sup>24</sup> Aid intended for one side may easily end up in the hands of another, or at a minimum, it might indirectly benefit the opposition.<sup>25</sup> This problem is exacerbated when the perpetrators in a war are rebel groups starved for resources like ammunition and intelligence.<sup>26</sup>

Although *Holder* may not directly apply to the war in Syria at this time, the principles from the case may still be applicable. A brief case study of the Red Cross illustrates *Holder’s* potential implications were it to be applied to Syria. The Red Cross operates under the tenets of “neutrality” and “impartiality.”<sup>27</sup> The Red Cross provides assistance in an international crisis without considering the fault of the potential recipient.<sup>28</sup> If the Red Cross were to act in Syria, it would begin administration of assistance and act without regard to fault.<sup>29</sup>

However, if it were discovered that one of the Syrian rebel groups was on the list of FTOs, *Holder* would prohibit the Red Cross from administering aid to all.<sup>30</sup> While *Holder* requires that an organization cannot *knowingly* support an

FTO, the situation in Syria is an irregular war.<sup>31</sup> The identification problem inherent to irregular wars create the possibility that aid could easily be diverted into rebels' hands.<sup>32</sup> Is that possibility enough to invoke *Holder* and prevent a humanitarian aid group from acting in Syria at all, lest its effort come to benefit rebel organizations?

It is hard to say if this extraction is stretching the principles of *Holder* too far. But one thing is certainly clear; moving forward, humanitarian organizations sending aid to Syria, while not bound by *Holder*, should be cognizant of its principles in order to guarantee that aid efforts result in their intended purpose: helping people in need.

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#### NOTES

1 *Syria*, *Times Topics*, N.Y. TIMES (Oct. 26, 2012), <http://topics.nytimes.com/top/news/international/countriesandterritories/syria/index.html>.

2 Rick Gladstone, *Massacre at Syrian Bakery Dims Hope for a Holiday Truce*, N.Y. TIMES (Oct. 23, 2012), at A9.

3 Direct humanitarian aid is assistance in the form of supplies, food, or other material resources. DEFINING HUMANITARIAN AID, <http://www.globalhumanitarianassistance.org/data-guides/defining-humanitarian-aid> (last visited Nov. 14, 2012).

4 *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2720 (2010).

5 Syria, *supra* note 1.

6 David D. Kirkpatrick, Hwaida Saad, and Neil MacFarquhar *United Nations Says 100,000 Refugees Fled Syria in August*, N.Y. TIMES (Sept. 4, 2012), at A7.

7 Syria, *supra* note 1.

8 *UN raises humanitarian appeal to \$347 million to help growing number of Syrians in need*, UN NEWS CENT. (Sept. 7, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42827&Cr=Syria&Cr1=#.UEzS6KRWpTo>; *Syria: UNICEF scales up health and nutrition response for children affected by crisis*, UN NEWS CENT. (Sept. 6, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42817&Cr=Syria&Cr1=#.UIhFb2k>. (The U.N. developed a Syrian Response Plan, but it is severely under-funded; the U.N. recently made an appeal for \$347 million, however, the plan is currently only funded at \$90 million.)

9 Karen DeYoung, *Suicide attacks in Syria makes international action less likely*, WASH. POST (May 10, 2012), [http://www.washingtonpost.com/world/national-security/suicide-attack-in-syria-makes-international-action-less-likely/2012/05/10/gIQA8KAmGU\\_story.html](http://www.washingtonpost.com/world/national-security/suicide-attack-in-syria-makes-international-action-less-likely/2012/05/10/gIQA8KAmGU_story.html).

10 *Syria Crisis: Kofi Annan quits as UN-Arab League envoy*, BBC NEWS (Aug. 2, 2012), <http://www.bbc.co.uk/news/world-middle-east-19099676>.

11 *Id.*

12 *Id.*

13 Syria, *supra* note 1.

14 *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2712 (2010) (citing 18 U.S.C. §2339(a)(1)).

15 American Civil Liberties Union, *Supreme Court Rules "Material Support" Law Can Stand*, BLOG OF RIGHTS (June 21, 2010), <http://www.aclu.org/national-security/supreme-court-rules-material-support-law-can-stand>.

16 *Id.*

17 *Holder*, 130 S.Ct. at 2720.

18 See Interview with John Nowak, Professor of constitutional law at Loyola University Chicago School of Law (Oct. 25, 2012) (citing Professor Ronald Rotunda). Professor Nowak points out that, when presented with the respondent's hypothetical that, following the court's theory, newspapers publishing op-ed articles by Hamas (an FTO) should be punished under the statute, Justice Scalia responded, "We can cross that bridge when we come to it." *Id.* See also Ronald D. Rotunda, MODERN CONSTITUTIONAL LAW CASES AND NOTES, 975 (Thomson Reuters, 10th ed. 2012).

19 Nowak, *supra* note 19.

20 American Civil Liberties Union, *supra* note 16.

21 SEC'Y OF STATE, BUREAU OF COUNTERTERRORISM, DESIGNATED FOREIGN TERRORIST ORG. (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

22 *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2713 (2010).

23 Stathis N. Kalyvas and Matthew Adam Kocher, *Ethnic Cleavages and Irregular War: Iraq and Vietnam*, 35 POL. & SOC'Y 183, 210 (2007).

24 *Id.*

25 SARAH KENYON LISCHER, DANGEROUS SANCTUARIES: REFUGEE CAMPS, CIVIL WARS, AND THE DILEMMAS OF HUMANITARIAN AID 91 (Cornell Univ. Press 2005).

26 Journalist Examines Chaotic Fighting in Syria, NAT'L PUB. RADIO (Oct. 18, 2012), <http://www.npr.org/2012/09/18/161345903/journalist-examines-chaotic-fighting-in-syria>.

27 FIONA TERRY, CONDEMNED TO REPEAT?: THE PARADOX OF HUMANITARIAN ACTION 18 (Cornell Univ. Press 2002).

28 *Id.* at 19.

29 *Id.*

30 *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2713 (2010).

31 *Id.* Kalyvas and Kocher, *supra* note 24.

32 *Id.*