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# Litigating the Arab-Israeli Conflict in U.S. Courts: Critiquing the Lawfare Critique

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# LITIGATING THE ARAB-ISRAELI CONFLICT IN U.S. COURTS: CRITIQUING THE LAWFARE CRITIQUE

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*The lawfare critique offers a provocative challenge to the use of law and legal process in the context of the Arab-Israeli conflict. It has been used to question the legitimacy of numerous lawsuits filed by individuals harmed in the conflict. The lawfare critique is misguided, however, because it fails to recognize that the purpose of any legal system is to offer a viable alternative to the use of force. In addition, the lawfare critique runs counter to the right to a remedy, a firmly established principle of international law. Legal fora should remain accessible to victims, who should have the right to seek redress for their injuries. The rule of law offers a powerful mechanism for ending violence. We should be wary of any efforts to limit its use.*

## I. INTRODUCTION

The Arab-Israeli conflict has lingered for decades. It has affected the political stability of the Middle East and implicated international relations throughout the world. The conflict has caused thousands of deaths and even more injuries, and the violence has affected lives far beyond the geographic borders of the Middle East. Countless efforts to resolve the conflict have met with limited success.

In the face of such an intractable conflict, it is not surprising that victims would seek redress for their injuries in any conceivable forum. Few lawsuits, however, are filed in the country where the harms were inflicted. Rather, these lawsuits are often filed in other countries. Several factors have contributed to this phenomenon, including the diverse number of nationalities affected by the conflict and the challenge of pursuing claims in the countries where the harms occurred.

In fact, several civil lawsuits have been filed in U.S. courts by individuals who have been harmed in attacks linked to the Arab-Israeli conflict. These lawsuits raise a number of claims, many of which are based on international human rights norms and, most notably, the prohibition against

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extrajudicial killing. The plaintiffs are innocent civilians, caught in the repetitive cycle of violence that typifies the Arab-Israeli conflict. Some victims were specifically targeted. Others were unintentional victims, euphemistically designated as collateral damage. The defendants are often foreign governments or government officials. Occasionally, nonstate actors are sued. This litigation has had mixed success; many of these lawsuits have been dismissed while others have resulted in successful judgments for the plaintiffs. A few of these successful lawsuits have even resulted in the receipt of monetary compensation by the plaintiffs.

Some critics have referred to this litigation as "lawfare," which is defined as a "strategy of using or misusing law as a substitute for traditional military means to achieve military objectives."[1] Lawfare has also been defined more generally as "the use of law as a weapon of war."[2] The lawfare critique has been applied to legal proceedings at both the international and national levels.[3]

In the context of the Arab-Israeli conflict, most of the lawfare critique has focused on litigation filed by Palestinian or Lebanese plaintiffs against Israeli government officials or related entities in U.S. courts.[4] In *Matar v. Dichter*, for example, victims of a 2002 Israeli Defense Forces (IDF) aerial bombing in Gaza City filed a lawsuit against Avraham Dichter, who was the head of the Israeli Security Agency.[5] The plaintiffs alleged that Dichter had authorized a targeted killing operation that killed or wounded numerous civilians. The plaintiffs raised several claims, including war

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[1] COUNCIL ON FOREIGN RELATIONS, *Lawfare, the Latest in Asymmetries*, March 18, 2003, *available at* http://www.cfr.org/publication/5772/lawfare_the_latest_in_asymmetries.html (discussing the increased use of legal tools as weapons of war).

[2] Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Carr Center for Human Rights, John F. Kennedy Sch. of Gov't, Harvard U., Working Paper, 2001), *available at* http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf.

[3] *See, e.g.*, Tung Yin, *Boumediene and Lawfare*, 43 U. RICH. L. REV. 865 (2009); David B. Rivkin, Jr. & Lee A. Casey, *Lawfare*, WALL ST. J., Feb 23, 2007, at A11; Eric Talbot Jensen, *The ICJ's "Uganda Wall": A Barrier to the Principle of Distinction and an Entry Point for Lawfare*, 35 DENV. J. INT'L L. & POL'Y 241 (2007); W. Chadwick Austin & Antony Barone Kolenc, *Who's Afraid of the Big Bad Wolf? The International Criminal Court as a Weapon of Asymmetric Warfare*, 39 VAND. J. TRANSNAT'L L. 291 (2006); Gerald M. Steinberg, *The UN, the ICJ and the Separation Barrier: War by Other Means*, 38 ISR. L. REV. 331 (2005); Jeremy Rabkin, *Lawfare: The International Court of Justice Rules in Favor of Terrorism*, WALL ST. J. Sept. 17, 2004 at A14.

[4] *See, e.g.*, Brooke Goldstein & Aaron Eiten Meyer, *Legal Jihad: How Islamist Lawfare Tactics are Targeting Free Speech*, 15 ILSA J. INT'L & COMP. L. 395 (2009); ANNE HERZBERG, NGO "LAWFARE" EXPLOITATION OF COURTS IN THE ARAB-ISRAELI CONFLICT 2 (2008). The lawfare critique has also been raised with respect to lawsuits filed by Muslim or Arab groups against authors or politicians for speech-related activities. *See* Goldstein & Meyer, *supra* note 4, at 395–397.

[5] Matar v. Dichter, 563 F.3d 9 (2d Cir. 2009).

crimes, crimes against humanity, extrajudicial killing, cruel, inhuman or degrading treatment, and wrongful death. In *Belhas v. Ya'alon*, victims of the 1996 IDF bombing of the U.N. compound in Qana, Lebanon filed an action against Lt. General Moshe Ya'alon, who was the head of IDF Army Intelligence.[6] The plaintiffs alleged that Ya'alon had command responsibility for the attack and was, therefore, responsible for war crimes, crimes against humanity, extrajudicial killing, and cruel, inhuman or degrading treatment or punishment. Finally, *Corrie v. Caterpillar, Inc.*, involved a lawsuit filed by relatives of several individuals, including a U.S. activist, who were killed by an IDF bulldozer that was demolishing Palestinian homes. Unlike *Matar* and *Belhas*, this lawsuit was filed against a U.S. corporation, Caterpillar Inc, which had sold the bulldozers to the IDF.[7] Each of these lawsuits was dismissed, albeit, on different grounds. Both *Matar* and *Belhas* were dismissed on immunity grounds[8] while *Corrie* was dismissed pursuant to the political question doctrine.[9]

The lawfare critique argues that such lawsuits are often filed by partisan groups or nongovernmental organizations (NGOs) for political or strategic purposes. Critics assert that plaintiffs do not expect to win when they file these lawsuits.[10] Critics have also noted that these lawsuits fail to achieve their legal objective of providing redress for victims and that such litigation can, in fact, undermine human rights.[11] Thus, "rather than putting an 'end to impunity' and 'obtaining justice,' NGO lawfare makes the promotion and enforcement of universal human rights even harder to achieve."[12]

This essay makes three claims regarding the lawfare critique and its applicability to lawsuits involving the Arab-Israeli conflict. Part II asserts that the lawfare critique stands in opposition to the right to a remedy, which is a firmly established principle of international law. Part III suggests that the lawfare critique is too broad because it could be used to challenge a wide range of lawsuits, including lawsuits filed by victims of terrorism in U.S. courts. Finally, Part IV raises concerns about the limitations that the lawfare critique could pose for a democratic society founded on the rule of law. At its most extreme, the lawfare critique would preclude the use of law to resolve conflicts or restrict the role of lawyers in conflict resolution, a

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6 Belhas v. Ya'alon, 515 F.3d 1279 (D.C. Cir. 2008).

7 Corrie v. Caterpillar, Inc., 503 F.3d 974 (9th Cir. 2007).

8 Matar, 563 F.3d at 15; Belhas, 515 F.3d at 1290.

9 Corrie, 503 F.3d at 984.

10 Herzberg, *supra* note 4, at 23.

11 *See id.*

12 Herzberg, *supra* note 4, at 40.

puzzling proposition. Regrettably, the U.S. Supreme Court recently sanctioned this very outcome in *Holder v. Humanitarian Law Project*.[13]

## II. CHALLENGING THE RIGHT TO A REMEDY

The right to a remedy is now firmly established in international law. It is codified in numerous international instruments, from the Universal Declaration of Human Rights to the International Covenant on Civil and Political Rights (ICCPR).[14] It is also recognized in regional human rights instruments. The right to a remedy is premised on a fundamental principle—where there is a right, there must be a remedy. Access to justice through judicial proceedings is an integral component of the right to a remedy. The lawfare critique would undermine this important advancement in human rights by restricting the right of victims to seek redress for their injuries.

For example, the ICCPR requires States Parties to provide remedies for any violation of its provisions. These remedies include the right to bring a claim and to have that claim heard. Article 2(3)(a) of the ICCPR requires States Parties "[t]o ensure that any person whose rights or freedoms as herein recognizes are violated shall have an effective remedy . . . ." Article 2(3)(b) adds that States Parties must "ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State . . . ." Finally, Article 2(3)(c) requires States Parties "[t]o ensure that the competent authorities shall enforce such remedies when granted."

The Human Rights Committee was established by the ICCPR to offer guidance on the interpretation and application of the treaty. The Committee has indicated that Article 2(3) requires States Parties to investigate and adjudicate cases of suspected violations and to provide redress in cases of established violations. Thus, the Committee has explained "Article 2, paragraph 3, requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3,

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[13] Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010).

[14] *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III); International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI) A, art. 2, U.N. Doc. A/RES/2200(XXI).

is not discharged."[15] Significantly, the obligation to provide a remedy under the ICCPR is non-derogable, even in times of national emergency.[16]

The right to a remedy is an established principle of customary international law. This development was recognized by the U.N. General Assembly in 2005 when it adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles).[17] The Basic Principles acknowledge that the right to a remedy for victims of human rights abuses is found in numerous international instruments and customary international law. Thus, the Basic Principles do not create new international responsibilities but reaffirm existing obligations.

The Basic Principles recognize that the right to a remedy encompasses three distinct features for victims of gross violations of international human rights law and serious violations of international humanitarian law: "(a) equal and effective access to justice; (b) adequate, effective and prompt reparation for harm suffered; [and] (c) access to relevant information concerning violations and reparation mechanisms."[18] Access to justice is an important component.

> A victim of a gross violation of international human rights law or a serious violation of international humanitarian law shall have equal access to an *effective judicial remedy* as provided for under international law. Other remedies available to the victim include access to administrative and other bodies, as well as mechanisms, modalities, and proceedings conducted in accordance with domestic law. Obligations arising under international law to secure the right to access justice and fair and impartial proceedings shall be reflected in domestic laws.[19]

Similarly, the U.N. Updated Set of Principles for the Protection and Promotion of Human Rights Through Action to Combat Impunity also emphasize the importance of redress for human rights abuses.[20] Holding perpetrators of human rights abuses accountable punishes them for their actions. And, it serves as a deterrent against future abuses. In addition, accountabili-

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[15] Human Rights Committee, "General Comment No. 31: Nature of the General Legal Obligation Imposed on States Parties to the Covenant," U.N. Doc. CCPR/C/21/Rev.1/Add.13 (2004), at para. 16.

[16] *See* Human Rights Committee, "General Comment No. 29, States of Emergency," U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), at para. 14.

[17] G.A. Res. 60/147, ¶ 11, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

[18] *Id.* at para. 11.

[19] *Id.* at para. 12 (emphasis added).

[20] *See* U.N. Commission on Human Rights, "Report of the Independent Expert to Update the Set of Principles to Combat Impunity, U.N. Doc. E/CN.4/2005/102/Add.1 (2005).

ty affirms the rule of law. It clarifies the truth about past events, allowing both victims and society to better understand the underlying causes of abuse. The right to a remedy is, thus, critical to the struggle against impunity.

While offering an intriguing and provocative rhetorical challenge, the lawfare critique misses the mark because it fails to recognize that the central purpose of any legal system is to offer a viable alternative to the use of force and a mechanism for victims to seek redress for their injuries. Legal fora should remain accessible to victims, who should have the right to bring claims for redress. Even lawsuits that are ultimately dismissed can serve a purpose for victims, publicizing their plight, and forcing defendants to respond. Thus, the lawfare critique stands in direct opposition to the right to a remedy.

## III. IS THE LAWFARE CRITIQUE TOO BROAD?

Lawfare has been defined as a "strategy of using or misusing law as a substitute for traditional military means to achieve military objectives."[21] While this critique has generally been used to challenge lawsuits filed against Israeli government officials or related entities in U.S. courts, it could be applied with equal force to lawsuits filed by victims of terrorism in U.S. courts. Indeed, several lawsuits have been filed against Hamas and the Palestine Liberation Organization (PLO) for their complicity in acts of terrorism.[22] Numerous lawsuits have also been filed against Iran for its support of terrorist groups.[23]

In *Estates of Ungar v. Palestinian Authority*, for example, a U.S. citizen and his Israeli wife were killed in a terrorist attack in Israel by members of the Hamas Islamic Resistance Movement, which was subsequently designated a terrorist organization by the U.S. Department of State.[24] In 2000, the Ungar heirs and administrator of the Ungar estates brought a civil action pursuant to the Anti-Terrorism Act (ATA) against several defendants, including Hamas, the PLO, and the Palestinian Authority.[25] The complaint alleged various causes of action, including acts of international terrorism, wrongful death, negligence, intentional infliction of emotional distress,

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21 COUNCIL ON FOREIGN RELATIONS, *supra*, at 1.

22 *See, e.g.*, Knox v. Palestinian Liberation Org., 628 F. Supp. 2d 507 (S.D.N.Y. 2009); Gilmore v. Palestinian Interim Self-Government Auth., 422 F. Supp. 2d 96 (D.D.C. 2006); Biton v. Palestinian Interim Self-Government Auth., 412 F. Supp. 2d 1 (D.D.C. 2005).

23 *See, e.g.*, Ben-Rafael v. Islamic Republic of Iran, 540 F. Supp. 2d 39 (D.D.C. 2008); Beer v. Islamic Republic of Iran, 574 F. Supp. 2d 1 (D.D.C. 2008); Stern v. Islamic Republic of Iran, 271 F. Supp. 2d 286 (D.D.C. 2003).

24 Estates of Ungar v. Palestinian Auth., 153 F. Supp. 2d 76 (D.R.I. 2001).

25 Estates of Ungar, 153 F. Supp. 2d at 82.

and negligent infliction of emotional distress.[26] Several plaintiffs were dismissed because they were not U.S. nationals, a pre-requisite for litigation under the ATA.[27] In addition, several defendants were dismissed for lack of personal jurisdiction. However, the court refused to dismiss the case for lack of subject matter jurisdiction, insufficiency of service of process, improper venue, or *forum non conveniens*. After the court rejected these defenses, the defendants refused to further participate in the litigation.[28] Default judgments were then entered against the PLO and the Palestinian Authority, with damages in excess of $116,400,000 for each defendant.[29] Damages included lost earnings, pain and suffering of the decedent, mental anguish, loss of companionship, and loss of parental services.[30] The First Circuit rejected the defendants' subsequent efforts to set aside the default judgments on the grounds that defendants were entitled to sovereign immunity and that the case presented nonjusticiable political questions.[31] Subsequent litigation has addressed the efforts of the plaintiffs to collect the judgment.[32]

In *Flatow v. Islamic Republic of Iran*, a U.S. national, Alisa Flatow was killed by a suicide bombing in Israel.[33] Palestine Islamic Jihad, an organization funded by the Iranian government, claimed responsibility for the attack.[34] In 1997, Alisa Flatow's father brought a lawsuit against the Iranian government and several Iranian officials in the federal district court for the District of Columbia.[35] The lawsuit was filed under the Foreign Sovereign Immunities Act (FSIA), which provides the exclusive means for suing a foreign government in U.S. courts.[36] The FSIA offers immunity to foreign governments but creates an exception for several enumerated acts, including

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[26] *Id.* at 84.

[27] *Id.*

[28] Estates of Ungar, 153 F. Supp. 2d at 91.

[29] *See* Estate of Ungar v. Palestinian Auth., 400 F. Supp. 2d 541 (S.D.N.Y. 2005); Estate of Ungar v. Palestinian Auth., 396 F. Supp. 2d 376 (S.D.N.Y. 2005); Estate of Ungar v. Palestinian Auth., 304 F. Supp. 2d 232 (D.R.I. 2004); The Estates of Ungar ex rel. Strachman v. The Palestinian Auth., 228 F. Supp. 2d 40 (D.R.I. 2002). *See generally* Debra M. Strauss, *Enlisting the U.S. Courts in a New Front: Dismantling the International Business Holdings of Terrorist Groups Through Federal Statutory and Common Law Suits*, 38 VAND. J. TRANSNAT'L L. 679 (2005).

[30] *See generally* Estates of Ungar *ex rel.* Strachman v. Palestinian Auth., 304 F. Supp. 2d 232 (D.R.I. 2004) (describing the basis of the recovery entered against Hamas).

[31] Ungar v. The Palestine Liberation Organization, 402 F.3d 274 (1st Cir. 2005).

[32] *See, e.g.*, Estate of Ungar v. Palestinian Auth., 2006 U.S. Dist. LEXIS 27384 (D.D.C. 2006).

[33] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1, 7–8 (D.D.C. 1998).

[34] *Id.* at 8.

[35] *Id.* at 7–10.

[36] 28 U.S.C. §§ 1602–1611 (2010).

acts of state-sponsored terrorism.[37] The *Flatow* plaintiffs alleged that the Iranian government had provided financial assistance to Palestine Islamic Jihad and that Iran had been named a state sponsor of terrorism by the U.S. Department of State, thereby fulfilling the core requirements of the FSIA.[38] Although the Iranian government was served with process, it refused to participate in the proceedings and default was entered.[39] On March 11, 1998, the district court held that the plaintiffs had met the requirements of the FSIA and awarded them approximately $22.5 million in compensatory damages and $225 million in punitive damages.[40] Initial efforts to satisfy the judgment by attaching Iranian government property in the United States were unsuccessful.[41] In response, Congress adopted the Victims of Trafficking and Violence Protection Act of 2002, which authorized the payment of certain FSIA judgments from the U.S. Treasury.[42] Through this compensation scheme, the *Flatow* plaintiffs accepted partial payment from the U.S. Treasury in satisfaction of their judgments.[43] They chose to collect compensatory damages from the Treasury and pursue their claims for punitive damages in U.S. courts.[44]

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[37] 28 U.S.C. § 1605 (2010).

[38] Flatow v. Islamic Republic of Iran, 999 F. Supp. 1 (D.D.C. 1998).

[39] *Id.* at 6.

[40] *Id.* at 32.

[41] *See* Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 28 (D.D.C. 1999); Flatow v. Islamic Republic of Iran, 76 F. Supp. 2d 16 (D.D.C. 1999); Flatow v. Islamic Republic of Iran, 74 F. Supp. 2d 18 (D.D.C. 1999). Subsequently, on October 28, 2000, the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, became law, affording certain victims of terrorist acts an opportunity to recover funds from the United States to satisfy their outstanding judgments. One month later, on November 28, 2000, Flatow applied for such funds, electing one-hundred percent recovery of the amount of compensatory damages plus post-judgment interest. *See* Victims of Trafficking and Violence Protection Act § 2002(a)(1)(B). His application was approved, and on January 4, 2001, the Treasury Department transferred to Flatow more than twenty-six million dollars, representing the compensatory damages award and post-judgment interest on that portion of the judgment. As a condition of receiving funds from the United States, Flatow was required under § 2002(a)(2)(D) to relinquish "all rights to execute against or attach property that is . . . subject to section 1610(f)(1)(A) of title 28, United States Code." Victims of Trafficking and Violence Protection Act § 2002(a)(2)(D). Subsequent litigation has ensued in his efforts to collect the remainder through the attachment of assets located in the United States. *See, e.g.*, Flatow v. Islamic Republic of Iran, 353 U.S. App. D.C. 275 (D.C. Cir. 2002).

[42] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002, 114 Stat. 1464.

[43] Michael L. Martinez & Stuart H. Newberger, *Combating State-Sponsored Terrorism with Civil Lawsuits*, VICTIM ADVOCATE 5, 7 (Spring/Summer 2002).

[44] *See generally* Joseph Keller, *The Flatow Amendment and State-Sponsored Terrorism*, 28 SEATTLE U. L. REV. 1029 (2005); Ruthanne M. Deutsch, *Suing State Sponsors of Terrorism Under the Foreign Sovereign Immunities Act*, 38 INT'L LAW. 891 (2004).

Each of these lawsuits was filed in the context of the decades-long Arab-Israeli conflict. Damages were sought, not only to compensate the plaintiffs, but to deter similar acts in the future. Would the lawfare critique apply to these lawsuits? Was the Ungar family using law as a substitute for traditional military means to achieve military objectives? Was the Flatow family using law as a weapon of war? There are certainly some Israeli plaintiffs who consider their U.S. lawsuits against Arab interests to support the global war on terror.[45] If the lawfare critique is valid, it would apply with equal force to these lawsuits.[46]

There is, of course, a simple distinction between the *Matar-Belhas-Caterpillar* cases and the *Ungar-Flatow* line of cases. The *Ungar-Flatow* plaintiffs were suing "Arab" defendants whereas the *Matar-Belhas-Caterpillar* plaintiffs were suing "Israeli" defendants. Another distinction concerns the outcome of the litigation. The *Ungar-Flatow* plaintiffs were successful whereas the *Matar-Belhas-Caterpillar* plaintiffs were not. But, should the legitimacy of the lawfare critique be decided by the nature of the parties or the outcome of the litigation? A human rights critique of these cases questions why the *Ungar-Flatow* plaintiffs were entitled to relief whereas the *Matar-Belhas-Caterpillar* plaintiffs were not.

## IV. EXTENDING THE LAWFARE CRITIQUE: *HOLDER V. HUMANITARIAN LAW PROJECT*

Perhaps the most ominous aspect of the lawfare critique is the inference that law should not be used by victims to seek redress for their injuries or that lawyers should not be allowed to counsel clients on their rights or on available forums to pursue their rights. And yet, this outcome was sanctioned by the U.S. Supreme Court in *Holder v. Humanitarian Law Project*.[47]

In *Holder*, two U.S. citizens and six organizations filed a lawsuit challenging the constitutionality of the terrorism material support statute.[48] One of the organizations, the Humanitarian Law Project, had consultative

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[45] *See, e.g.*, Yigal Sarna, *Israelis Fight Terror Through U.S. Court System* (July 18, 2010, 7:10 PM) http://www.ynetnews.com/articles/0,7340,L-3921358,00.html (describing a lawsuit filed in federal court against al-Jazeera for complicity in attacks against Israelis during the 2006 war in Lebanon and the comments of one Israeli plaintiff, who remarked, "[t]his isn't about money. I want to make the world a better place.").

[46] *Cf.* Noura Erakat, *Litigating the Arab-Israeli Conflict: The Politicization of U.S. Federal Courtrooms*, 2 BERK. J. MIDDLE E. & ISLAMIC L. 27 (2009) (raising concerns about the politicized nature of human rights litigation in the United States and the inability of Palestinians to achieve success in lawsuits filed against Israeli defendants).

[47] *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2729 (2010).

[48] *Id.*

status with the United Nations.[49] The remaining five organizations worked on behalf of promoting Tamil rights.[50] The plaintiffs sought "to provide support for the humanitarian and political activities of the PKK [Kurdistan Workers' Party] and the LTTE [Liberation Tigers of Tamil Eelam] in the form of monetary contributions, other tangible aid, legal training, and political advocacy, . . . ."[51] Specifically, the plaintiffs sought to pursue several activities, including training the PKK "on how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief."[52]

At the time the lawsuit was filed, the material support statute provided "[w]hoever, within the United States or subject to the jurisdiction of the United States, 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 10 years, or both."[53] A companion statute defined material support or resources as "currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials."[54] The statute was subsequently amended to include "expert advice or assistance" in the definition of material support or resources.[55]

The plaintiffs raised two constitutional challenges against the material support statute. First, they argued that the statute violated their First Amendment rights to freedom of speech and association because it criminalized their provision of material support to organizations without requiring a finding that they had a specific intent to further the unlawful activity of

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[49] *See id.* at 2713.

[50] *See id.* at 2713–14.

[51] *Id.* at 2714. The PKK and LTTE had been designated foreign terrorist organizations by the U.S. State Department.

[52] *Id.* at 2716.

[53] 18 U.S.C.A. § 2339B(a) (West, Westlaw through 2010 P.L. 111-255 (excluding P.L. 111-203 and 111-240)), *invalidated by* Humanitarian Law Project v. U.S. Treasury Dept., 578 F.3d 1133 (9th Cir. 2009).

[54] 18 U.S.C.A. § 2339A(b) (West, Westlaw through Oct. 25, 2001) (amended Oct. 26, 2001).

[55] 18 U.S.C.A. § 2339A(b)(1) (West, Westlaw through 2010 P.L. 111-255 (excluding P.L. 111-203 and 111-240)).

these organizations.[56] Second, the plaintiffs argued that the statute was unconstitutionally vague in violation of their Fifth Amendment rights.[57]

The lawsuit proceeded through the federal courts for several years, shuttling between the district court and the Ninth Circuit Court of Appeals.[58] In 2009, the Ninth Circuit affirmed the district court's decision to grant the plaintiffs partial relief on vagueness grounds.[59] In response, the U.S. Supreme Court granted certiorari. In its June 2010 decision, the Court upheld the constitutionality of the material support statute as applied to the specific forms of support that the plaintiffs sought to provide.[60] The Court denied that the statute prohibited the plaintiffs from speaking or writing "freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law."[61] On these matters, the plaintiffs were free to act. Rather, the Court found that the statute prohibited the plaintiffs from providing these terrorist organizations with "material support," which covers "a narrow category of speech *to, under the direction of, or in coordination with* foreign groups that the speaker knows to be terrorist organizations."[62]

Under the Court's analysis, the plaintiffs could not train members of designated terrorist organizations on how to use humanitarian and international law to peacefully resolve disputes.[63] According to the Court, "[a] foreign terrorist organization introduced to the structures of the international legal system might use the information to threaten, manipulate, and disrupt."[64] These groups could use peaceful negotiations as subterfuge, "as a means of buying time to recover from short-term setbacks, lulling opponents into complacency, and ultimately preparing for renewed attacks."[65] The Court also found that the plaintiffs could not teach these groups how to petition international bodies such as the United Nations for relief because such speech "teaches the organization how to acquire 'relief.'"[66] On this

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[56] *See* Humanitarian Law Project, 130 S. Ct. at 2714.

[57] Humanitarian Law Project v. Mukasey, 552 F.3d 916, 927–28 (9th Cir. 2009), *cert. granted* Holder v. Humanitarian Law Project, 130 S. Ct. 534 (2009), *consolidated with* Humanitarian Law Project v. Holder, 130 S. Ct. 534 (2009).

[58] *Id.* at 921–24.

[59] *Id.* at 929–30. The Ninth Circuit affirmed that the portions of the AEDPA relating to "training" and to the "other specialized knowledge" portion of the "expert advice or assistance" element were vague.

[60] Holder v. Humanitarian Law Project, 130 S. Ct. at 2723.

[61] *Id.*

[62] *Id.* (emphasis added).

[63] *Id.* at 2720.

[64] *Id.* at 2729.

[65] *Id.*

[66] *Id.*

point, the Court viewed relief and money interchangeably.[67] Accordingly, groups could redirect such international relief to fund terrorist activities.

In making these determinations, the Court attached great weight to Congressional findings regarding the serious threat posed by international terrorism. "One of those findings explicitly rejects the plaintiffs' contention that their support would not further the terrorist activities of the PKK and the LTTE: 'Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that *any contribution to such an organization* facilitates that conduct.'"[68] The Court also noted that any material support, even support meant to promote peaceful activities, could be used for other purposes or could free up valuable resources.[69] Moreover, "[i]t 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."[70]

In dissent, Justice Breyer criticized the majority's failure to accord First Amendment protection to the plaintiffs' purported activities: "All the activities involve the communication and advocacy of political ideas and lawful means of achieving political ends."[71] He also expressed concern with the majority's willingness to rely on generalized and speculative fears about the possible implications arising out of the plaintiffs' activities. Justice Breyer recognized the broader implications of the Court's opinion, which essentially criminalized efforts to promote the rule of law.

> 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"?[72]

A thorough critique of the *Holder* decision is beyond the scope of this essay. It seems clear, however, that the U.S. Supreme Court accepts the assertion that law can essentially be used as a weapon of war. Thus, the plaintiffs could not train a terrorist group on how to use international law to peacefully resolve disputes. In addition, the plaintiffs could not even teach

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67 *Id.* at 2725–26, 2729.

68 *Id.* at 2724 (emphasis added in original).

69 *Id.* at 2725.

70 *Id.*

71 *Id.* at 2732 (Breyer, J., dissenting).

72 *Id.* at 2738 (citation omitted).

these groups how to petition international bodies for relief. According to the Court, such actions could aid a group in its military operations.[73]

## V. CONCLUSION

In the face of an intractable conflict that has lasted for decades and cost thousands of lives, we should see the law as an ally rather than an enemy. And, we should view lawyers as promoters of peace and not weapons of war. Courts should remain accessible to victims of human rights abuses, and the success or failure of such lawsuits should not be used to measure their legitimacy. The rule of law offers a powerful mechanism for ending violence. We should be wary of any efforts to limit its use.

[73] In contrast, the material support statute excludes medicine and religious materials from the definition of "material support or resources." 18 U.S.C. § 2339A(b)(1)(2010). Presumably, such materials could also aid a group in its military operations.