

Permissible Activities for Peacebuilders – Based on Statements by U.S. Officials

April 2017

Since the Supreme Court’s 2010 decision in *Holder v. Humanitarian Law Project* (HLP), peacebuilding organizations have faced significant uncertainty as to what communications with Foreign Terrorist Organizations (FTOs) remain permissible under the prohibition on material support of terrorism in 18 USC 2339B. Although there have been no prosecutions for peacebuilding activities since the decision, the lack of clarity about how it should be interpreted and applied has created a chilling impact on peacebuilding activities, inhibited constitutionally permitted speech and association, and reduced the kinds of contacts that might help prevent/counter violent extremism and terrorism.

This fact sheet is intended to provide a measure of clarity by drawing on representations made by the government to the Supreme Court during oral argument and in its brief in the *Holder* litigation about what it considers to be permissible communications with listed groups.¹ A chart summarizing these statements is attached.

Please Note:

The information contained in this fact sheet is provided for informational purposes only is not a substitute for expert legal, tax, or other professional advice tailored to your specific circumstances. It does not guarantee that the U.S. government’s interpretation of the law will not change or differ in specific cases.

These statements to the court are the best available information from the government on what the material support prohibition does and does not apply to. While the new administration may change policy, to date enforcement has not focused on legitimate organizations that make good faith attempts to comply with the law. When in doubt, peacebuilders should seek legal advice.

Based on these U.S. government statements, the prohibition on material support of terrorism does not appear to prohibit the following activities and communications with FTOs:

• **Meetings with FTOs**

Peacebuilding organizations may attend meetings sponsored by FTOs (*Solicitor General’s Brief, HLP case, p. 61, Transcript, HLP oral argument in the Supreme Court p. 35-36*) and engage in discussion with FTO members, as long as they do not provide expert advice or impart a specific skill. (*Brief p. 22, Transcript p. 52-53*) In addition, peacebuilding organizations may encourage the FTO and its members to renounce violence, (*Transcript p. 35-36*) engage in peace processes and use international forums to address their concerns. Incidental logistical activity in support of such meetings, such as arranging chairs and cleaning up, is also not prohibited. (*Transcript p. 52-53*)

¹This fact sheet will be updated to reflect any public statements by U.S. officials on this topic. Check for updates at www.charityandsecurity.org/permissiblepeacebuilding

- **Education and Communications with FTOs**

Peacebuilding organizations may provide FTOs with information that is based on general knowledge, including information on international humanitarian law (i.e. requirements on humanitarian access, treatment of children and protection of medical facilities) and historical examples of successful transitions by armed groups to nonviolent political processes. (*Solicitor General's Brief p. 31, HLP case*)

- **Training**

Under current law, peacebuilding organizations cannot legally provide training in conflict resolution and peacebuilding to FTOs. However, if such training is provided in a forum open to the public and is not provided in coordination with or at the direction of an FTO, such training does not violate the statute simply because one or more members of a FTO attends. (*Solicitor General's Brief p.22, HLP case*)

- **Legal Representation of FTOs and members of FTOs**

A U.S. attorney may provide legal advice to defend against criminal charges or sanctions, including

advice on how an FTO can change its activities and structure in order to no longer meet the criteria for designation as an FTO. (*Transcript HLP oral argument in the Supreme Court p. 31 and 47*)

- **Joint Activities**

Joint activities of FTOs and peacebuilding or humanitarian organizations that are protected by international humanitarian law, such as negotiations for access to civilians in need of assistance are not prohibited by the statute. (*Transcript HLP oral argument in the Supreme Court p. 41*)

USG Statements re Permissible Speech with FTOs

From *Holder v. Humanitarian Law Project* USG Supreme Court Brief on the transcript from oral argument

NOTE: These quotes are listed by topic. Some quotes address more than one topic. In those cases the quotes are repeated in the relevant topic categories.

Source	Permissible Speech	Quote
USG Brief p. 61	Assembly	“Section 2339B is fully consistent with this principle: it does not prevent petitioners from peaceably assembling with members of the PKK and LTTE for lawful discussion. It prevents the separate step of rendering material support, in the form of property or services, to these groups based on their demonstrated willingness to commit acts of terror rather than on their political views.”
USG Brief p. 45	Coordination, direction and control	“What petitioners may not do under the statute is something different: engage in certain activities in coordination with, or under the direction or control of , groups that they know have been designated as terrorist organizations or have engaged in terrorist activity.”
USG Brief p. 17	Expressing views re FTO	“...the material-support statute is not targeted at speech , still less at any particular message, and petitioners may accordingly express any views they wish about the PKK, LTTE, or any other terrorist organization.”
USG Brief p. 49-50	Expression	Petitioners are free to communicate with the public , as the speakers wished to do in the cases that petitioners cite, about ideas held by the PKK and LTTE. And just as importantly, petitioners are free to join and communicate with the members of the PKK or LTTE, so long as they do not use that communication as a vehicle for conveying material assistance.
Transcript p. 13-15 Cole	Expression Op-ed publication Service	MR. COLE: Well, the government says if they -- even if they speak in conjunction with the group and they are providing a benefit to the government, that's prohibited. So for example -- JUSTICE SCALIA: When they provide a benefit. MR. COLE: So, for example, under that view, the New York Times, Washington Post, and the L.A. Times, all of which published op-eds by Hamas spokespersons -- Hamas on the list -- thereby providing a benefit to Hamas, working with the Hamas spokesperson, they are all criminals. President Carter -- JUSTICE KENNEDY: No, no, no. I thought that he was -- he wants to meet with the people. The New York Times didn't meet with Hamas to tell them how great their editorial was. MR. COLE: No, but it's not about -- it's not about whether you meet with them. It's about whether you coordinate with them , and they've

		<p>certainly coordinated with the Hamas spokesperson in editing and accepting and then publishing his editorial. That is --that would be providing a service.</p> <p>JUSTICE SCALIA: It depends on what "coordinating" means, doesn't it? And we can determine that in the next case.</p> <p>MR. COLE: Well, let me -- let me also answer it this way, Justice Scalia. If you look at the specific speech which our clients seek to engage, it includes writing and distributing literature in conjunction with the Kurdistan Workers Party in the United States advocating their support. How is that different from...</p>
<p>Transcript p. 52-53</p> <p>Kagan</p>	<p>Expression, coordination</p> <p>Training and skills</p>	<p>JUSTICE KENNEDY: But Justice Ginsburg's question is can you advocate peaceful means -- and let's assume that if they embrace peaceful means, they get more interest in their organization, the organization becomes stronger for all purposes. Can you do that, that was Justice Ginsburg's question.</p> <p>GENERAL KAGAN: Can you say to an organization, look, you guys really should lay down your arms.</p> <p>JUSTICE KENNEDY: And here's how to do it. And here's how to go to the U.N., and here's how to apply for aid and here's how to file an amicus brief,</p> <p>GENERAL KAGAN: Well, now you can't. Because when you tell people, here's how to apply for aid and here's how to represent yourself within international organizations or within the U.S. Congress, you've given them an extremely valuable skill that they can use for all kinds of purposes, legal or illegal. And it's not sufficient for the Petitioners --</p> <p>JUSTICE GINSBURG: So you can -- you can communicate, but the communications are censored. That you said you can meet with -- you can be a member, you can attend meetings, you can discuss things, but there only -- there is a certain point at which the discussion must stop, right?</p> <p>GENERAL KAGAN: The discussion must stop when you -- when you go over the line into giving valuable advice, training, support to these organizations. At that point --</p>
<p>USG Brief p. 54</p>	<p>Membership, expression, inciting terrorist conduct</p>	<p>"Congress did not prohibit individuals from joining terrorist groups, expressing solidarity with them, or even inciting others to engage in terrorist conduct."</p>
<p>USG Brief p. 59</p>	<p>Membership, expression</p>	<p>Quoting the court of appeals (br. 56-59): "The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. [Petitioners]</p>

		are even free to praise the groups for using terrorism as a means of achieving their ends.”
p. 35-36 Kagan	Expression, association Membership	<p>JUSTICE GINSBURG: “And I thought you went further than saying there has to be strictly independent advocacy. You recognized in your brief that they could meet with members of these terrorist organizations. They could meet and communicate with them, but they can’t communicate advice on how to pursue their goals through lawful means?”</p> <p>GENERAL KAGAN: Justice Ginsburg, you are exactly right that, in addition to engaging in independent advocacy, Petitioners can meet with members of the foreign terrorist organizations, can join the foreign terrorist organizations, that membership is not prohibited by the statute.</p> <p>...</p> <p>GENERAL KAGAN: Absolutely, Justice Kennedy. If -- if Judge Fertig or the other Petitioners wanted to say to these organizations, you should change your ways, nothing in the statute --</p> <p>JUSTICE KENNEDY: “And suppose the organization’s board of directors agrees with that and wants them to address the general membership on that point? And they are doing it with the blessing of the organization.”</p> <p>GENERAL KAGAN: Justice Kennedy, I want first -- I am going to answer your question, and I am going to say that that’s still not covered.”</p>
USG Brief p. 4	Individual acting entirely independently of FTO to advance its goals Personnel	<p>Quoting IRTPA: “No person may be prosecuted under this section in connection with the term ‘personnel’ unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction and control. 18 U.S.C. 2339B(h).”</p>
USG Brief p. 13	Independent advocacy and expression	“The statute does not prohibit independent advocacy or expression of any kind.”
USG Brief p. 14-15	Independent advocacy and expression	“But the material support statute is not reasonably read to cover —and in the face of any constitutional doubt should not be read to cover— independent advocacy. ”
USG Brief p. 22	Independent advocacy and expression	“Moreover, the material-support statute only prohibits imparting a specific skill “to a foreign terrorist organization.” 18 U.S.C. 2339B(a)(1) (emphasis added). The statute thus prohibits support that is channeled to

	Training and skills	a foreign terrorist organization and excludes all advocacy or expression that occurs independently of such an organization. "
USG Brief p. 22	Independent advocacy and expression Training and skills	"... a defendant provides "training" within the meaning of the material-support statute only if he endeavors to impart a specific skill to people whom he knows to be members of a foreign terrorist organization."
USG Brief p. 37-38	Independent advocacy Personnel	They say that they seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * write and distribute publications supportive of the PKK and the cause of Kurdish liberation; * * * advocate for the freedom of political prisoners in Turkey* * ; and * * * assist PKK members at peace conferences and other meetings. " J.A. 58-59. Of course, petitioners could conduct all but the last of those listed activities "entirely independently" of the PKK and LTTE, 18 U.S.C. 2339B(h), in which case their conduct would not be criminal. But petitioners do not wish to do so: they sought to enjoin enforcement of the term "personnel" so that they could coordinate those activities with, and carry them out under the direction and control of, the PKK and LTTE. Because those proposed coordinated activities clearly fall within the statutory definition of "personnel," the court of appeals properly rejected petitioners' as-applied challenge.
USG Brief p. 39	Independent advocacy Service	"...the statutory requirement that a "service" be provide "to a foreign terrorist organization." 18 U.S.C. 2339B(a)(1) (emphasis added). That limitation requires a direct relationship with the foreign terrorist organization that benefits from the proffered service. See p. 22, <i>supra</i> . A speaker or writer who acts independently of a foreign terrorist organization may in fact benefit that organization, but he does not "knowingly provide[] material support or resources to a foreign terrorist organization" within the meaning of the statute. Petitioners simply cannot reconcile themselves to the statute's basic distinction between independent and concerted action.
Transcript p. 32-34 Kagan	Independent advocacy	GENERAL KAGAN: The statute cannot legitimately be read to -- to include their independent advocacy. But the statute in fact does not cover their independent advocacy. Judge Fertig and all the rest of the Petitioners can lobby Congress, can lobby international organizations --
Transcript p. 41	Joint activities	"And indeed, the government, as we discussed in our brief, believes that there are certain kinds of joint activities that would be allowed by the statute. "
Transcript p. 31 Kagan	Legal representation	JUSTICE SOTOMAYOR: If a terrorist was arrested in the United States from one of these groups, would they be barred under the statute from serving as their attorney in a U.S. court? ...

		GENERAL KAGAN: Justice Sotomayor, I believe that that would be excluded from the, statute, should be excluded from the statute, and indeed even Petitioners have never suggested ...”
Transcript p. 47	Filing amicus briefs Legal representation Service	JUSTICE KENNEDY: Do you stick with the argument made below that it's unlawful to file an amicus brief? GENERAL KAGAN: Yes, that I think that would be a service. In other words, not an amicus brief just to make sure that we understand each other. The petitioners can file amicus briefs in a case that might involve the PKK or the LTTE for themselves, but to the extent that a lawyer drafts an amicus brief for the PKK or for the LTTE, that that's the amicus party, then that indeed that would be prohibited. ”
USG Brief p. 15	Membership in FTO Association	“Finally, the statute does not infringe associational rights, because it does not prevent petitioners from joining or otherwise associating with foreign terrorist organizations.”
USG Brief p. 44	Membership and association	“And the statute does not prevent petitioners from joining or otherwise associating with foreign terrorist organizations.”
USG Brief p. 54	Membership, expression, inciting terrorist conduct	“Congress did not prohibit individuals from joining terrorist groups, expressing solidarity with them, or even inciting others to engage in terrorist conduct. ”
USG Brief p. 59	Membership, expression	Quoting the court of appeals (br. 56-59): “The statute does not prohibit being a member of one of the designated groups or vigorously promoting and supporting the political goals of the group. [Petitioners] are even free to praise the groups for using terrorism as a means of achieving their ends. ”
USG Brief p. 60	Membership	“Section 2339B does not prevent petitioners from becoming members of the PKK and LTTE or impose any sanction on them for doing so. ”
USG Brief p. 61	Membership	“Section 2339B does not regulate the membership of any organization, expressive or otherwise.”
Transcript p. Kagan	Association, membership	GENERAL KAGAN: Justice Ginsburg, you are exactly right that, in addition to engaging in independent advocacy, Petitioners can meet with members of the foreign terrorist organizations, can join the foreign terrorist organizations, that membership is not prohibited by the statute. What the statute does prohibit is active support of all kinds
p. 35-36 Kagan	Expression, association Membership	JUSTICE GINSBURG: “And I thought you went further than saying there has to be strictly independent advocacy. You recognized in your brief that they could meet with members of these terrorist organizations. They could meet and communicate with them, but they can't communicate advice on how to pursue their goals through lawful means? GENERAL KAGAN: Justice Ginsburg, you are exactly right that, in addition to engaging in independent advocacy, Petitioners can meet with

		<p>members of the foreign terrorist organizations, can join the foreign terrorist organizations, that membership is not prohibited by the statute.</p> <p>...</p> <p>GENERAL KAGAN: Absolutely, Justice Kennedy. If -- if Judge Fertig or the other Petitioners wanted to say to these organizations, you should change your ways, nothing in the statute --</p> <p>JUSTICE KENNEDY: "And suppose the organization's board of directors agrees with that and wants them to address the general membership on that point? And they are doing it with the blessing of the organization.</p> <p>GENERAL KAGAN: Justice Kennedy, I want first -- I am going to answer your question, and I am going to say that that's still not covered."</p>
Transcript p. 40-41 Kagan	Meetings Membership	<p>JUSTICE ALITO: And doesn't that lead to, kind of logically lead to the conclusion that mere membership could be prohibited? Could you explain how someone could be a member of one of these organizations without providing a service to the organization? Simply by lending one's name as a member; that might be regarded as a service. If you attended a meeting and you helped to arrange the chairs in advance or clean up afterwards, you would be providing a service to the organization.</p> <p>GENERAL KAGAN: I -- I actually don't think -- I mean, Congress clearly did not mean to include that."</p>
USG Brief p. 35	Personnel	<p>"18 U.S.C. 2339B(h). Accordingly, conviction under that provision requires a defendant to knowingly provide one or more persons to work under or to supervise a terrorist organization. If an individual acts independently of the organization, he cannot be held liable.</p>
USG Brief p. 4	Individual acting entirely independently of FTO to advance its goals Personnel	<p>Quoting IRTPA: "No person may be prosecuted under this section in connection with the term 'personnel' unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control. 18 U.S.C. 2339B(h)."</p>
USG Brief p. 37-38	Independent advocacy Personnel	<p>They say that they seek to "engage in political advocacy on behalf of the PKK and the Kurds before the U.N. Commission on Human Rights and the United States Congress; * * write and distribute publications supportive of the PKK and the cause of Kurdish liberation; * * * advocate for the freedom of political prisoners in Turkey* * ; and * * * assist PKK members at peace conferences and other meetings." J.A. 58-59. Of course,</p>

		petitioners could conduct all but the last of those listed activities “entirely independently” of the PKK and LTTE, 18 U.S.C. 2339B(h), in which case their conduct would not be criminal. But petitioners do not wish to do so: they sought to enjoin enforcement of the term “personnel” so that they could coordinate those activities with, and carry them out under the direction and control of , the PKK and LTTE. Because those proposed coordinated activities clearly fall within the statutory definition of “personnel,” the court of appeals properly rejected petitioners’ as-applied challenge.
USG Brief p. 41	Service	“The statute’s text plainly requires that a “service” be rendered “to” a foreign terrorist organization (which requires a direct relationship) . Any remaining ambiguity is easily avoided by interpreting the statute to require that a “service” be done at the terrorist organization’s command or behest. ”
USG Brief p. 39	Independent advocacy Service	“...the statutory requirement that a “service” be provide “to a foreign terrorist organization.” 18 U.S.C. 2339B(a)(1) (emphasis added). That limitation requires a direct relationship with the foreign terrorist organization that benefits from the proffered service . See p. 22, <i>supra</i> . A speaker or writer who acts independently of a foreign terrorist organization may in fact benefit that organization, but he does not “knowingly provide[] material support or resources to a foreign terrorist organization” within the meaning of the statute. Petitioners simply cannot reconcile themselves to the statute’s basic distinction between independent and concerted action.
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		<p>JUSTICE SCALIA: It depends on what "coordinating" means, doesn't it? And we can determine that in the next case.</p> <p>MR. COLE: Well, let me -- let me also answer it this way, Justice Scalia. If you look at the specific speech which our clients seek to engage, it includes writing and distributing literature in conjunction with the Kurdistan Workers Party in the United States advocating their support. How is that different from...</p>
Transcript p. 47	Filing amicus briefs Legal representation Service	<p>JUSTICE KENNEDY: Do you stick with the argument made below that it's unlawful to file an amicus brief?</p> <p>GENERAL KAGAN: Yes, that I think that would be a service. In other words, not an amicus brief just to make sure that we understand each other. The petitioners can file amicus briefs in a case that might involve the PKK or the LTTE for themselves, but to the extent that a lawyer drafts an amicus brief for the PKK or for the LTTE, that that's the amicus party, then that indeed that would be prohibited."</p>
USG Brief p. 31	Training – general knowledge	<p>"For the same reason that Congress expressly excluded general knowledge from the definition of "training," Congress required "expert advice or assistance" to be based on or drawn from a body of scientific, technical or specialized knowledge..."</p>
Transcript p. 52-53 Kagan	Expression, coordination Training and skills	<p>JUSTICE KENNEDY: But Justice Ginsburg's question is can you advocate peaceful means -- and let's assume that if they embrace peaceful means, they get more interest in their organization, the organization becomes stronger for all purposes. Can you do that, that was Justice Ginsburg's question.</p> <p>GENERAL KAGAN: Can you say to an organization, look, you guys really should lay down your arms.</p> <p>JUSTICE KENNEDY: And here's how to do it. And here's how to go to the U.N., and here's how to apply for aid and here's how to file an amicus brief,</p> <p>GENERAL KAGAN: Well, now you can't. Because when you tell people, here's how to apply for aid and here's how to represent yourself within international organizations or within the U.S. Congress, you've given them an extremely valuable skill that they can use for all kinds of purposes, legal or illegal. And it's not sufficient for the Petitioners –</p> <p>JUSTICE GINSBURG: So you can -- you can communicate, but the communications are censored. That you said you can meet with -- you can be a member, you can attend meetings, you can discuss things, but there only -- there is a certain point at which the discussion must stop, right?</p>

		GENERAL KAGAN: The discussion must stop when you -- when you go over the line into giving valuable advice, training, support to these organizations. At that point --
USG Brief p. 22	Independent advocacy and expression Training and skills	“Moreover, the material-support statute only prohibits imparting a specific skill “to a foreign terrorist organization.” 18 U.S.C. 2339B(a)(1) (emphasis added). The statute thus prohibits support that is channeled to a foreign terrorist organization and excludes all advocacy or expression that occurs independently of such an organization.”
USG Brief p.22	Independent advocacy and expression Training and skills	“... a defendant provides “training” within the meaning of the material-support statute only if he endeavors to impart a specific skill to people whom he knows to be members of a foreign terrorist organization.”