

Criminalising the enemy and its impact on humanitarian action

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Le *Centre de réflexion sur l'action et les savoirs humanitaires* (CRASH) a été créé par Médecins sans frontières en 1999. Sa vocation : stimuler la réflexion critique sur les pratiques de l'association afin d'en améliorer l'action.

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The *Centre de reflexion sur l'action et les savoirs humanitaires* (CRASH) was created by Médecins Sans Frontières in 1999. Its objective is to encourage debate and critical reflexion on the humanitarian practices of the association.

The Crash carries out in-depth studies and analyses of MSF's activities. This work is based on the framework and experience of the association. In no way, however, do these texts lay down the 'MSF party line', nor do they seek to defend the idea of 'true humanitarianism'. On the contrary, the objective is to contribute to debate on the challenges, constraints and limits –as well as the subsequent dilemmas- of humanitarian action. Any criticisms, remarks or suggestions are most welcome on our website: **www.msf-crash.org/en**

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Could a doctor working for a humanitarian organisation be sentenced to life imprisonment in the United States for having offered his “expert advice” to people linked to a “terrorist organisation”? That is what is feared by a number of civil rights’ organisations in the US since the Supreme Court declared on 21 June that the legislation known as the Material Support Statute was constitutional. Adopted by the US Congress in 1996 and amended twice since 9/11,¹ the legislation is intended to provide a framework to crack down on “material support” for organisations and individuals identified by the State Department as “terrorists” or a “threat to US national security and foreign policy”.

These laws adopt a broad definition of the concept of “material support”, to cover “training”, “services”, “expert advice or assistance” and “personnel”. The constitutionality of the statute had been contested by the Center for Constitutional Rights (CCR)². In 2005, it had brought a case before the Supreme Court on behalf of a group of organisations and individuals who feared criminal prosecution under the Material Support Statute³ if they engaged in “political and humanitarian activities”⁴ for the Kurdistan Workers’ Party (PKK) in Turkey and the Liberation Tigers of Eelam Tamoul (LTTE) in Sri Lanka (two organisations included on the State Department’s list of terrorist organisations).

DISTINGUISHING POLITICAL SOLIDARITY AND HUMANITARIAN AID

In its ruling of 21 June, the Supreme Court confirmed that training members of the PKK and LTTE to use international humanitarian law and other peaceful means to defend their cause was a federal crime that could be punished by up to 15 years in prison. The decision has been denounced by the CCR as an unjustified attack on the freedom of expression and freedom of association guaranteed by the US constitution.⁵ The ruling has also been criticised by international human rights’ organisations, which consider it as a risk of criminalising not only their activities but also humanitarian aid. In a brief sent to the Supreme Court in 2009, the Carter Center and the International Crisis Group emphasised that “the provision of humanitarian aid often requires

¹ The Patriot Act (2001) and the Reform and Terrorism Prevention Act (2004).

² An organisation created in 1966 to defend civil rights.

³ The plaintiffs based their appeal on the “vagueness” of anti-terrorist legislation. As the concept of “material support” was not clearly defined, citizens would be obliged to refrain from any behaviour that could be seen as incriminating, thus broadening the scope of the prohibition beyond the intentions of the legislature. The law would thus be “overly broad” in impinging on the freedom of expression and freedom of association guaranteed by the Constitution.

⁴ CCR website, “Holder v. Humanitarian Law Project”, <http://ccrjustice.org/holder-v-humanitarian-law-project>, accessed 15 March 2010.

⁵ Cf. for example, “Supreme Court Ruling Criminalizes Speech in Material Support Law Case”, CCR, Press Release, 21 June 2010, <http://ccrjustice.org/newsroom/press-releases/supreme-court-ruling-criminalizes-speech-material-support-law-case>. “The Supreme Court goes too far in the name of fighting terrorism”, *The Washington Post*, Editorials, 22 June 2010.

working with and providing expert advice to local actors”, activities that could be covered by the sanctions set out in the Material Support Statute however tenuous the link between these local actors and an organisation identified as “terrorist”.⁶

Whilst their fear is legitimate, it is important to emphasise that the cases brought before the Supreme Court did not relate to humanitarian aid delivered to a population but rather to political support to a rebel movement. According to the complaint filed by the CCR, organisations and individuals it represented “sought to associate and provide support to the PKK and LTTE”⁷. In the first case, the human rights NGO, the Humanitarian Law Project, sought to “advocate for the PKK in the interest of protecting human rights of the Kurds in Turkey, and to provide the PKK and persons associated with them with training and assistance in human rights advocacy and peacemaking negotiation”.⁸ In the second case, a group of doctors and US citizens of Tamil origin sought to “provide humanitarian aid and services and political support to the LTTE”, primarily with the aim of accessing international funding intended for the victims of the tsunami.⁹ The CCR pointed out that “the plaintiffs oppose terrorism and seek to associate with and support only the lawful, nonviolent activities of the PKK and the LTTE. Yet they are deterred from doing so by [anti-terrorist legislation], because any activities in conjunction with or for the benefit of the PKK or the LTTE might cause them to be designated or subject to investigation.”¹⁰ It is therefore non-violent support for a foreign political and military organisation that is being targeted, rather than the direct distribution of humanitarian aid to a population by an international NGO.

The CCR’s ongoing confusion between political solidarity and humanitarian action is in this respect, a source of some regret. The expression “support the humanitarian activities of the PKK and LTTE” is misleading if humanitarian action is taken to mean the impartial distribution of essential aid with no other aim than helping a population to survive the consequences of a conflict. However legitimate and useful, the socially-oriented activities of the PKK and LTTE are neither impartial nor divorced from political and military aims. In this respect, they are not more humanitarian than the campaign of psychological warfare carried out by the NATO’s “Provincial Reconstruction Teams” in Afghanistan or the distribution of food and water by the Sri Lankan army in the internment camps for Tamil civilians at the end of the conflict (February - December 2009).

Nonetheless, although the Supreme Court ruling confirms, first and foremost, a prohibition on any propaganda and political support for the enemies of the United States, its argument contains the seeds of criminalising humanitarian action. Echoing the argument made by the US Congress, namely that “foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct,” Judge John G. Roberts Jr. maintained in his recitals that, “It is not difficult to conclude, as Congress did, that the taint of [the PKK and LTTE’s] violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means.”¹¹ He continued:

⁶ Brief Amicus Curiae of the Carter Center... et al. 23 November 2009, p. 26.

⁷ United States Court of Appeal for the Ninth Circuit, Appeal No.07-55893, Humanitarian Law Project, et al. v. US Dept. of Treasury, et al., Appellant Opening Brief, 7 January 2008, p. 11. Available at http://ccrjustice.org/files/HLP/HLP_4_Ninth-Circuit_Plaintiffs_Opening_Brief.pdf accessed 15 March 2010.

⁸ Appellant Opening, p. 12.

⁹ Appellant Opening, p. 12.

¹⁰ Appellant Opening, p. 12-3.

¹¹ “Foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.” ... The PKK and the LTTE are deadly groups. It is not difficult to conclude, as Congress did, that the taint of their violent activities is so great that working in coordination with them or at their command legitimizes and furthers their terrorist means” HOLDER, ATTORNEY GENERAL, ET AL. v. HUMANITARIAN LAW PROJECT ET AL., CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR

“... designated foreign terrorist organizations do not maintain organizational firewalls between social, political, and terrorist operations, or financial firewalls between funds raised for humanitarian activities and those used to carry out terrorist attacks. Providing material support in any form would also undermine cooperative international efforts to prevent terrorism and strain the United States’ relationships with its allies, including those that are defending themselves against violent insurgencies waged by foreign terrorist groups.”¹²

Applied literally, this argument amounts to the criminalisation of any relief provided to help populations living in areas administered by rebel groups identified as “terrorists”. Setting up aid operations necessarily involves negotiating directly with the *de facto* authorities (“working under their authority”) and providing indirect material support to their political economy. Like most guerrilla movements and governments, the Tigers benefited from taxes applied on local staff’s wages of aid organisations as well as on service contracts (for transport, construction, supplies, etc.) Taking responsibility for the welfare of the population (by providing medical care, water, accommodation, food, etc.) allows rebel groups (and governments) to “outsource” the control and management of their population whilst saving their own resources for the war effort. Even though humanitarian action does not aim to “support the activities” of the PKK or LTTE or any other political or military organisation, there is no getting away from the fact that it does to some extent help to strengthen them – only marginally in most cases, but sufficiently in the eyes of Supreme Court Judge John G. Roberts Jr. to constitute a federal crime.

BRAVING GOVERNMENT PROHIBITIONS

The Court’s arguments are part of the discourse of total war traditionally used by warring parties hostile to the deployment of humanitarian aid in the enemy’s territory. It recalls the Cold War era when the criminalisation of humanitarian assistance in rebel controlled areas was the norm rather than the exception. From Afghanistan to Angola and Ethiopia to Cambodia, the governments of the time put up radical opposition to any form of negotiation between humanitarian organizations and rebel groups and *a fortiori* to the deployment of aid outside government-controlled areas. The ICRC was paralysed, and most aid was delivered to refugees, on the periphery of the conflict. It was primarily as a reaction to being locked out in this way that the “without borders” movement began in the early 1970s. Following in the footsteps of the (primarily religious) pro-Biafran organisations in Nigeria, MSF decided to sidestep government prohibitions by clandestinely crossing the borders of Afghanistan, Ethiopia and Angola, and later Sudan and Burma.

At the time, braving government prohibitions was possible because of a combination of at least three conditions: the existence of armed movements controlling particular regions and populations (the Mujahedin in Afghanistan, the EPLF and TPLF in Ethiopia and UNITA in Angola); the tacit acceptance of neighbouring countries, which tolerated illegal border crossings (Pakistan, Sudan and Zaire); and finally a decision by the “without borders” organisations to give up neutrality insofar as they found themselves embedded in the rebellion and were therefore rarely in a position to operate in government-controlled areas. In most cases, Western governments and their public opinion backed what was in fact a breach of state sovereignty for the sake of humanitarianism. Governments saw the “without borders” movement as an influential ally in the ideological battle against Communism, insofar as the states that criminalised humanitarian assistance all happened

THE NINTH CIRCUIT, No. 08–1498. Argued February 23, 2010—Decided June 21, 2010, p. 4. Available at: <http://www.supremecourt.gov/opinions/09pdf/08-1498.pdf>, accessed 15 November 2010.

¹² *Idem*, p. 5.

to be allies of the Soviet Union (the MPLA in Angola, the DERG in Ethiopia, and the pro-Soviet government in Afghanistan).

The early 1990s were an interlude when many nations, particularly in Africa, were more inclined to enter into international negotiations involving at least a degree of recognition of rebel movements, particularly in the context of arrangements for the deployment of humanitarian aid. The shift had begun in 1988 with the creation of Operation Lifeline Sudan (OLS), the first agreement on delivering humanitarian aid signed by a United Nations agency (UNICEF), a rebel movement (SPLA) and a government (Sudan).¹³ Yet, the criminalisation of “spoilers” of international peace agreements – like the RUF in Sierra Leone from 1997 onwards and UNITA in Angola after 1999 – has led to a return to denied access, based on the argument of the “criminal” nature of the enemy, and any assistance provided to it, including by humanitarian organisations whose sole aim is to help civilian populations.¹⁴ This is how people living in RUF and especially UNITA areas were deprived of any kind of assistance by a particularly effective embargo on humanitarian relief that cost thousands of lives.

Since 9/11 and the United States’ entry into the war along with its allies in Afghanistan and Iraq, the rhetoric of the war on terror has revived the figure of the enemy of mankind – *hostis humani generis* – in its transnational, tentacular form, rejecting the fundamental laws of humanity and therefore unable to claim protection under them. Criminalising humanitarian assistance to “enemy terrorists” is re-emerging in countries at war inside or outside their own borders (Iraq, Afghanistan, Pakistan, Somalia, Sri Lanka... and the United States). The decision of the Supreme Court will be used to legitimise, on the national and international stage, the reluctance of national governments to fulfil their humanitarian obligations.

Gaining clandestine access to populations living under the authority of “terrorist” organisations is now much more complicated than it was during the Cold War. The movements concerned (Pakistani, Afghan, Somali, Sri Lankan... rebels) do not necessarily have enough territorial control to protect humanitarian workers from central government. Few neighbouring countries are inclined to allow humanitarian workers to cross their borders illegally alongside “terrorist” organisations (either because they respect their international commitments in relation to the “war on terror” or because they are trying to hide the fact that they have broken them). Militants have little inclination to open their territory to international organisations, whose head offices are based in countries that are waging war on them or supporting the incumbent government. Furthermore, there is generally little support from Western governments and public opinion for such clandestine missions. It is therefore through negotiation and building political leverage – and less and less through clandestine action – that humanitarian organisations must resist the trend that criminalises their activities.

DEFENDING POLICIES OF HUMANITARIAN ASSISTANCE

Countering the rhetoric that denies the right to provide aid impartially to all victims of a conflict, including when they are on the “wrong side” of the front line requires being transparent and articulated. In my view, humanitarian organisations firstly need to recognise that the risk of humanitarian aid being co-opted materially or symbolically in the war effort is real and that it

¹³ Sri Lanka is also a special case, where negotiated access was introduced in 1980 at the instigation of a democratic government seeking to demonstrate its symbolic sovereignty over the areas controlled by the separatist rebels.

¹⁴ Cf. Fabrice Weissman (ed.), *In the Shadow of Just Wars. Violence, Politics and Humanitarian Action*, London, Hurst & co, 2004.

should be taken into consideration when setting up operations. Ideally, they should be able to say in all honesty, “We are conscious of the political and strategic benefits that the *de facto* authorities (government, anti-government and “terrorist”) may derive from our actions. We will do our utmost to limit the impact of this and ensure that aid is not being used against the populations, that it is not diverted (to support violence, amongst other things). In order to carry out this evaluation, we require from the existing authorities a minimal degree of freedom that includes the ability to move around freely and engage in direct dialogue with the local population, as well as to plan, implement and monitor our operations. Finally, we commit ourselves to suspending our operations if we believe we are not in a position to know what we are doing or if we consider that the effects of our action are so far removed from our intentions that it is doing more harm than good.” This, in short, is the message that should be conveyed to authorities which accuse humanitarian organisations of providing criminal assistance to “terrorist” organisations. A commitment to transparency— which is too often reduced to financial transparency, keeping political and operational decisions aside is crucial for governments to at least tolerate, if not trust humanitarian organisations.

The next step is to defend the legitimacy of a policy of humanitarian assistance, starting by reminding national governments that they have made a commitment to respect the impartiality of humanitarian organisations, conscious of the fact that this carries with it a political cost – indirectly supporting the political economy of warring parties – and a benefit – ensuring the survival of as many people as possible. Aid organisations may choose to emphasise the fact that the support of the war effort by humanitarian assistance is generally marginal in light of the resources derived from the belligerents’ involvement in the global economy, including funds raised from diaspora networks, political support, earnings from legal and illegal trade, etc.¹⁵ The failure of counter-insurgency strategies based on an overtly political use of “humanitarian” aid by Western forces to “win hearts and minds” of the people of Afghanistan, Pakistan and Iraq illustrates the limited impact on the course of the war of the (massive and highly questionable) co-option of aid organisations.

Lastly, it is important to emphasise the sheer inconsistency of criminalising “material support” for “terrorism”. Classifying an organisation as “terrorist” is eminently liable to change, as shown by the turnaround in the situation in Afghanistan or Somalia (where the United Nations and Western governments are now supporting the government led by Sheikh Sharif, having previously fought him as a terrorist). By the time humanitarian workers could be judged for providing “material support” to terrorism, it is likely that the political assessment of the status of the movement has changed. A trial on the legality of a humanitarian operation to support people living under the authority of a “terrorist” organisation could potentially have positive outcomes: it would create a political and media arena where the legitimacy of impartial humanitarian assistance policies would be defended, and its autonomy vis-à-vis “Raisons d’Etat” reaffirmed.

¹⁵ The material support provided by organisations such as the ICRC or MSF to the LTTE is derisory compared with the funds raised from the diaspora and profits generated from arms and drugs smuggling... and the aid provided by the government, which continued to pay the salaries of civil servants (primarily in health and education) living there as a symbol of its continued sovereignty over rebel areas.