Implications of the US Government's 'material support laws' for international peacebuilding

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In June 2010 the US Supreme Court upheld the constitutionality of a law that makes it illegal for US citizens or organisations to provide "expert advice," "service", "personnel" or "training in human rights enforcement or peaceful conflict resolution" to armed groups designated by the US Government as "terrorists."

This law is so sweeping that it treats peacebuilders, humanitarian workers and human rights advocates as criminal terrorists and threatens us with 15 years in prison for promoting peace.

The government's list includes groups like the Filipino CPP/NPA who are currently in peace-talks with their government mediated by Norway.

It also applies to other groups, like ETA in the Basque region and the ELN in Colombia who would like to be.

The shockwaves from that decision have had profound effects on our growing field of international peacebuilding.

What has taken some time for many of us in Europe to fully appreciate is that this decision also applies outside of the US – and not only to American citizens like myself – but also to peacebuilders of all nationalities.

We all need to appreciate that this threat of prosecution is real and serious and to take appropriate precautions.

Our work in context

Conciliation Resources is an independent organisation providing practical support to help people living in the midst of conflict to prevent violence and build peace.

We apply what we learn to improve peacebuilding policies and practice worldwide.

We are working with partners in a number of conflict and post-conflict contexts including: the conflict over Abkhazia and the conflict over Nagorny Karabakh in the South Caucasus, and the conflict with the LRA affecting Central and East Africa.

We also work in the Philippines where we are members of the International Crisis Group supporting the peace process between the Government and the MILF; and we are working in Pakistan and India in support of local actors on the Jammu and Kashmir conflict, as well as in the MRU region of West Africa, Colombia, and coup-ridden Fiji.

The work that we do on the ground is very diverse but will often include dialogue initiatives across the conflict divide; and media initiatives including radio and film to help raise debates and levels of public understanding; and support for local groups advocating their needs and interests with policy makers.

In addition we draw on the experiences we are having in these regions and we try to capture and promote learning from one peace process to another.

We publish the online journal Accord on peace processes and cross-cutting issues. Our latest in this series, published earlier in 2011, is on cross-border peacebuilding.

Lastly, we try to bring the work altogether by seeking to influence conflict policy – with a particular focus on the issues of public and womens' participation in peace processes, engagement and proscription, democracy, governance and peacebuilding, and most recently on cross-border peacebuilding challenges.

In the spectrum of our work we regularly engage with non-state (and sometimes state-like) armed actors, their supporters and sometimes proscribed groups.

This ranges from members of the LRA to representatives of the de-facto authorities in Abkhazia, from the MILF in the Philippines to militant Islamists in Pakistan.

Conciliation Resources and proscription

We first began working on proscription issues when we published on "Engaging Armed Groups" in Issue 16 of Accord back in 2005.

We did this through a process that involved what we call a "Joint Analysis Workshop," which involved bringing together a group of mediators and mediation supporters, government negotiators, representatives of armed groups. Together we discussed the issues and challenges. We then worked to bring all of their diverse views under the cover of one publication

We then published on "incentives, sanctions and conditionality in peacemaking", and a few years ago we brought out a policy brief we called Choosing to Engage: armed groups and peace processes, which was our contribution to the field of practice and an attempt to distil what we saw as some of the key issues.

To briefly highlight the key points made in Choosing to Engage, this document essentially made the case for:

- Constructive engagement of armed groups: (Humanitarian protection; Effectiveness; and Sustainability);
- Engagement without recognition or conferring legitimacy: (Making the case that there are multiple tactics available which do not equate with appeasement or complicity in violence – Talking doesn't necessarily mean negotiating);
- The importance of understanding the dynamics of each armed group and how decisions are made within it;
- How engagement tends to strengthen the pro-dialogue moderates / while lack of engagement tends to strengthen the position of hardliners;
- We flagged concerns about proscription or blacklisting policies as blunt instruments that can be counterproductive;

- And finally, we highlighted how improved interaction and cooperation between official and unofficial intermediaries benefits all parties pursuing engagement strategies (and that absence of positive interaction risks having the opposite affect).

Since then we have been cooperating with Berghof Peace Support (in Berlin) and the Centre for Humanitarian Dialogue (in Geneva) who are both members of the international Mediation Support Network (which includes the Folke Bernadotte Academy) to look more deeply into the issues of proscription and its impacts on mediation.

We held a series of seminars in Washington DC, London and Brussels – and each resulted in a report published online.

Our strategy was to bring together diplomats, NGOs, academics and civil servants working at both ends of the Counter-Terrorism/Mediation spectrum.

We then explored the issues of anti-terrorist laws and how these affected (or not) mediation.

Observations on proscription

There are two things that I learned from these meetings that I wanted to mention here today:

The first is the cumulative impact of these various proscription lists.

These range from the UN lists that focus on the Taliban and Al-Qaida to the EU and member states lists, the US lists and, in some context, the national blacklisting in the conflict in which we are working.

All in some fashion criminalise certain armed groups with asset freezes/travel restrictions.

In the case of the US, UK and many other countries there are provisions that criminalise direct or indirect support for groups on a list.

For us in London it has been important to be aware of how the global system of anti-terrorist legal regimes relate to and reinforce one another.

The second very striking factor was that those who work on counter-terrorism and those who work on mediation and peacebuilding move in very difference circles.

In the UN, Washington, London and Brussels, there appeared to be a surprising lack of interaction between the counter-terrorism and the conflict-resolution people.

This meant that mediators did not always understand the letter of the law when it came to proscription, and those enforcing the Counter Terrorism legislation and counter-terrrorism mechanisms had little or no understanding of the field and practice of peacebuilding or the particular vulnerabilities of non-governmental humanitarian organisations.

What this means in practice for peacebuilding work

Implications for armed actors

- From our work on sanctions it seems that where they do have leverage it is more usually with States than non-state actors.
- Terrorist listing for some has been taken as a badge of honour (al-Shabab; Hezbollah) with celebrations in the streets when the news was announced.
- Barring certain groups from travelling abroad/being engaged with can be counter-productive as members (already parochial) are never exposed to alternative views/influences. There are no opportunities to 'transform' (Ireland/Adams; Vendrell – Afghanistan; Sri Lanka/LTTE)
- Proscription laws tend to be all stick and no carrot. They do not respond to behavioural shifts. There's an absence of clear criteria for de-listing.

Criminalising communities

One of the groups who brought the case to the US Supreme Court was a group of American Tamil doctors from Sri Lanka who were working to provide tsunami relief to the LTTE-held areas of eastern Sri Lanka.

In one of our workshops we also had a Sri Lankan Tamil. He reminded us of the popular perception of persecution felt by the associated constituent population who share the aspirations for national self determination with the LTTE while not actually supporting them as a group or their use of terrorism.

He said the result of draconian anti-terrorist legislation actually helped rather than hindered proscribed groups building UK-based political support.

This feeling is even stronger when social entities close to groups are also listed (for example, Batasuna/Sortu).

Less well known are the consequences for refugees and asylum seekers – but I have heard some shocking stories of people being turned away for their very indirect association with listed armed groups.

Implications for third parties

<u>Humanitarian agencies and those they serve</u>

We have seen real innovations and risk-taking in this area in terms of engaging with armed and proscribed groups to reach humanitarian agreements.

In the last year we have seen UNICEF/World Health Organization and the Government of Afghanistan cooperating with the Taliban authorities to deliver a vaccination programme in the Province of Laghman.

Unfortunately, NATO was not willing to also cooperate – and this inevitably limited the programme's reach. Also in the last year we saw US aid to UN Development Programme in Somalia frozen for fear that it was falling into the hands of Al-Shabab.

While UN agencies and the International Red Cross enjoy specific immunities from prosecution, these immunities do not extend to the non-governmental development and humanitarian sector.

In a recent meeting of the Humanitarian Policy Group there was a case study from Gaza where the "clarity" provided by the Holder decision meant that training programmes for elected municipal authorities had to stop as they were potentially in breach of US legislation – even thought the US Government was not actually funding the programme.

There is a clear danger that humanitarians will refrain from engaging with proscribed groups, thereby limiting access to populations in need.

Of course, concern for the welfare and safety civilians living in areas occupied by proscribed organisations should be one of the international community's highest priorities regarding the responsibility to protect – not the people most neglected.

Implications for mediation and peacebuilding

Loss of neutrality/credibility

At Conciliation Resources' workshop in Washington we had Alvaro De Soto as our keynote speaker.

You may know that he famously resigned in 2007 after 25 years of service over a set of issues which relate directly to the UN's changing position on terrorism and the related issue of the election of Hamas in Gaza.

Although his reasons for resignation were specific and complex in his "end of mission" report he made it clear that, in a world beset with civil wars, for the UN to be seen to support one side over another is not only a violation of maintaining neutrality in practice and words, but also because to failure to do so, "may well place our personnel in jeopardy over time" (de Soto, pg 42).

The threat of arrest

Example: Geneva Call

Many of you will know of the international NGO Geneva Call who have been doing very innovative work with Non-State Actors (NSA) and securing their commitment to ban the use of landmines.

Their contact with NSAs is more transparent than most, and as a result the US Supreme Court decision has a direct impact on their work.

Due to their work with the Turkish Kurds, the President of the organisation will not risk travelling to the US, which has limited their policy and fundraising work.

The US law firm that offered them pro bono services has recently pulled out of their contract apparently fearing that giving legal advice to Geneva Call could be construed as falling under the "material support" interpretation of the law.

A US university decided not to risk working with them in what they call their "legal clinic" for similar reasons.

A UK University wanted to restrict the NSAs who would have access to an interactive IHL dissemination tool they were developing (over concerns with UK legislation)

Despite this, Geneva Call has not changed it criteria, policies or practice of engagement in the field.

Self-censorship and missed opportunities

Example: The Carter Center

One of the few unofficial mediation organisations in the world wanted to create a student "parliament" among the universities in occupied Palestinian territories.

Students would be trained to adjudicate disputes through peaceful dialogue rather than violence.

The Center fears that work places them at risk due to the possibility that some of the students participating could be members of a designated Foreign Terrorist Organisation and that it could be prosecuted.

I believe the programme has been closed as a result.

For many organizations in Europe – like Conciliation Resources – the effects of the US Supreme Court case and the related proscription regimes are having a self-censoring affect – we are simply no longer able to transparently engage with proscribed organisations.

We are certainly ensuring that when we do engage, we are not covering costs or offering training to individuals we know to be proscribed.

Proscription clearly has negative impacts on the work of peacebuilders.

It can influence who can (and cannot) engage with armed groups and in what circumstances.

Proscription and the Supreme Court's decision can affect where mediation and peace talks can take place.

Negotiators are unable to travel – and mediators are unable to hold meetings in certain countries for fear of potential arrest.

It is no accident that we see so little mediation from the US, the EU or even the UN.

And why Norway and Switzerland play such important roles and why the emergence of unofficial mediators and the new roles played by countries like Turkey, Malaysia and Qatar.

What is the response in the US amongst peacebuilders? A letter has been sent to Secretary of State Clinton to ask for a waiver for all conflict resolution activities, which Conciliation Resources has signed, and there is lobbying in Congress for an amendment to the law.

Concluding remarks

If we care about peace and ending the human costs of conflict – in the Middle East, Afghanistan, Pakistan, the Philippines, Somalia, Turkey, Spain, Colombia – wherever organised violence and weak governance lead to civilian deaths and displacement, we must find ways of protecting vulnerable civilian populations and supporting indigenous and sustainable processes of peaceful engagement and democratic change.

I believe the terrorist lists from the UN, the US the EU, [and for us the UK lists] and of course the domestic laws in the conflict context – each cast concentric nets over peacebuilding work.

They represent significant obstacles to human rights and peacemaking – and we must take care not to be caught like unwanted fish!

Does the US Anti-Terrorism Act and the US Supreme Court decision one year ago matter for us here? Absolutely!

And though we are vulnerable there is a question of degrees: I would say the risks range from high to low from local intermediaries, international intermediaries, international humanitarian NGOs – to goverments – the UN and ICRC.

We need a paradigm shift: seeing the problem of terrorism not only as a military and security problem – but also as a political and social problem which has causes as well as consequences, and requires a range of options (including tough security responses) to prevent future violence and see change.

We need more dialogue and understanding of these issues between those working on counter-terrorism with those engaging in the peacebuilding project including the local stakeholders

We need more light and less heat.

There is an ambiguity to be addressed regarding the political space for peacebuilding and the proscription issue.

We need the political space for peacebuiding work to be diplomatically defended.

Is Sweden prepared to defend its NGO partners' right to do peacebuilding work?

Right now the European External Action Service is looking to strengthen its conflict resolution capacities with the creation of a New Directorate for Conflict Prevention and Peacebuilding.

As it does so there is an urgent need for them to look at the relationship between proscription and peacebuilding.

Would it be worth considering negotiating some legal cover, perhaps a block waiver for EU citizens and organisations engaged in supporting peace processes?

Could OECD Development Assistance Committee donors consider an arrangement to be able to step in to support activities where the US withdraws its funds for peacebuilding (to the UN, NGOs or other IGOs?)

The American peacebuilding NGOs that took their case all the way to the Supreme Court hoped to clarify some of the ambiguities of the law so as to freely do their important work. The tactic backfired.

As a result some of the ambiguities have been resolved – and the legal space for doing peacebuilding work has gotten that much smaller.

We have to be hugely careful in sharing our resources for conciliation – BUT even when it comes to the groups listed by the US government – **it is still not a crime to talk to non-state armed groups**

Where conflicts are frozen or there is no there is no decisive victory on the battlefield, the only way we can find long-lasting solutions is to chose the path of engagement and dialogue.

Peacebuilding organisations are risk-taking and discrete by nature.

But peacebuilding is also not an event of providing "material support".

Peace is a process.

Our work will find new venues, and strategies to work around these obstacles. We must take these new threats and challenges very seriously, but our work to prevent and end wars and build peace will continue.

Thank you!

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