

STATEMENT FOR THE RECORD FROM PHYSICIANS FOR HUMAN RIGHTS

U.S. Senate Committee on the Judiciary, Human Rights and the Law Subcommittee

Senator Richard J. Durbin, Illinois, Chairman of the Subcommittee, Presiding

“The ‘Material Support’ Bar: Denying Refuge to the Persecuted?”

September 19, 2007

Physicians for Human Rights commends Chairman Durbin and the Human Rights and Law Subcommittee for holding a hearing on this important issue. The current interpretation of the “material support” for terrorism bar has had a serious negative impact on large numbers of asylum seekers and refugees who have legitimate claims for safe haven in the United States. Physicians for Human Rights (PHR) strongly supports the efforts of our colleagues in other non-governmental organizations who are working to correct the unintended consequences of the material support bar and its unjust impact on many individuals who have themselves been victims of oppression and terrorism in places such as Colombia, Sri Lanka, and Burma. While it is vital that the Bush Administration address the consequences of the material support bar for these broad groups, PHR would like to bring to the subcommittee’s attention another important but less visible problem raised by the bar.

As an organization that mobilizes health professionals to advance human rights, dignity, and justice, PHR has a particular interest in how the material support bar has affected the asylum claims of healthcare workers and how it may affect them in the future. PHR, an organization with a unique expertise in medical ethics and international humanitarian law believes that it is vital to defend medical neutrality and the right of civilians and combatants to receive medical care during time of war. In our view, current interpretation of the Immigration and Nationality Act, which considers the provision of medical care to injured members of groups designated as terrorist organizations to be “material support” to terrorism under Section 211(a)(3)(B)(iv)(VI), conflicts with well-established principles of customary law and with applicable international conventions.

Ethical Obligations

Healthcare workers worldwide are obligated, according to principles of medical ethics, to treat the sick and wounded without regard to politics, nationality, religion, race, sex or other such factors. The Geneva Conventions and their two Additional Protocols, not only require parties to the conventions to care for the wounded and sick, but prohibit parties from punishing those who carry out medical activities compatible with medical ethics. Including medical care under the definition of “material support” thus violates the principles of medical ethics. Denying asylum to a healthcare worker for providing medical assistance pursuant to his professional and ethical obligations, in circumstances protected by the Geneva Conventions, would undermine the ability of healthcare workers to provide aid in war-torn areas.

Anti-terrorism legislation adopted under the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 amended section 212 of the INA and widely expanded the class of individuals considered inadmissible to the U.S. for having “engaged in terrorist activity,” by inter alia, providing “material support” to “terrorists” or “terrorist organizations.” Instead of defining the term, the statute lists examples of “material support.” Medical care does not fit with examples of “material support” contained in the INA. To the contrary, the examples enumerated in the statute – such as hijacking a plane, kidnapping or violently attacking an internationally protected person like a healthcare worker, or using biological or

chemical weapons – share the common attribute of harming or endangering the safety and lives of human beings.

After defining the six actions that constitute terrorist activities, the statute lists examples of the type of conduct that constitutes “material support”—actions that Congress placed on the same footing as actually “engaging in terrorist activity.” Thus, one engages in terrorist activity when he commits:

an act that the actor knows, or reasonably should know, affords material support, including a safe house, transportation, communications, funds, transfer of funds or other material financial benefit, false documentation or identification, weapons (including chemical, biological, or radiological weapons), explosives or training...

Each of these examples describes conduct that actively furthers the ability of terrorists to carry out defined terrorist acts. The activities specifically enumerated as constituting “material support” share a common characteristic: the contribution of money, infrastructure, and means for accomplishing a terrorist organization’s agenda. Providing medical assistance to sick and wounded human beings who also happen to be members of terrorist organizations does not share this characteristic; indeed it is of an entirely different order. The ethical imperative to give medical care to the sick and wounded aims only to heal individuals, without regard to any political beliefs or agenda. None of the enumerated examples of “material support” involves anything similar to medical care. Clearly, Congress could have easily included medical care on this list but did not do so. Congress had good reasons for not listing medical care, given that healthcare workers are obligated under customary international law and medical ethics to care for the sick and wounded regardless of their politics.

Customary International Humanitarian Law

As the Supreme Court has ruled, courts are bound to follow customary international law, that universally acknowledged body of norms reflecting the practice of nations as developed over time and accepted by States as binding legal rules. In particular, the Geneva Conventions and consistent State practice acknowledging and following the Conventions form the basis of customary international law rules pertinent to this issue. Reflecting widespread agreement on the norms of medical ethics, these principles have been adopted as part of the body of customary international humanitarian law. Article 10 of Additional Protocol II to the Geneva Conventions provides that “persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol. Given that the relevant standards relating to the protection of medical personnel form part of customary international law, U. S. authorities must apply these rules.

Healthcare workers worldwide are bound to observe common tenets of medical ethics which find expression in a variety of codes and forms. The most familiar is the Hippocratic Oath, which has as its central premise “above all, do no harm.” The most widely accepted modern codification is the *International Code of Medical Ethics* of the World Medical Association, an international organization representing physicians, which provides ethical guidance to physicians worldwide. The *International Code of Medical Ethics* affirms a physician’s duties by providing that:

A physician shall always bear in mind the obligation to respect human life.

A physicians shall always act in the patient’s best interest when providing medical care.

A physician shall owe his/her patients complete loyalty...

A physician shall give emergency care as a humanitarian duty unless he/she is assured that others are willing and able to give such care.

Similarly, the “Geneva Oath” requires members of the medical profession to treat patient’s health as their “first consideration” and to “maintain the utmost respect for human life..., even under threat.”

Not only do the principles of medical ethics apply equally in times of peace and war, but international humanitarian law also requires medical personnel who provide their services in armed conflicts to respect the principles of medical ethics. As in times of peace, the primary task of the medical profession during armed conflicts is to preserve health and save life. International humanitarian law also provides that the wounded and sick “shall be treated humanely,” consistent with the fundamental purpose of the Geneva Conventions: to protect the wounded, sick and others no longer taking part in hostilities, in order to minimize suffering and loss of life.

Civilians and combatants alike are entitled to medical treatment in times of conflict. As codified in the Geneva Conventions and their two Additional Protocols, “the duty to care for the wounded and sick combatants without distinction is a long-standing rule of customary international law.” Likewise, compliance with the standards of medical ethics requires healthcare workers to assist all those in need, on all sides of an armed conflict.” In approaching a wounded person, a healthcare worker “must see only a patient, and not a friend or enemy. “ As framed by the ICRC:

Medical assistance should always be neutral; it should not be considered as taking a stand on the conflict because of those benefiting from this assistance. the criterion of when to undertake medical activities is based on purely humanitarian considerations, regardless of any other factors. To perform medical activities for the benefit of any person, including persons belonging to the adverse party, is not only lawful, but even a duty for those who are professionally bound.

If the provision of medical care were to be considered ‘material support’ under the INA, the result would be that healthcare workers would be required to deny medical care to certain wounded persons. Under such a reading of the INA healthcare workers would be in the untenable position of deciding whether a life is worth saving, whether a person has committed a crime or terrorist act, and whether a group should be denied medical treatment – a form of political decision-making incompatible with medical ethics and international law.

Adopting this viewpoint would undermine the United States’s efforts against terrorism by implicitly sanctioning terrorists who deny essential medical care on political, religious, or other invidious grounds in violation of the same international norms the U.S. should be following. Encouraging disrespect of these rules potentially puts at risk sick and wounded U.S. citizens who find themselves in war zones throughout the world.

Such a view is also contrary to U.S. policy regarding care of the sick and wounded in combat zones, as articulated by the State and Defense Departments. United States policy and practice is to provide medical treatment to detained terrorist suspects; soldiers are instructed to abide by customary international humanitarian law by respecting the rights of the wounded and sick. In addition, the State Department repeatedly has condemned foreign governments for not protecting medical personnel who provide medical assistance to enemy combatants, classifying such persecution as “human rights violations” in State Department country reports. The U.S. Army Field Manual, the U.S. Air Force

Pamphlet, and the U.S. Naval Handbook all require U.S. military personnel to treat the wounded and sick humanely. U.S. military manuals also codify the customary international law prohibition against denying medical care based on the politics or similar attributes of a wounded or ill person.

Conclusion:

The anti-terrorist legislation which amended the INA was aimed at thwarting further terrorist. Nowhere in the statutes or legislative history is there any indication that Congress intended to bar from the U.S. persons who conform their conduct to international law and ethical norms by treating the sick and wounded. Including medical activities under the definition of “material support” would lead to absurd and unconscionable results. For example an emergency room doctor who treats a patient considered to be a terrorist suspect could be classified as ‘affording material support” to a terrorist. Likewise, non-citizen U.S. military personnel in medical units, who provide medical assistance to detained terrorist suspects could be deemed to be providing “material support” to someone engaged in terrorist activity. Given that more than 40,000 non-citizens serve in the military (active and reserve) and about 8,000 permanent resident aliens enlist for active duty every year, many of whom enlist to qualify for citizenship, Congress could not have intended to penalize its own military personnel for fulfilling their duty to provide indiscriminate medical care in accordance with humanitarian law.

Medical care does not come within the statutory definition of “material support” as a matter of law. To maintain otherwise would penalize a victim of terrorism, violate the United State’s obligations under customary international humanitarian law, undermine medical ethics, and contradict U.S. policy as espoused by the Departments of Defense and State. Physicians for Human Rights urges that the U.S. government not deny asylum or refugee status to any healthcare worker under the material support provision of the INA for the provision of medical care in line with ethical duties.