

# Winning the Battle for Hearts and Minds: The Role of Charities in the War on Terrorism

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## Introduction

The tragic events of September 11, 2001 (9/11) set in motion a series of international legislative responses to concerns that charities are a primary source of funding for terrorist activity. These responses have created a new regulatory paradigm for international charity,<sup>1</sup> which differs fundamentally from prior regulation because it is modeled on money laundering legislation. No longer are charity regulators prepared to treat almost any regulatory breach by a charity as the inadvertent mistake of a well-meaning but uninformed do-gooder. In this new paradigm the great latitude and license traditionally accorded to charities to carry on their activities has been replaced by a suspicion that charities are naive operators which are manipulated by terrorists to fund illegal activities. So weighty are the implications of the new paradigm of charitable regulation, in fact, that from the perspective of regulators, the parable of the Good Samaritan, Jesus Christ's own illustration of the charitable impulse at work, may take on a whole new interpretation.

In Jesus' telling, the Samaritan who stopped on the road to Jericho to give assistance to a beaten and naked stranger was the charitable protagonist who put two other men who passed the stranger by to shame.<sup>2</sup> Jesus told the parable in answer to the question, "Who is my neighbour?" However, a modern-day rendition of the Good Samaritan set in today's political theatre might well portray the Samaritan as the villain of the parable. Helping a stranger lying half-dead between the cities of Jerusalem and Jericho without first ascertaining that he was not a terrorist would itself be grounds for suspicion. The fact that Samaritans were as reviled in Jesus' time as Islamists are today in the Western world would serve as probable cause to the regulatory authorities seeking to investigate the incident further. The Samaritan's decision to provide financial support not only for the terrorist's immediate needs but also for his rehabilitation would serve as evidence that this was no random act of charity.

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<sup>1</sup> See the author's paper "The New Paradigm of International Charity" given at the International Conference of the International Society for Third-Sector Research, July 9-12, 2006, Bangkok, Thailand.

<sup>2</sup> Luke 10:25-37, New Testament, New International Version:

25 On one occasion an expert in the law stood up to test Jesus. "Teacher," he asked, "what must I do to inherit eternal life?"

26 "What is written in the Law?" he replied. "How do you read it?"

27 He answered: "'Love the Lord your God with all your heart and with all your soul and with all your strength and with all your mind'; and, 'Love your neighbour as yourself.'"

28 "You have answered correctly," Jesus replied. "Do this and you will live."

29 But he wanted to justify himself, so he asked Jesus, "And who is my neighbour?"

30-35 In reply Jesus said: "A man was going down from Jerusalem to Jericho, when he fell into the hands of robbers. They stripped him of his clothes, beat him and went away, leaving him half-dead. A priest happened to be going down the same road, and when he saw the man, he passed by on the other side. So too, a Levite, when he came to the place and saw him, passed by on the other side. But a Samaritan, as he travelled, came where the man was; and when he saw him, he took pity on him. He went to him and bandaged his wounds, pouring on oil and wine. Then he put the man on his own donkey, brought him to an inn and took care of him. The next day he took out two silver coins and gave them to the innkeeper. "Look after him" he said, "and when I return, I will reimburse you for any extra expense you may have."

36 "Which of these three do you think was a neighbour to the man who fell into the hands of robbers?"

37 The expert in the law replied, "The one who had mercy on him." Jesus told him, "Go and do likewise."

Because the Samaritan paid the innkeeper for the stranger's expenses with cash rather than a credit card, thus providing a traceable financial record, a charge of money laundering might also be added to that of funding and facilitating terrorists. In the brave new world of international charity which we have entered, the priest and the pillar of the establishment who passed by the stripped and beaten stranger on the other side of the road seem to be the new protagonists, because they did not provide assistance to someone who might be a "terrorist" and therefore remained above suspicion. One of the consequences of "the world changed after 9/11" is that we are now afraid to treat a potential terrorist as our "neighbour."

The draconian anti-terrorism legislation that has been enacted since 9/11 is entirely contrary to the legal culture in which charities and their funders have operated for countless years. Because of this, most charities have responded to the legislation by denying the key role that the charitable sector plays in any terrorism crisis, by ridiculing and ignoring the legislation, and by presuming that the legislation will only be used against the most politically vulnerable groups. The response of most charities to the anti-terrorism legislation has been based on their perception of whether or not the legislation poses a legal threat to them. This response is short-sighted and self-serving and ignores the extent to which this paradigm shift in the regulation of the entire charitable sector impacts and reduces the historical role of charities in crisis situations fomented by terrorists. The ethnic or religious minorities which the public views as the target of this legislation frequently suffer the collateral damage of being tarred as collaborators with terrorists.

### The Anti-Terrorism Legislative Paradigm

President Bush responded to the attacks on the World Trade Centre with the very dramatic declaration that every nation and individual was either with the U.S. or with the terrorists. In the post-9/11 world, the complexities of terrorism were reduced to a simplistic definition of "good guys" and "bad guys." The world immediately and instinctively reacted with sympathy to the trauma experienced by American citizens, with country after country declaring its solidarity with the United States. Very soon thereafter, it became evident that "solidarity" required the passage of domestic money laundering and anti-terrorism legislation to adopt provisions in international treaties.<sup>3</sup> The legislation that was passed by the legislatures of America's allies in late 2001 in response to 9/11 was not driven by domestic pressure or the fear of an imminent domestic terrorist threat, but by political pressure to prove to the United States that each country was not "with the terrorists."<sup>4</sup> Subsequent terrorist activities in Spain and England have changed the attitudes of both politicians and citizens and given this legislation a relevance that it did not have at its inception in many countries. However, there are so many conflicting definitions of terrorism in different countries and international treaties that it is still difficult to know what the law considers "terrorism" in this global environment where very little terrorist activity is entirely domestic.

In Canada, the primary legislative response to the events of 9/11 was the enactment of the *Anti-terrorism Act*, which made significant amendments and additions to the *Criminal Code*, the *Canada Evidence Act*, the *Proceeds of Crime (Money Laundering) Act* and other statutes, and enacted

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<sup>3</sup> The United Nations Treaty Collection of Conventions on Terrorism is found at <http://untreaty.un.org/English/Terrorism.asp>

<sup>4</sup> The term terrorists as used in this paper connotes the persons who are the targets of the anti-terrorist legislation enacted subsequent to 9/11.

measures respecting the registration of charities, all “in order to combat terrorism.”<sup>5</sup> Since 2001, it has been a crime to commit or to directly or indirectly fund any “terrorist activity,” which is defined to include an:

act or omission, in or outside Canada, that is committed in whole or in part for a political, religious or ideological purpose, objective or cause, with the intention of intimidating the public, or a segment of the public, with regard to its security, including its economic security...and that intentionally causes death or serious bodily harm to a person by the use of violence, endangers a person's life, or causes a serious risk to the health or safety of the public or any segment of the public...<sup>6</sup>

The issue of greatest concern to donors and charities is that this legislation also makes it an indictable offence to collect or make available funds, “knowing that, in whole or in part, they will be used by or will benefit a terrorist group.”<sup>7</sup> These provisions are potentially threatening the future of international charitable activities. This is because much of the charitable sector has become so mesmerized by both the rhetoric and the reality of the war on terror that it has lost sight of its historic mission: to heal and rehabilitate any stranger lying injured on the Jericho road without inquiring into his or her religious, ethnic, political or ideological affiliation. The charitable sector has traditionally fought terrorism by winning over the “hearts and minds”<sup>8</sup> of the people to whom it brings healing, succour, education and development. Its role is not to be the agent of either terrorists or state authorities but to bring compassionate care and hope to those who suffer. In doing so, it points the way to a better society created through peaceful interaction with our “neighbours” rather than through terrorist acts.

A related threat to international charitable activities is that governments have become so mesmerized by the rhetoric and reality of the war of terrorism that they have lost sight of their historic role in allowing and enabling charities to help the suffering without being circumscribed by domestic political considerations. In modern times this assistance has extended beyond helping the victim lying alone on the Jericho Road to helping multiple victims have the right to freely associate with each other and build communal solutions to social problems. When the regulators of charities were primarily persons focused on how much good was being accomplished by their social activities, there was a significant degree of license extended to charities in their conduct on the ground. Now that international charitable activities are examined through the lens of regulators more concerned with money laundering and terrorist financing, there is little appreciation of the scale of good accomplished relative to the instances of misconduct.

The post 9/11 legislative response has not accounted for the fact that, historically, the law of charity has clearly contemplated and sanctioned charities dealing with and even providing “financing” to terrorists. The most obvious example of this is the charitable purpose of “redeeming captives,” which was recognized by both the common law and the civil law. In the post-9/11 world of international

<sup>5</sup> Anti-terrorism Act, S.C. 2001, c. 41 (assented to 18 December 2001; proclaimed in force 24 December 2001). The complete provisions of the Anti-terrorism Act, including Part 6, the Charities Registration (Security Information) Act, can be found on the website of Canada's Department of Justice. See <http://laws.justice.gc.ca/en/A-11.7/index.html>.

<sup>6</sup> Criminal Code, R.S.C. 1985, c. C-46, as am. by Anti-terrorism Act, S.C. 2001, c. 41, s. 83.01, emphasis added

<sup>7</sup> Ibid, s. 83.03.

<sup>8</sup> We think of the “battle for hearts and minds” as a modern concept associated with the war on with the lawyer immediately before telling the parable of the Samaritan. (Luke 10:27). Supra note 2.

charity, "the relief or redemption of prisoners or captives" seems to have been struck off the list of acceptable charitable purposes because it is impossible to pay for a person's redemption without directly or indirectly financing a terrorist cause. While there are arguments to support the view that charities should no longer have the ability to fund the redemption of captives, it is wrong for the international charitable sector to be denied its tradition of directly engaging terrorists simply because of the trauma of 9/11. Will we betray the lessons of Christ's parable by making the priest and the pillar of the establishment who passed by the beaten stranger on the Jericho road the models of good charity in the war on terrorism? Or will we recognize that the true charitable protagonists of our complicated age are those who respond to the suffering of victims of violence in volatile areas by binding their wounds and redeeming their loved ones, even if this requires them to accept the social reproach of being considered "Samaritans" for assisting any neighbour on the sole basis of their humanity?

### The "Relief or Redemption of Prisoners or Captives"

It is a truism to say that the world changed after 9/11. However, the fact that there has been change does not mean that everything that has gone before is irrelevant. Many partisans seek to draw historical parallels between the current global conflict with Islamic extremists and the Crusades. What most people fail to recognize, however, is that charities played a crucial role during the period of the Crusades in raising money to purchase the release of captives taken by terrorists, primarily Muslim pirates on the Barbary Coast.

The Crusades left a legacy of piracy in which corsairs carried on a holy war against the enemies of their faith by capturing Christians at sea and selling them as slaves. These corsairs, who operated from Turkish regencies in northern Africa, attacking maritime traffic in the Mediterranean, saw themselves as warriors of Islam in ways that somewhat parallel modern jihadis. Charities responded to these terrorist attacks by raising money to purchase the release of the captives taken by Muslim pirates. Most of the captives who were subsequently redeemed are now nameless and forgotten. However, one person who was captured by the Turks in 1575 and spent 5 years as a slave in Algiers went on to become a famous novelist, playwright, and poet. Miguel de Cervantes was redeemed by Trinitarian friars who paid a considerable sum of money for his ransom. This experience was a turning point in his life, and numerous references to the themes of freedom and captivity later appeared in *Don Quixote de la Mancha* and his other literary works.

Not only was it the practice of charities to purchase the release of captives, but both the common law and civil law traditions condoned and sanctioned charities dealing with and "financing" terrorists in this way. The starting point for the common law definition of charity is the *Preamble*<sup>9</sup> to the *Statute of Charitable Uses, 1601*<sup>10</sup> which lists "the relief or redemption of prisoners or captives" as a charitable purpose. The most recent decision of the Supreme Court of Canada dealing with the meaning of

<sup>9</sup> The purposes listed in the Preamble as charitable are:

"The relief of aged, impotent, and poor people; the maintenance of sick and maimed soldiers and mariners, schools of learning, free schools and scholars of universities; the repair of bridges, havens, causeways, churches, sea banks and highways; the education and preferment of orphans; the relief, stock or maintenance of houses of correction; marriages of poor maids; supportation, aid and help of young tradesmen, handicraftsmen and persons decayed; the relief or redemption of prisoners or captives and the aid or ease of any poor inhabitants concerning payments of fifteens, setting out of soldiers and other taxes."

<sup>10</sup> 43 Elizabeth I, c. 4.

charity specifically cited the "relief or redemption of prisoners or captives" as an example of how broad the Tudor conception of charity was.<sup>11</sup>

The civil law tradition, which was received in Canada with the colonization of New France, also recognizes the redemption of captives as a charitable purpose. In fact, more than one thousand years prior to the enactment of the *Statute of Charitable Uses, 1601*, the Roman Emperor Justinian included provisions regarding bequests for the redemption of captives in his comprehensive legal code.<sup>12</sup>

It was captives such as Cervantes, whose liberty was purchased by paying ransom funds to terrorists, who were the intended beneficiaries of the charitable object of "the relief or redemption of prisoners or captives." Several religious orders, such as the Redemptionists and Mercedarians, devoted their ministries primarily to this charitable activity. It is estimated that Redemptionist priests purchased the freedom of 15,500 captives between 1575 and 1769.<sup>13</sup> It is clear that the law of charity has a long history of enabling activists to deal directly with terrorists and to collect funds knowing that, in whole or part, these funds will be used by or will benefit a terrorist group. This is clearly in contravention of the "financing of terrorism"<sup>14</sup> provisions in the *Anti-terrorism Act*.

The issue as to whether charities should be allowed to continue with these activities becomes more relevant when one remembers that the stated cause of the recent war in Lebanon was the capture of two Israeli soldiers on July 12, 2006. Rather than having charities negotiate the redemption of these captives, much of Lebanon was destroyed and hundreds of civilians were killed in a military response. It is naive to expect that charities could have averted the war by paying to redeem captives who were soldiers. It is also reasonable to argue that paying for the redemption of captives is bad policy because it sends a message that seizing captives is a profitable activity. From the perspective of the *Anti-terrorism Act*,<sup>15</sup> a charity that provides funding to terrorists for the relief of such captives is indirectly providing financing intending that it be used in part for the purpose of facilitating the terrorist activity of holding such captives. However, even those who would forbid charities from paying to "redeem" any such captives will acknowledge that these captives continue to need "relief". Consequently, the "relief or redemption of prisoners or captives" remains an important charitable purpose which charities must struggle to pursue, in spite of the *Anti-terrorism Act*.

## Cutting the Money Flow to International Charity

My extensive travels and international experience in the charity world convinced me long before 9/11 that there is frequently a nexus between subversive and violent political movements and charity. This is

<sup>11</sup> *Vancouver Society of Immigrant and Visible Minority Women v. M.N.R.*, [1999] 1 S.C.R. 10, (1999) 169 D.L.R. (4th) 34 at para. 36.

<sup>12</sup> *Cod. 1.3.28. I am indebted to Kathryn Chan's work, "Taxing charities, imposer les organismes de bienfaisance: harmonization and dissonance in Canadian charity law" (LL.M. thesis, McGill University, 2006) for this information with regard to the redemption of captives in the Justinian Code and civil law.*

<sup>13</sup> See "*Barbary corsairs*", available online at: <http://www.cindyvallar.com/barbarycorsairs.html>.

<sup>14</sup> Criminal Code, supra note 6, s. 83.02 – 83.04.

<sup>15</sup> Criminal Code, supra note 6, s. 83.03 :

Every one who, directly or indirectly, collects property, provides or invites a person to provide, or makes available property or financial or other related services

- (a) intending that they be used, or knowing that they will be used, in whole or in part, for the purpose of facilitating or carrying out any terrorist activity, or for the purpose of benefiting any person who is facilitating or carrying out such an activity, or
- (b) knowing that, in whole or part, they will be used by or will benefit a terrorist group, is guilty of an indictable offence and is liable to imprisonment for a term of not more than 10 years.

particularly true in relation to charities that promulgate fundamentalist or extreme religious views. In my own home in western Canada, I have witnessed the violent strife between warring factions in Sikh temples over the struggle for independence from India in Khalistan. The most deadly single act of terrorism prior to 9/11 was the bombing of Air India flight 182 on June 23, 1985. That bomb originated in Vancouver and the alleged perpetrators were deeply involved with registered charities. I believe that regulatory authorities have an obligation to pursue any links between charities and terrorists and have stated that publicly.<sup>16</sup> If international charities want to retain the right to continue to fund "the relief or redemption of prisoners or captives," they must recognize that there is a problem in the sector with certain organizations which do intentionally fund terrorist activities.

The *Anti-terrorism Act* and similar post-9/11 laws in other countries seek to stem the flow of money to the "bad guys" in the charitable world through the use of a statutory regime modelled on anti-money laundering legislation. In my view, the authorities are right to try to choke off funding for terrorism. My concern is that when regulators and legislators impose stringent new compliance provisions on charities, it is always the "good guy grantors" who are the first to comply. The "good guy grantors" are the ones who err on the side of caution in not wanting to make any grants which might inadvertently or indirectly fund terrorist activities. Consequently, my fear is that the post-9/11 legislative and regulatory regime is more effective in choking off the money flowing from "good guy grantors" to the "good guy grantees" than it is in blocking the flow of money from "bad guy grantors" to the "bad guy grantees."

The efforts that have been made to prevent charities from providing material support and resources to terrorist organizations are not limited to formal legislation. USAID now requires every U.S. and non-U.S. charity to sign a certificate stating that to the best of its current knowledge, the recipient of USAID funding has not within the last ten years provided material support and resources to any individual or entity that attempts to commit, advocate, facilitate or participate in terrorist acts.<sup>17</sup> This policy goes beyond the *Anti-terrorism Act* in Canada in that it makes no reference to the purpose for which the charity provided the resources to the recipient.

The stringent requirements of such a certificate cause one to consider government programs that seek to curb terrorism by purchasing weapons which could be used to commit terrorist acts back from weapons owners: are these programs themselves in compliance with anti-terrorism policies? The rationale is that terrorists will not surrender their guns voluntarily without compensation, and so funding is provided to encourage them to sell their guns and use the money for more peaceful and productive pursuits. However, the history of Tudor England suggests that even such a noble objective can be used to further the cause of the "terrorists." During Henry VIII's reign the noted English evangelical Protestant, William Tyndale, fled to Europe to translate and publish the Bible in English. The Bishop of London, Tunstall, wanted to destroy all copies of the English New Testament and therefore made a bargain with a merchant in Antwerp to purchase the Bibles. The end result of this deal was that the Bishop of London had a very public bonfire to burn these Bibles and Tyndale's debt to the Antwerp merchant was discharged with enough additional funds to finance the printing of new Bibles. The lesson for modern times is that the funds paid to purchase the Bibles burned were used to finance the printing of

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<sup>16</sup> See the author's Opening Statement before the Senate of Canada's Special Committee on the Anti-terrorism Act, June 20, 2005. Link through <http://www.beneficgroup.com>

<sup>17</sup> USAID Acquisition & Assistance Policy Directive AAPD 04-14, Certification Regarding Terrorist Financing.

better replacement Bibles.<sup>18</sup> If government programs designed to reduce terrorism are in fact providing indirect benefits to terrorist organizations, how is the government to penalize charities whose charitable activities may result in funds directly or indirectly being made available for terrorist activities?

The consequences of stemming the flow of money to the “good guy grantees” are dire, because these are the protagonists who produce the best international philanthropy. It is international charity and not military might which is the cornerstone of most of the goodwill between Western democracies and the developing world. One of the unintended consequences of the *Anti- terrorism Act* has been to choke off international charitable funding for activists in the charitable sector who champion human rights, democracy and compassion, and seek to improve quality of life. These activists are far more effective fighters against terrorism than governments or their military forces, because they not only address many of the root causes of terrorism, but win over the hearts and minds of the civilians that they serve. It is doubtful that the West can win the battle for hearts and minds which is necessary to defeat terrorism when it has removed or financially disabled its charity foot soldiers, and replaced them with military soldiers who engender more alienation than reconciliation.<sup>19</sup> Further, in the current war in Afghanistan, Canadian soldiers engaged in winning hearts and minds through simple gestures like handing out candy to children are increasingly becoming vulnerable to terrorist attacks.<sup>20</sup>

### Charity, Human Security, and Social Power

It is true that human security is a prerequisite for the operation of a robust civil society that provides a high quality of life to its citizens. Consequently, Western donor countries are awaiting a resolution of the military struggle in places like Iraq and Afghanistan before fully mobilizing the forces of international charity. These donor countries seem not to have fully grasped the “Catch 22” of the asymmetrical war against terrorism: occupying forces cannot succeed militarily and thus ensure human security until they deliver on promises that basic social needs for water, electricity and food will be provided. The battle to provide human security in a terrorist theatre can only be won if the local population provides intelligence necessary to defeat the terrorists. That intelligence will be provided most readily to the side which wins the battle for hearts and minds. And in the absence of human security, the battle for hearts and minds will be won by the side which most promptly and effectively delivers humanitarian services to a region’s embattled inhabitants.

The international coalition’s *modus operandi* in Iraq and Afghanistan appears to be to resolve military and terrorist security issues before addressing “charitable” needs. Consequently, in my opinion, it was a brilliant strategy for the terrorists and insurgents to drive international charitable organizations and the United Nations out of Iraq at a very early stage. If winning the war on the “charitable” front is a precondition for winning the military war on terrorism, we should not be surprised to find that the international community’s failure to meet the pressing humanitarian needs of Iraqi civilians has hampered its ability to effectively combat its military foe.

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<sup>18</sup> Another lesson is that while the government of the day so reviled Tyndale as a religious radical activist that he was publicly burned to death at the stake in 1536, today Tyndale is revered as one of the great martyrs of the Christian faith.

<sup>19</sup> Mark Mazzetti, “Spy Agencies Say Iraq War Worsens Terror Threat” (*New York Times*, September 24, 2006).

<sup>20</sup> Paul Koring, “The High Cost of Winning Hearts and Minds” (*Globe and Mail*, September 19, 2006).

Further, it is important to recognize that in this asymmetrical war, terrorists often deliver both humanitarian assistance and human security. For example, local Shiites in the Sadr City section of Baghdad turn to and depend upon Muqtada al-Sadr and his Mahdi Army of insurgents for human security. The argument being made here is not that international humanitarian agencies should be armed and become involved in military security issues. There are enough reminders of the Crusades in today's conflicts without reviving the role of Christian soldiers such as the Knights Templar in the history of charity. However, it is important to recognize that terrorist organizations often have a significant advantage over their adversaries in the war on terrorism because they can simultaneously fulfil the functions of the military and of charitable organizations.

The issue which must be considered is whether it is possible to win the human security battle without winning the battle for hearts and minds, and whether it is possible to win the battle for hearts and minds without delivering on the charity front. Relying on military forces to deliver on the reconstruction and humanitarian agenda has not proven to be successful to date. Consequently, it seems imperative to consider whether, if international charities were empowered with more resources and given access to the most troubled and sensitive areas, they might build the trust and loyalty that could lead to the desired security solution. However, charities can only operate effectively in difficult circumstances if they are free to exercise their best judgment on how to ameliorate human suffering in the situations in which they are placed. Charities cannot exercise their judgment and discretion freely if they face the threat of criminal or treason charges for aiding and abetting terrorists because the beneficiaries of their charitable activities include the children, wives and victims of "bad guys."

The *Anti-terrorism Act* and other related laws are necessary weapons for governments and security forces to deal with charities which intentionally raise and distribute money to fund terrorist activities. However, these laws must be administered in ways which focus on identifying and prosecuting such offenders, rather than choking off funding to responsible international charities which have some chance of winning the battle for hearts and minds and overcoming terrorism through compassionate action. The *Anti-terrorism Act* must be implemented in such a way as not to preclude "the relief or redemption of prisoners or captives" from being a charitable purpose in today's complex world.

In March 2003, I attended a consultation in Sri Lanka organized by the British Foreign and Commonwealth Office and attended by senior representatives from the governments of Afghanistan, Pakistan, Sri Lanka, Bangladesh, Thailand, Malaysia, Indonesia, Singapore and the Philippines. The objective of the consultation was to assist these governments in enforcing *United Nations Security Council Resolution 1373*<sup>21</sup> which is designed to prevent charities from channeling funds to finance terrorism. At that time and place, the solution seemed to be to stop the flow of all money to any recipients who might possibly use the funds for terrorist activities. However, it was during these meetings that I first began to appreciate that the issues on the ground in countries like Pakistan are far less black and white than they appear from Vancouver. It became clear that it takes a very small percentage of the money transferred for legitimate charitable activities to finance some dangerous

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<sup>21</sup> UN SCOR, 2001, 4385th Mtg., UN Doc. S/Res./1373 (2001), available online at: <http://www.un.org/terrorism/sc.htm>

terrorist activities. What was not given enough attention was how much good charitable work was being suspended or stopped in the zeal to stop the small percentage of money going to the “bad guys.”

Reducing the conflict to a simplistic battle between “good guys” and “bad guys” is a major obstacle to the realization of an effectual debate on the role of charities in the war on terrorism. An even greater obstacle is that the West is loath to recognize the extent to which terrorist organizations simultaneously deliver charitable services. In the intervening years since those Sri Lanka meetings I have asked experts from Islamic countries what they understand the appeal of Osama bin Laden to be. It has been shocking to repeatedly hear the answer that bin Laden developed loyalty through the charitable work he funded in local communities much more than through the promotion of *jihad*. This view is supported by published reports that charitable activities were integral to the support that *Hezbollah* enjoys in Lebanon.<sup>22</sup> The charitable works of the *Muslim Brotherhood* were important to the gains of that radical organization in the most recent Egyptian elections.<sup>23</sup> *Hamas* won a landslide victory in the Palestinian elections both because of its relative lack of corruption when compared to the Fatah government, and because of its charitable works.<sup>24</sup>

Recognizing the important role that charitable activities play in the battle for hearts and minds does not require one to accept that Osama bin Laden is a paragon of charitable virtue. But we would be wise to remember that Christ chose a hated Samaritan as the charitable protagonist of his parable. Certainly, we must not make the mistake of assuming that charity is a virtue shared by only certain societies, races or religions. We must seriously consider the possibility that the most promising strategy in the war on terror may be to succeed in delivering the agenda of charity. The war on terror is not a conventional military battle. It is possible that if the war on terror is to be “won,” it will be waged on the battlefield of charity, and will take the form of a race to win over hearts and minds through the prompt and effective delivery of compassionate humanitarian and development assistance.

This analysis takes on some credibility when one reflects on the origins of the common law of charity in medieval England. The Roman Catholic Church provided for many of the educational and social needs of the English people. Its charitable services were the basis for the allegiance of the common people to the Catholic Church during the Tudor period. When King Henry VIII broke with Rome, one of his first strategic moves was to “dissolve” the monasteries<sup>25</sup> and expropriate the charity endowments.<sup>26</sup> Arguably, King Henry VIII and his daughter Elizabeth I would not have succeeded in preserving their thrones from the military, social and religious insurgencies of the “Papists” if they had not first destroyed the charity infrastructure which funded and fostered the Roman Catholic social and educational services on which the peoples’ allegiance was built.

<sup>22</sup> Sabrina Tavernise, “Charity Wins Deep Loyalty for Hezbollah” (New York Times, August 5, 2006).

<sup>23</sup> “Muslim Brotherhood Wins Over Egyptians with Charity Services” (Albion Monitor, February 20, 2006).

<sup>24</sup> In its facts on Hamas, the Council of Foreign Relations cites Israeli scholar Reuven Paz as authority for the view that “approximately 90% of its work is in social, welfare, cultural and educational activities.” See <http://www.cfr.org/publication/8968/#61>

<sup>25</sup> 27 Henry VIII c. 28 (1536) and 31 Henry VIII c. 18 (1539).

<sup>26</sup> 37 Henry VIII c.4 (1545).

One does not traditionally think of Tudor England as a case study of how destroying an operating charitable sector was a prerequisite for restructuring the political structure of the country. However, in my opinion, if the common people had continued to receive their education and social services from religious charities with allegiance to Rome, it is doubtful that the Tudor monarchs would have won their battle for the hearts and minds of the English people. Similar concerns exist today with regard to the poor children educated and fed in the madrassahs in Pakistan. My reading of history leads me to believe that the Queen Elizabeth who produced the *Preamble*<sup>27</sup> was suspicious of the politics and power of the charitable sector. However, she succeeded in her reign by empowering and mobilising the Protestant charitable sector to provide the educational and social programs necessary for social stability. This was possible because she had the cunning to first deny her opponents the opportunity to retain the loyalty of hearts and minds by providing charitable services.

An examination of the recent history of Thailand provides a more modern and positive illustration of how the provision of charitable services may produce social power. This year Thais are celebrating the 60th anniversary of the reign of their much loved King Bhumibol Adulyadej, Rama IX. When he first became king in 1946 following the assassination of his older brother, many observers thought that King Bhumibol Adulyadej would be a weak ruler. During the first three decades of his reign there were a number of coups and counter-coups. However, despite the constitutional limitations upon his royal power, King Bhumibol Adulyadej developed moral standing and respect through the initiation of social and charitable programs aimed at rural development. The respect that the king earned from his people through his charitable work gave him the moral standing to lead his country through the student revolution of 1973 and eighteen military coups. When the military staged the coup on September 19, 2006, they suspended all regular television programming and broadcast only pictures of the King and his charitable works. Arguably, it is King Bhumibol Adulyadej's morality-based philosophy and prodigious charitable and development output that has taken him from inauspicious beginnings to a governing authority which approaches the sovereign character of the "divine right of kings."

### Sectarian Reaction to Terrorists

It is difficult to respond rationally to terrorist activities when those activities aim to destroy the iconic symbols of power in our societies. When terrorists destroy the World Trade Center in New York or threaten to blow up the Parliament buildings in Canada, the emotions of citizens are understandably inflamed. Again, history is instructive when one remembers that a mere four years after the *Preamble* to the *Statute of Charitable Uses, 1601*<sup>28</sup> listed "the relief or redemption of prisoners or captives" as a charitable object, Guy Fawkes sought to blow up the Parliament of England during its formal opening session with King James I and members of both the House of Lords and House of Commons in attendance. If this act of terrorism had succeeded, the enormity of the tragedy experienced by England would have been comparable to the tragedy that would have been experienced by the United States if the Pentagon and the White House had also been destroyed on 9/11.

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<sup>27</sup> *Supra note 10.*

<sup>28</sup> *Supra note 10.*

Guy Fawkes and his terrorist conspirators were Roman Catholics and consequently their religion became a focus of the backlash in England. The reality was that the war on terrorism transmogrified into a war on religion. Parliament responded to Guy Fawkes failed "Gunpowder Plot" by enacting "*An Act for the better discovering and repressing of Popish Recusants*"<sup>29</sup> and "*An Act to prevent and avoid dangers which may grow by Popish Recusants*."<sup>30</sup> This legislation was designed to oppress Roman Catholics by placing them under a myriad of legal disabilities and to penalize them for adherence to any Christian faith other than Protestant Christianity. In today's world, there are no formal legal disabilities imposed on religious groups, but there is nonetheless a focus on citizens' religious beliefs.

History teaches us that when the response of the state is to focus on a sectarian minority, that sectarian minority has reason to fear that the war on terrorism can become a war on religion. Many Muslims believe that the targeting of persons of their faith under the guise of national security means that today there is a war on Islam. Once that attitude is adopted, it is not difficult to draw parallels between the *Patriot Act* in the United States and anti-Catholic legislation in Tudor England. Those who truly feel persecuted need only substitute "Mohammedans" for "catholicks" and "King George W." for "the Queen's majesty" to feel that they are the target of the preamble of the Elizabethan statute aimed at:

the better discovering and avoiding of such traitorous and most dangerous conspiracies and attempts as are daily devised and practised against our most gracious Sovereign ladie the Queen's majesty and the happy estate of this common weal, by sundry wicked and seditious persons, who terming themselves catholicks, and being indeed spies and intelligencers, not only for her Majesty's foreign enemies, but also for rebellious and traitorous subjects born within her Highness realms and dominions, and hiding their most detestable and devilish purposes under a false pretext of religion and conscience, do secretly wander and shift from place to place within this realm, to corrupt and seduce her Majesty's subjects, and to stir them to sedition and rebellion.<sup>31</sup>

It is critical that both governments and ordinary citizens refuse the tendency in the emotional reaction to accounts of intended terrorism to transform a revulsion to terrorism into religious hostility. The Canadian Parliament responded to 9/11 by enacting the *Anti-terrorism Act*. *Canada's Charter of Rights and Freedoms* prevented it from singling out any specific religious group. However, all countries and citizens need to be vigilant to protect human rights in an era when it is easy for governments to retract them in the name of national security.

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<sup>29</sup> 3 James I, c. 4.

<sup>30</sup> 3 James I, c. 5.

<sup>31</sup> "An Act for restraining Popish Recusants to some certain places of abode" 35 Elizabeth I, c. 2.

## One Path Forward

It is not my contention that the *Anti-terrorism Act* should be repealed or that government and regulatory authorities should reduce their efforts to use the powers given under this legislation to stem the flow of charity funds to those who use them for terrorist activities. This is an important objective and the appropriate use of this legislation. This is also an objective which can be better achieved by police and intelligence authorities than by utilizing military forces to obliterate insurgents hiding behind and among a civilian population. Having said that, it is my view that the best strategy to win the battle for hearts and minds which is so crucial in the war on terror is to allow dollars to flow freely to international charities who will address the humanitarian needs of suffering populations. This means that charities must be freed from the fear that any inadvertent transfer of money to terrorists will result in criminal prosecution or worse. If charities are to succeed in winning over hearts and minds, they must be allowed to carry on activities consistent with accomplishing "the relief or redemption of prisoners or captives," even when they are knowingly dealing with terrorists.

The way to move forward in this delicate context is to recognize that legitimate charities which fund activities akin to the relief of captives will fall outside the definition of "terrorist activity"<sup>32</sup> in the *Anti-terrorism Act* if their motives are purely humanitarian. It is a requirement of the Canadian statutory definition that the terrorist act be committed "in whole or in part for a political, religious or ideological purpose, objective or cause." Charities that operate in terrorist areas need to conduct their activities on a purely humanitarian basis without any motivation to accomplish political or ideological objectives. The "charity" which survives the legal test of not being a "terrorist activity" is the charity described by John Gardner, Professor of Jurisprudence at the University of Oxford, as a "humanitarian" rather than a "civic" virtue:

"...to be impeccably charitable...one must exhibit the capacity to look upon those involved as human beings with none of whom one has any special personal bonds...beyond those of shared humanity."<sup>33</sup>

If charities are to protect the ability to operate internationally on the basis of humanitarian values, their activities must not be circumscribed by domestic political considerations in donor countries.

Forcing charities to restrict themselves to a humanitarian "purpose, objective or cause" will have the additional benefit of precluding charities operating in terrorist areas from acting as agents of any government, since that would amount to pursuing a political or ideological purpose. This means charities wanting to be excluded from the ambit of the *Anti-terrorism Act* must consider declining funding from sources such as the United States Agency for International Development (USAID), which maintains the policy position that "all aid is political."<sup>34</sup> More recently, the U.S.A. has taken the position that organizations receiving funding and grants from the U.S. government are considered to be part of

<sup>32</sup> Criminal Code, *supra* note 6, s. 83.01.

<sup>33</sup> John Gardner, "The Virtue of Charity and its Foils," in Charles Mitchell and Susan Moody, eds., *Foundations of Charity* (Oxford: Hart Publishing, 2000) 1 at 15-16.

<sup>34</sup> "Foreign Aid in the National Interest" USAID, 2002 p. 29. Find at [http://www.usaid.gov/fani/Summary--Foreign\\_Aid\\_in\\_the\\_National\\_Interest.pdf](http://www.usaid.gov/fani/Summary--Foreign_Aid_in_the_National_Interest.pdf)

the U.S. government's "transformational diplomacy."<sup>35</sup> However, it is encouraging that there are some improvements in the latest version of the *U.S. Treasury Department's Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*.<sup>36</sup> In this document, responding to considerable pressure from the charitable sector regarding the earlier guidelines, the U.S. Treasury revised the first of the "Fundamental Principles of Good Charitable Practice" to say: "Charities are independent entities and are not part of the U.S. Government." International charities seeking to engage in "the relief or redemption of prisoners or captives" cannot afford to be acting as the agent of any government if they are to be accorded the presumption of not having a political or ideological objective.

It is far more difficult to determine the extent to which the various "*Best Practices Guidelines*" published by different national governments may have a political or ideological objective which goes beyond stopping the funding of terrorism through charities.<sup>37</sup> There are now over 30 state members of the Financial Action Task Force (FATF), an inter-governmental body that is charged with developing and promoting policies, both nationally and internationally, to combat money laundering. In 2002, FATF published a series of "international best practices" on this issue, which are available on the worldwide web.<sup>38</sup> International charity has for years focused on educating religious relief and development organizations to operate without actively engaging in religious proselytization. The question is whether non-sectarian relief and development organizations can similarly be educated to operate without proselytizing a political ideology.

This definitional approach presents a problem for charities which have a religious motivation in providing humanitarian aid. One must remember that the conversation in which Jesus told the parable of the Good Samaritan began with the question, "What must I do to inherit eternal life?"<sup>39</sup> The imperative to "Love your neighbour as yourself" is the Bible's articulation of the Golden Rule: "Do unto others as you would have them do to you." How, then, can one argue that their "purpose, objective or cause" in carrying on specific activities in crisis areas is not religious but is humanitarian?

The answer is to distinguish between charitable activity which is designed to bring salvation to the provider, and charity which is designed to "save" the victim. It is possible to require religious charities to refrain from carrying on proselytization under the guise of humanitarian aid without denying the religious origins of their charitable activity. The restriction in the Anti-terrorism Act that charities not carry on their activities for a religious "purpose, objective or cause" can serve to forbid proselytization while allowing their altruism to flow from religious teaching or motives.

However, it is important to note that there is a significant difference in the U.S. position on religious purposes in that the definition of "material support and resources" which cannot be supplied to terrorists explicitly excludes "religious materials."<sup>40</sup>

<sup>35</sup> Condoleezza Rice, U.S. Secretary of State, "New Direction for U.S. Foreign Assistance," January 19, 2006, to be found at <http://www.usaid.gov/press/speeches/2006/sp060119/html>

<sup>36</sup> This publication was originally released in November 2002 and revised in December 2005. The final version was released on September 29, 2006 and can be accessed at <http://www.treasury.gov/press/releases/reports/0929%20finalrevised.pdf>

<sup>37</sup> The Charity Commission for England and Wales' policy statement on charities and terrorism is found at <http://www.charity-commission.gov.uk/tcc/terrorism.asp>

<sup>38</sup> See Financial Action Task Force on Money Laundering, Combating the Abuse of Non-Profit Organizations: International Best Practices (11 October 2002), available online at: <http://www.fatf-gafi.org/dataoecd/39/19/34033761.pdf>

<sup>39</sup> Luke 10:25, supra note 2.

<sup>40</sup> USAID Acquisition & Assistance Policy Directive AAPD 04-14, Certification Regarding Terrorist Financing.

## Conclusion

It is important that governments pursue whatever police and security procedures are necessary to choke off the funds intentionally flowing through charities to fund terrorism. Presumably the extraordinary powers granted to the authorities through the Anti-terrorism Act will be of great assistance in this regard. However, if the authorities abuse these powers it is almost certain that they will lose the cooperation of the communities that are being investigated for terrorist ties. The government's success in stopping those who finance and carry out terrorist activities will depend upon it exercising its extraordinary powers in ways which engender the trust and confidence of the people with inside knowledge of such illegal activities. Without the cooperation of informants in ethnic and religious communities, it is highly improbable that the government will succeed in stemming the flow of charitable dollars to terrorist groups. This is as true in the battle to stop charitable funding for terrorists in donor countries as it is in areas of crisis fomented by terrorists.

The danger which this paper has sought to highlight is that the battle against charities funding terrorism could be won at the cost of losing the greater war against terrorism. "Terrorists" appear to be winning the battle for the "hearts and minds" of ordinary citizens in rural communities and on the street in many parts of the world. This may be, at least in part, because Osama bin Laden and others who carry out terrorist activities meet the charitable needs of the poor so effectively. They also contribute to human security needs in areas of chaos and failed states. In many parts of the world, those whom the West has labelled "terrorists" are considered locally to be agents of order and contributors to the public good. From the perspective of the suffering residents of these troubled zones, the real "terrorists" are the military personnel who bomb and destroy villages, crops and families in their quest to eliminate Al Qaeda. Having been given the opportunity to vote in a reasonably free democratic election, the people of Palestine overwhelmingly elected a group which is listed as a terrorist organization in Canada and most countries having anti-terrorist legislation.

The U.S. government understands the link between successfully performing charitable services and winning the battle for hearts and minds. The opening sentences in the Annex to the U.S. Treasury Guidelines issued September 29, 2006 read:

The risk of terrorist abuse facing charitable organizations is ongoing and significant and cannot be measured from the important but relatively narrow perspective of terrorist diversion of charitable funds. Rather, terrorist abuse also includes the exploitation of charitable services and activities to radicalize vulnerable populations and cultivate support for terrorist organizations and activities.<sup>41</sup>

The problem is that this "understanding" is limited to the potential for "bad" charitable funding to do harm to the interests of the "good guys" and shows no comprehension of the extent to which "good" charitable funding can help the "good guys" to win the battle for hearts and minds.

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<sup>41</sup> U.S. Treasury Guidelines, *supra* note 36, *Annex to Guidelines*.

The war on terrorism is not a conventional military battle, but an asymmetrical struggle against insurgents who are frequently stateless. Unless the military succeeds in winning the battle for hearts and minds, the local people will not provide it with the intelligence necessary to identify the terrorists who are creating the instability – an instability which prevents the military from achieving an acceptable level of human security. And if the government and military forces cannot provide human security, the only way of winning the battle for hearts and minds may be to mobilize charities to provide for the basic social needs of the suffering people. The war on terrorism must be won on the “charity” front rather than on the military battlefield. However, the West will not win this war if the Anti-terrorism Act results in the drying up of all charitable funding because legitimate charities are too afraid that some funding might inadvertently fall into the hands of insurgents.

Throughout history, charities have found themselves as key actors in difficult moral and military situations. The best and most responsible charities do not turn their heads and cross over to the other side of the road when they encounter a battered victim lying naked on the Jericho Road. Nor do they refuse to put the victim on their own donkey because the victim is a member of a despised and disenfranchised sector of society. The Good Samaritan not only bandaged his “neighbour’s” wounds and paid for the immediate costs of care, he also funded future recovery costs. Presumably, if the victim had been held hostage and a ransom demanded, the Good Samaritan would also have paid a terrorist the amount demanded to redeem the captive’s life.

The law of charity has recognized the “redemption of captives” as a charitable purpose since at least its inclusion in the Code of Justinian in the sixth century. Notwithstanding the horrors of 9/11, the international charitable sector must fight to maintain the ability to fund “the relief or redemption of prisoners or captives.” This fight is in reality a battle for the fundamental concept of “charity” as an altruistic humanitarian virtue. Charities must be free to make mistakes in choosing to whom among the suffering population they will give succour and financial support. If responsible charities are allowed to operate without fear of violating the Anti-terrorism Act, the good they will do in advancing the cause of freedom-loving people will far outweigh any harm they might cause by occasionally, inadvertently providing support to terrorists. Governments and ordinary citizens must realize that the mobilization of the charitable sector is critical to winning the war on terrorism. The Anti-terrorism Act must not be applied in such a way as to remove the most effective warriors against terrorism from the battlefield. The battle would be better served by empowering and funding charities to provide assistance to their “neighbours” in the most troubled areas of the world without inquiring as to their religion, politics or ideology.