

Counter-terrorism and humanitarian action Tensions, impact and ways forward

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Key messages

- Counter-terrorism laws and other measures are having a significant impact on humanitarian action. They include provisions that criminalise the transfer of resources to terrorist groups or individuals, irrespective of the humanitarian character of such actions or the absence of any intention to support terrorist acts.
- Humanitarian funding from donor governments is increasingly being made conditional on assurances that it is not benefiting listed individuals or organisations, and that greater security checks are being placed on local partners and implementing actors. The co-option of humanitarian actors into counter-terrorism efforts directed against one party to a conflict can undermine the principles of impartiality and neutrality.
- Counter-terrorism laws and other measures have increased operating costs, slowed down administrative functions and operational response, curtailed funding and undermined humanitarian partnerships. They have also prevented access and altered the quality and coordination of assistance.
- A dialogue is needed between NGOs, UN agencies, humanitarian donors and governments in order to ensure that counter-terrorism objectives do not undermine humanitarian commitments. This requires greater clarity from donors on the scope and applicability of counter-terrorism laws and measures and the development of common principled positions among humanitarian actors.

This HPG Policy Brief examines the impact of certain counter-terrorism laws and other measures, both international and national, on humanitarian action. It is based on a review of the literature, a series of interviews with donors, UN agencies and NGOs and a roundtable event organised with the Inter-Agency Standing Committee (IASC) in February 2011.¹ The Policy Brief begins by outlining the evolution and content of counter-terrorism laws and their impact on donor policies and programme funding. It then discusses the implications for principled humanitarian action. These are explored in greater detail in two case studies, covering Somalia and Gaza.

¹ A summary of the roundtable is at <http://www.odi.org.uk/events/details.asp?id=2659&title=counter-terrorism-humanitarian-action>.

The evolution of counter-terrorism legislation

International law

Although the threat of terrorism has been on the international agenda since the League of Nations, agreements on countering terrorism at a global level date from the 1960s. A total of 14 international conventions exist, including the 1979 International Convention Against the Taking of Hostages, adopted in response to the US–Iran hostage crisis, and the 1980 Convention on the Physical Protection of Nuclear Material.² It has proved easier to reach agreement on these specific acts of terrorism than on a general definition of terrorism, and

² For a full list, see <http://www.un.org/terrorism/instruments.shtml>.

hence on a global anti-terrorist convention. As terrorist activities are mostly defined in opposition to the state, there has been a fear that such a convention would be used to suppress the right to self-determination (see Box 1). The events of 11 September 2001 gave some new impetus in this area. The 2005 World Summit Outcome Document included a commitment to conclude a comprehensive convention on international terrorism, and the UN General Assembly adopted a global counter-terrorism strategy in September 2006. Despite this, no progress has been made in the finalisation of the Comprehensive Convention.

Within the UN Security Council (UNSC), the events of 9/11 also led to new levels of consensus on dealing with terrorism. On 28 September 2001 the Council passed Resolution 1373 under Chapter VII of the Charter. Whilst terrorism is not defined in the Resolution, UN member states are ordered to refrain from providing any form of support to terrorist groups and individuals, and to implement measures to suppress terrorist acts within their jurisdiction. These include enhanced financial and border controls, international judicial cooperation, bans on the granting of asylum to terrorists (specifically, people who have ‘planned, facilitated or participated in the commission of terrorist acts’) and ensuring that ‘any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice’. Member states are obliged to give effect to the Resolution at the national level through national law and other measures. Resolution 1373 also established the Counter-Terrorism Committee, comprising all the members of the Security Council, to monitor and report on the implementation of the Resolution.

Supplementing this overarching Resolution are specific sanctions regimes imposed by the Security Council in response to specific threats to international peace and security. These target particular actors, such as non-state armed groups in Somalia (under UN Security Council Resolution 733 of 1992) and groups in Afghanistan (based on UN Security Council Resolution 1267 of 1999). The Somalia sanctions regime targets Al-Shabaab and associates, and the Afghanistan regime, established in the wake of the August 1998 bombings of US embassies in East Africa, targets Al-Qaeda and the Taliban. Although these sanctions regimes are not necessarily characterised as counter-terrorism measures, as discussed further below, the individuals subject to UN sanctions are often brought within the ambit of national counter-terrorist laws.

The open-ended nature of Resolutions 1373 and 1267 in particular has been criticised as being potentially *ultra vires*, or beyond the authority

Box 1: Defining terrorism

There is no internationally accepted definition of the term ‘terrorism’. Global conventions deal with specific terrorist acts, such as the taking of hostages or hijacking of aircraft, and UN resolutions refer to terrorism, but the meaning of the term and to whom it applies is still contested. It is in practice used to describe both violence perpetrated by a state, and violence perpetrated by individuals or non-state groups, both in situations of conflict and in peacetime. Generally, the term is understood as relating to politically motivated violence perpetrated to cause death or injury to civilians with the aim of intimidating a wider audience, and these elements are largely reflected in national laws. However, which acts of politically motivated violence constitute terrorism and who the perpetrators can be remain highly contested. States tend to characterise violence as ‘terrorist’ when it is perpetrated by groups considered a threat to themselves or their allies, whilst similar acts perpetrated by groups politically or ideologically closer to them might be part of a ‘liberation struggle’. This ambiguity is evident in how the term is applied in domestic counter-terrorism legislation.³

of the Security Council, including by the former UN Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. It has been claimed that the measures imposed by these Resolutions are disproportionate in countering any specific threats to peace and security, which is the mandate of the Council, in particular by imposing permanent sanctions over unlimited geographical areas on specific individuals.⁴

Regional and national law

Counter-terrorism laws have developed at different paces in different jurisdictions, reflecting the political environment in each case. In the UK, for example, counter-terrorism laws developed in response to the situation in Northern Ireland. A 12-month Prevention of Terrorism Act introduced in 1974 was renewed every year until 2000, when it was replaced with a

³ M. Taylor, *The Terrorist* (London: Brassey’s Defence, 1988); Charles Ruby, ‘The Definition of Terrorism’, *Analyses of Social Issues and Public Policy*, 2002; Jo Macrae and Adele Harmer, ‘Humanitarian Action and the “War on Terror”: A Review of Issues’, in Macrae and Harmer (eds), *Humanitarian Action and the “Global War on Terror”: A Review of Key Trends and Issues*, HPG Report 14, July 2003, p. 3.

⁴ The former Special Rapporteur, Martin Scheinin, recommended in 2010 that these and related Security Council resolutions be replaced by a single united one, and that the (temporary) listing and delisting of individuals be dealt with at state level, with all the attendant judicial safeguards that a national jurisdiction can provide. See UN Doc A/65/258 (<http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/478/27/PDF/N1047827.pdf?OpenElement>).

permanent version in response to the more varied and open-ended terrorist threat deemed evident in attacks in Luxor, Dar es Salaam, Nairobi and Omagh. In Australia, the offence of terrorism was introduced in 2002, in response to both 9/11 and the Bali bombings of that year, in which 88 Australians were killed. Counter-terrorism legislation existed in the US prior to 9/11, with events such as the 1995 Oklahoma City bombing prompting a tightening of the law. However, 9/11 can be said to mark a turning-point in national legislation in general, with counter-terrorism measures being stepped up across the board (partly in implementation of Resolution 1373). Additional controls have been introduced on the use of state funds, and a range of activities connected with terrorism have been criminalised where these were not specifically addressed before, including not only carrying out terrorist acts themselves but also providing resources or support to terrorist groups or individuals.

A number of groups and entities have been designated as terrorists by the Security Council, as with the 1267 regime, and these and others have also been designated as such by individual states. The designation of Hamas as a terrorist organisation by the US and the European Union (EU), for example, is not based on a Security Council Resolution but on national and regional policy decisions. The EU also maintains a list of 'persons, groups and entities involved in terrorist acts', established as an immediate response to Resolution 1373,⁵ as well as a list that reproduces the Security Council list under the 1267 regime. Individuals and organisations are included in some lists and excluded from others. There have been numerous complaints and challenges – including successful legal challenges – to the accuracy of the various lists, and the lack of transparency and due process around listing and de-listing procedures.⁶

The precise scope of the notion of 'support' to terrorist groups varies across jurisdictions. The EU Council Framework Decision on combating terrorism, which is binding on all EU Member States, defines participation in the activities of a terrorist group to include 'supplying information or material resources, or ... funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist

⁵ Council Common Position of 27 December 2001 on the application of specific measures to combat terrorism.

⁶ See for example the Judgment of the UN Human Rights Committee in the case of Sayadi and Vinck, 22 October 2008, and the Judgement of the European Court of Justice declaring that the UN listing process had violated the rights of an individual on the list: *Kadi & Al Barakaat Int'l Found. v. Council of the EU & Comm'n of the EC*, 2008. See Peter Fromuth, 'The European Court of Justice Kadi Decision and the Future of UN Counterterrorism Sanctions', *ASIL Insights*, vol. 13, no. 20, October 2009, at <http://www.asil.org/insights091030.cfm#author>.

group'. The UK has expanded this so that not only 'knowledge' that the support will contribute to terrorist activity, but also 'having reasonable cause to suspect' that this is the case, is enough to attract criminal responsibility.⁷ In Australia the intent required is lower, with being 'reckless' as to whether the funds will be used to facilitate or engage in a terrorist act considered a crime.⁸ In the US, no knowledge or intention to support terrorism *per se* is required if support is knowingly provided to a designated Foreign Terrorist Organization (FTO).

It is worth looking at US law in this area in more detail, as this is by far the law with the greatest potential adverse impact on humanitarian organisations. The two most relevant regimes in the US are the sanctions regime, implemented by the Office of Foreign Assets Control (OFAC), and the Material Support Statute in US criminal law. Under the International Emergency Economic Powers Act (IEEPA) of 1977, the President may block resources to designated entities in wartime or if a national emergency is declared 'to deal with any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States'. Resources which may not be blocked include 'donations ... of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering', although this can be overridden in three cases: where making such an exception would 'seriously impair [the President's] ability to deal with [the] national emergency'; where the donations 'are in response to coercion against the proposed recipient or donor'; and where they 'would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances'. The list of individuals and organisations subject to sanctions under the IEEPA, known as Specially Designated Nationals, is maintained by OFAC. OFAC can licence private entities to engage in prohibited transactions in sanctioned countries (e.g. Iran) or in countries where designated groups are located (e.g. Somalia).⁹ Violations of OFAC sanctions are subject to both civil and criminal penalties, with the latter increasing in 2007 to a maximum fine of \$1 million or up to 20 years in prison.

After 9/11, US President George W. Bush used his powers under the IEEPA in Executive Order 13,224, entitled 'Blocking Property and Prohibiting

⁷ Terrorism Act 2000, sections 15 and 17.

⁸ Suppression of the Financing of Terrorism Act, 2002.

⁹ There are two categories of licences, general and specific. General licences are issued by OFAC permitting certain categories of persons to carry out certain types of transactions, without the need for individual permission. In the absence of a general licence, specific licences can be applied for and are dealt with on a case-by-case basis.

Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism'. Terrorism is defined in the Executive Order as involving 'a violent act or an act dangerous to human life, property, or infrastructure' which appears to be intended either 'to intimidate or coerce a civilian population ... to influence the policy of a government by intimidation or coercion; or ... to affect the conduct of a government by mass destruction, assassination, kidnapping, or hostage-taking'. Section 4 of the Order overrides the humanitarian exception in the IEEPA on the grounds that allowing donations of food, medicine and so on would not only impair the President's ability to deal with the emergency but would also endanger armed forces on the ground.

Alongside the OFAC-run sanctions regime, the US criminal code prohibits a range of terrorist activities, including the provision of material support or resources to terrorism, and these crimes can be prosecuted in the US even when committed abroad. The scope of these prohibitions was broadened after 9/11 by the USA PATRIOT Act.¹⁰ The code distinguishes between providing material support to terrorists generally and to designated FTOs in particular.¹¹ The former requires that the support or resources be given 'knowing or intending that they are to be used in preparation for, or in carrying out' a terrorist act, whilst this is not necessary in the case of support to a listed FTO. It suffices for the provider to know either that the organisation is a designated terrorist group or that it has engaged or is engaging in terrorist activity; no knowledge or intent that the support or resources given will be used for terrorist purposes is required.¹²

Material support or resources include the provision of 'any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials'. When first defined in the criminal law,¹³ material support excluded 'humanitarian assistance to persons not directly involved in [terrorist] violations'. This was amended to the

¹⁰ The title of the PATRIOT Act is 'Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism'.

¹¹ USC §2339A and B, respectively. FTOs are designated by the Secretary of State, as foreign organisations which engage in terrorism and threaten the security of the US or its nationals.

¹² USC §2339B, affirmed in *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

¹³ By the 1994 Violent Crime Control and Law Enforcement Act.

current, narrower exception for medicine and religious materials in the wake of the Oklahoma City bombing in April 1995.¹⁴ The definition of terrorism in the statute closely resembles that in Executive Order 13,224.

The scope of this humanitarian exception has been explored in a number of lawsuits in the US. Prosecutions so far are notable for primarily targeting Islamic organisations and individuals who are allegedly ideologically linked to a proscribed group.¹⁵ In 2008, the Holy Land Foundation for Relief and Development, then the largest Islamic charity in the US, was found guilty of supporting Hamas through its contributions to West Bank *zakat* committees. The charity was dissolved and its Directors received sentences of up to 65 years in prison (the case is currently under appeal).¹⁶ In an associated civil case brought against the Holy Land Foundation by a victim of Hamas, the court examined the scope of the humanitarian exception, in particular the exclusion of medicine from the definition of material support. It considered the theoretical case of 'medical (or other innocent) assistance by nongovernmental organizations such as the Red Cross and Doctors Without Borders' to injured Hamas fighters, and confirmed that this would fall within the terms of the exception. In the court's non-binding interpretation,¹⁷ even if Doctors Without Borders/Médecins Sans Frontières (MSF) knew that it was treating Hamas fighters, it would not be liable for contributing to terrorism:

*It would be helping not a terrorist group but individual patients, and, consistent with the Hippocratic Oath, with no questions asked about the patients' moral virtue ... The same thing would be true if a hospital unaffiliated with Hamas but located in Gaza City solicited donations.*¹⁸

However, in two criminal cases concerning individual doctors ideologically affiliated with Al-Qaeda, rather than humanitarian organisations, the doctors were convicted of supporting terrorism by providing medical treatment to members of a proscribed group (the cases are *US v. Shah* and

¹⁴ By the 1996 Antiterrorism and Effective Death Penalty Act. See Laura K. Donohue, 'Constitutional and Legal Challenges to the Anti-Terrorist Finance Regime', *Wake Forest Law Review*, vol. 43, 2008, pp. 643–97.

¹⁵ For an analysis of this phenomenon, see S. F. Aziz, 'Countering Religion or Terrorism: Selective Enforcement of Material Support Laws against Muslim Charities', *ISPU Policy Brief*, September 2011.

¹⁶ No. 09-10560, United States of America v. Mohammad El-Mezain; Ghassan Elashi; Shukri Abu Baker; Mufid Abdulqader; Abdulrahman Odeh; Holy Land Foundation for Relief and Development, aka HLF, Appellants.

¹⁷ The remarks are obiter dicta and do not concern facts in dispute in this particular case.

¹⁸ *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008) (en banc) at 699.

US v. Farhane).¹⁹ The humanitarian exception was interpreted narrowly in these cases as including the provision of medicine only, and not the provision of medical treatment, which draws upon medical expertise. However, a significant factor in each case was the stated commitment of the defendants to the goals of Al-Qaeda, and the judgments suggest that a different conclusion could be reached in the case of independent humanitarian organisations not acting under the ‘direction or control of a designated foreign terrorist organization’.²⁰

In its well-publicised 2010 judgement in *Holder v. The Humanitarian Law Project (HLP)*, the US Supreme Court authoritatively clarified that the intention of the provider of support to a designated FTO is irrelevant, as long as the provider knows of the terrorist nature of that organisation, as defined by US law. This case was not a prosecution but a challenge to the constitutionality of the Material Support Statute initiated by the HLP, five other organisations and two US citizens, and the judgement is particularly significant because it issues from the Supreme Court, the highest legal authority in the US. The particular forms of support considered by the court case were training, expert advice or assistance, services and personnel provided by the HLP to the Kurdish Workers’ Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), and the innocent intentions of the HLP were not in dispute. The court found that even ‘material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways’.²¹

Donor funding

A number of states and inter-governmental funding bodies have introduced clauses into grant agreements and procedures into relationships with humanitarian organisations to comply with counter-terrorism laws and policy objectives. NGOs or NPOs (Not for Profit Organisations) were identified as a potential conduit for terrorist financing soon after the events of 9/11. In October 2001, the inter-governmental Financial Action Task Force (FATF) expanded its remit beyond money-laundering to specifically include the funding of terrorism, and issued eight Special Recommendations on terrorist financing, including better regulation of NPOs. Greater regulation also stems from concern among donor officials about their possible individual liability and the reputational hazards for the governments they serve if their partners

are deemed to be providing resources or funds to designated individuals or groups.

USAID has taken a number of steps designed to prevent diversion of its funds to terrorist organisations. In March 2002 it began including a clause in grant agreements reminding applicants of the ban on transactions with organisations on the list of Specially Designated Nationals. From December 2002 USAID has also required all grantees to certify that funds do not assist terrorist activity, and has introduced a ‘Partner Vetting System’. This is intended to ‘ensure USAID funds and USAID-funded activities are not purposefully or inadvertently used to provide support to entities or individuals deemed to be a risk to national security’, and requires information on implementing partners to be sent to USAID headquarters.²² The UK Department for International Development (DFID)’s funding agreements include a clause requiring recipients of funding to not in any way provide direct support to a listed organisation. The EU first tried to address this issue by recommending best practices to member states and developing a code of conduct for NPOs. However, the experience of recipients of ECHO funding in certain sensitive contexts suggests that lately more restrictive contractual terms have been introduced. AusAID requires grantees to use their best endeavours to ensure that their funds ‘do not provide direct or indirect support or resources to organisations and individuals associated with terrorism’, and to inform AusAID immediately if ‘the Organisation discovers any link whatsoever with any organisation or individual listed by the Australian government as associated with terrorism’.²³ Although the explanatory notes say that ‘the obligation to notify AusAID does not ... confer an active intelligence gathering responsibility’,²⁴ this may be perceived differently in the field.

Counter-terrorism laws and humanitarian engagement

There is real concern among humanitarian actors that their operations could fall foul of international and national counter-terrorism laws. Whilst humanitarian action intends to save lives and relieve human suffering, and not support terrorism, the manner in which ‘support’ to terrorism has been interpreted directly impacts upon the work of humanitarian organisations.

Humanitarian access, which in conflict is regulated by International Humanitarian Law (IHL), is based

¹⁹ *United States v. Shah*, 474 F. Supp. 2d 492 (S.D.N.Y. 2007); *United States v. Farhane* 634 F.2d 127 (2d Cir. 2011).

²⁰ *United States v. Shah*, at 499.

²¹ *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010). For a comprehensive review of the decision, see Harvard Program on Humanitarian Policy and Conflict Research, *Humanitarian Action Under Scrutiny: Criminalizing Humanitarian Engagement*, HPCR Working Paper, February 2011.

²² Federal Register /Vol. 74, No. 1/Friday, January 2, 2009/ Rules and Regulations. For more details see http://www.charityandsecurity.org/analysis/Issue%20Brief_USAID_Alternative_Vetting_Approaches.

²³ AusAID NGO Umbrella Contract, paragraph 3.2.

²⁴ Guidelines for Strengthening Counter-Terrorism: Measures in the Australian Aid Program, September 2004, p. 3, at http://www.usaid.gov.au/publications/pdf/ctm_guidelines.pdf.

on an implicit agreement with the fighting parties: provided humanitarian action is carried out in a neutral and impartial manner, the parties allow humanitarian actors to operate and respond to needs. Some benefit to the party in whose territory humanitarian organisations operate is inevitable, whether by offering perceived legitimacy to a non-state actor, improving the image of a negligent state or relieving the party of its own obligations to care for the population in the area under its control. In some cases this goes further. Humanitarian organisations may be required to pay registration fees or ‘taxes’, and in some cases, depending on the criticality of humanitarian need, they may even tolerate a certain level of aid diversion. As long as this does not have a significant impact on the military efforts of one side, the humanitarian imperative to assist victims of conflict prevails, and humanitarian access is permitted.

Counter-terrorism legislation is based on a different logic (see Box 2). Many armed opposition groups and even some government entities appear on terrorist lists, and so any contribution to these groups, even if unintentional, could result in criminal liability. This has created significant anxiety amongst members of the humanitarian

community. The range of criminal laws prohibiting support to terrorism, many of which apply extra-territorially, including to foreign nationals; the shifting definitions of material support; and the differences in donor positions on this issue, including their decreasing levels of risk tolerance, have only made matters more complicated.

Some donors have introduced clauses in their funding agreements and imposed vetting systems in order to prevent any resources flowing to a designated individual or group, whilst others have adopted a ‘don’t ask, don’t tell’ policy, trusting the judgement of their partners. There are also differences in what is deemed permissible. In Gaza, one donor reportedly accepts that contact with Hamas, a designated terrorist group, is permissible for humanitarian purposes (though any payments or suspected diversion of aid would need to be rigorously reported), whilst personnel from another donor agency have been instructed not to deal with Hamas officials to minimise any legal risk. Donor positions on this issue also vary from context to context; as one donor interviewed for this Policy Brief put it, ‘I am not being asked to apply the same level of scrutiny in Afghanistan as in Somalia’.

Box 2: Counter-terrorism and International Humanitarian Law

States fighting armed opposition groups are sometimes reluctant to accept the application of IHL to that conflict, and often designate these groups as ‘terrorists’. This tendency was accentuated by the events of 9/11, with many states fighting armed groups within their own borders justifying their actions by appealing to the international fight against terrorism. This view, in which one party to a conflict is criminal *per se*, differs from IHL, which regulates the behaviour of all parties in equal fashion and provides the traditional legal framework for humanitarian action.

While IHL balances the principle of military necessity with that of humanity, and places limits on the waging of war, the application of a counter-terrorism framework to conflict threatens to erode those limits and with them the ability of persons affected by conflict to receive humanitarian protection and assistance. IHL does not draw a distinction between victims of war, while counter-terrorism laws suggest that helping a victim on the terrorist side may be a criminal act. Although such laws do not prohibit discussions with designated terrorists, and IHL clearly provides

for humanitarian actors to offer their services to all parties to a conflict, some humanitarian actors have been instructed not to engage with proscribed groups, or fear the consequences of doing so. Failure to engage with armed opposition groups significantly limits the ability of aid actors to reach the population under their control, and can effectively exclude victims on one side of the conflict from humanitarian assistance.

The objectives of counter-terrorism and IHL coincide over the protection of civilians from attack. Violence aimed at spreading terror among the civilian population is specifically prohibited in all conflicts by IHL.²⁵ Intentional attacks against civilians or civilian objects and other violence or ill-treatment of protected persons also qualify as war crimes, meaning that perpetrators may be punished at national and international level.²⁶ Aiding and abetting war crimes is also punishable.²⁷ In other words, under existing international criminal law, any aid agency or member of that agency who knowingly assisted in the perpetration of a crime against civilians, ‘terrorist’ or otherwise, would be criminally liable. Under counter-terrorism legislation, such actions are only penalised if they support the ‘terrorist’ party to the conflict.

²⁵ Additional Protocol I, article 51(2), applicable in international armed conflict, and Additional Protocol II, article 13 (2), applicable in non-international armed conflict. Similar prohibitions are agreed to exist under customary international law

(see ICRC Customary Rules of IHL, Rule 2, http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter1_rule2).

²⁶ See for example ICC Statute article 8.

²⁷ See for example ICC Statute article 25(3).

The operational impact of counter-terrorism legislation

Certain counter-terrorism laws have had an immediate impact on Islamic charities, particularly after 9/11, affecting their levels of funding and burdening them with administrative delays, such as the freezing of bank transactions. Since 2007 the impact has become more general across the humanitarian sector. This is due to multiple factors, including the judgement in the Holy Land Foundation case, the fact that donors, in response to pressure from domestic constituencies, have focused more closely on the issue, and allegations of high levels of aid diversion to designated terrorist groups, particularly in Somalia and the occupied Palestinian territories (oPt). The research carried out for this study suggests that counter-terrorism laws and measures have had an impact in five key areas.

Funding levels

First, counter-terrorism legislation has directly affected levels of humanitarian funding. This has been particularly acute for Islamic organisations, as they have come under greater scrutiny than others, with many of their private donors becoming afraid of the possible consequences of indirectly funding designated groups or individuals. The impact on local NGOs, such as in oPt and Pakistan, has been especially severe. For example, several small organisations which ran sponsorship schemes for orphans in the Gaza Strip using private donations from Gulf donors have had to stop their operations. This has been partly as a result of specific restrictions introduced by governments such as Saudi Arabia, which has sought to counteract accusations by Western governments that it has allowed its citizens to support international terrorism through Saudi charities.

The impact has not been restricted to Islamic organisations. Donors that in the past had quietly accepted the risk of some aid diversion as ‘the cost of doing business’ in volatile environments have profoundly lowered their levels of tolerance when it comes to designated groups, often without taking into consideration the level of need. They now require firm assurances that the risk of aid being misappropriated is minimised and that no benefits are going to designated groups. When donors have considered these assurances inadequate funding has been stopped. Examples provided in interviews for this Policy Brief include OFAC licences not being renewed for specific projects in Gaza, despite the organisation in question receiving licences for other projects and having individually screened all project beneficiaries and undergone rigorous external auditing for the project.

The inability of aid agencies to provide firm assurances against the risk of misappropriation of aid has been particularly problematic in south-

central Somalia, an area largely controlled by Al-Shabaab, an Islamist group that was designated as a terrorist organisation by the US government in 2008 and subject to UN sanctions from April 2010. Fears that Al-Shabaab was benefiting from the influx of humanitarian assistance, particularly food aid, led OFAC to suspend over \$50 million in humanitarian aid for Somalia in 2009.²⁸ These concerns were compounded by a report by the UN Monitoring Group on Somalia in March 2010 that alleged that three contractors were diverting over half of all food in Somalia – allegations that were contested by the World Food Programme (WFP).

Administration

Second, the administrative burden introduced by counter-terrorism legislation has affected the timeliness and efficiency of humanitarian aid, and can even deter aid actors from operating in high-risk areas. Delays in the transfer of funds and other administrative complications have become the norm for most Islamic humanitarian organisations, including those that are in full compliance with counter-terrorism laws. Islamic NGOs encounter tremendous difficulties in transferring monies received from donors, including Western bilateral and multilateral donors, to their country offices in places such as Pakistan. Bank transactions are frequently stopped without explanation and organisations have to wait for up to three months while an investigation is carried out. They are often asked to bear the costs of these investigations, even if they are cleared of any wrongdoing. Non-Islamic humanitarian organisations interviewed did not report similar problems with bank transfers, but they too have faced a significant increase in administrative procedures.

While many organisations already implement measures to minimise the diversion of aid, substantial staff time and financial resources are being devoted to applying for exemptions, checking lists (both of donors and partners) and otherwise ensuring compliance. Large amounts of information need to be collected and monitored as some donor regulations require organisations to vet, not just their staff or the staff of partner organisations, but of their partners’ partners too. In interviews for this Policy Brief organisations detailed the number of extra staff hired at headquarters or in specific contexts such as Gaza to collect this information and ensure legal compliance. The same point came out of a consultation process between donors and humanitarian organisations in Somalia organised by WFP and supported by HPG in June 2011. Staff from Islamic organisations also reported screening all donations above \$8,000, both from individuals and organisations, despite the very significant administrative burden this imposes.

²⁸ M. Bradbury, *State-building, Counterterrorism, and Licensing Humanitarianism in Somalia*, Feinstein International Center Briefing Paper, September 2010.

Whilst humanitarian organisations clearly consider risk mitigation measures important,²⁹ many also feel that they have become too cumbersome and are preventing them from taking the necessary risks to assist communities in need. Interviewees felt that funding shortfalls and the difficulty of complying with counter-terrorism laws in countries like Somalia have led some organisations to scale down their presence in areas controlled by designated terrorist groups.

Relations with local communities

Third, the vetting of partners and beneficiaries is undermining relations between humanitarian organisations and local communities. USAID partner vetting requirements envisage collecting and reporting personal information about partner and contractor staff to the US government – a requirement that is invariably seen as invasive and accusatory by locals.³⁰ Organisations are also concerned that the policy lacks clarity and transparency. Other donors have tried to insert clauses in funding contracts requiring recipients to disclose personal information on partner organisations and beneficiaries. These measures undermine the neutrality of humanitarian organisations and make local acceptance harder to achieve, thereby potentially compromising access to people in need. As noted by one commentator, ‘through complying [with] national legislation, US [funded] organisations are seen by partners on the ground as endorsing the political view of the government ... particularly in its conception of terrorism and who deserves assistance’.³¹ In Somalia, two US organisations, International Medical Corps (IMC) and CARE, were expelled from areas under Al-Shabaab control in 2008 for allegedly spying and gathering intelligence that led to the assassination of Al-Shabaab leader Sheikh Maalim Adam Ayro in a US air strike.³² NGOs with large non-state funding, such as MSF, have refused to accept these clauses and have replaced them with more generic clauses or inserted additional text stressing that nothing in their donor agreements ‘shall be interpreted in a way that prevents MSF from fulfilling its mission as

²⁹ BOND and Humanitarian Forum, Counter-Terrorism Policy and Development Workshop. 6 July 2010. Executive Summary.

³⁰ InterAction, Letter to Hillary Clinton: Concerns over Partner Vetting System, 15 March 2009, <http://www.interaction.org/sites/default/files/1%20InterAction%20letter%20to%20Secretary%20Clinton%20-%20March%202015%2C%202009.pdf>; Charity and Security Network, *USAID Must Consider Alternative Vetting Approaches*, Issue Brief, http://www.charityandsecurity.org/analysis/Issue%20Brief_USAID_Alternative_Vetting_Approaches.

³¹ ‘Dilemma for US NGOs: Counterterrorism Laws v. the Humanitarian Imperative’, Transcript of a panel discussion hosted by the Charity & Security Network, 1 July 2009, <http://www.charityandsecurity.org/system/files/July%201%20transcript.pdf>.

³² Department of Political Affairs and Regional Administrations Press Release, Harakat Al-Shabaab Al-Mujahideen, 20 July 2009, http://patronusanalytical.com/files/Al_Shabaabs_NGO_liaison_office_announces_closure_of_UN_offices_in_Somalia.php.

an impartial humanitarian actor bound by medical ethics’.³³

Transparency

Fourth, the lack of clarity on the implications of the legislation and donor policy has led to decreased transparency and accountability in the way humanitarians operate in contexts where they have to interact with designated groups and individuals. In Gaza, for example, minutes are often not recorded at cluster meetings to avoid officially acknowledging any engagement with proscribed organisations. Donors have given policy advice on non-headed paper. Charitable giving too has become less transparent as individuals turn to less regulated routes to avoid falling foul of counter-terrorism legislation, e.g. cash donations, which are more difficult to track.³⁴ Several interviewees for this Policy Brief felt that, in the wake of the Pakistan floods, concerns about banking restrictions affecting transfers to and from Islamic organisations may have led the UK diaspora to give large amounts of money in cash to individuals or ‘briefcase NGOs’, which were not registered with the UK Charity Commission and did little if anything to comply with counter-terrorism legislation.

Coordination

Fifth, the threat of criminal sanctions has impeded transparent discussions between humanitarian actors and the development of a coordinated response to the issue of counter-terrorism. Due to the risk of criminalisation and potential prosecution of staff, many individuals and organisations are reluctant even to discuss this issue, let alone to discuss particular concerns or develop associated responses with other humanitarian organisations. Agencies have been reluctant to share information at cluster meetings and other coordination fora. This reluctance is also evident among donors, with many also preferring not to discuss this issue openly, or, as already noted, providing policy advice on non-headed paper. Various initiatives have been undertaken by the IASC and individual organisations to document the impact of counter-terrorism legislation, but with little uptake. According to several interviewees, some organisations may be reluctant to admit that they have agreed to certain conditions or restrictions – or have operated in violation thereof.

Counter-terrorism laws have affected humanitarian operations globally, but it is in Somalia and Gaza where the impacts have been most felt by the humanitarian community.

³³ Kate Mackintosh, ‘Holder v. Humanitarian Law Project: Implications for Humanitarian Action – A View from Médecins sans Frontières’, *Suffolk Transnational Law Review*, Volume 34, Symposium 2011, Number 3, 2010.

³⁴ Mohammed Kroessin, ‘Islamic Charities and the “War on Terror”: Dispelling the Myths’, *Humanitarian Exchange*, no. 38, June 2007.

Case Study: Somalia

The sanctions regime in Somalia dates back to 1992, when an arms embargo was imposed under UN Security Council Resolution 733. Resolution 1844 in 2008 added targeted sanctions against listed individuals and entities. UN member states have implemented the resolution through a range of measures, including criminalising the provision of resources and material support to those on the list, which was drawn up on 12 April 2010. The list currently comprises Al-Shabaab and ten individuals.³⁵ Resolution 1916, passed in March 2010, introduces a humanitarian exemption to the sanctions,³⁶ but this applies only to 'the United Nations, its specialised agencies or programmes, humanitarian organisations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners'. This excludes independent organisations like MSF, which are neither part of the UN nor an implementing partner. In addition, the exemption is not mandatory. In the US, for example, whilst the substance of Resolutions 1844 and 1916 has been implemented, the humanitarian exemption has not been incorporated into domestic law.³⁷ While the humanitarian exemption in Resolution 1916 could be seen as an example of how to mitigate the humanitarian impacts of sanctions and counter-terror legislation, there are fears that it sets a precedent in which humanitarian action is exempted only in particular circumstances, rather than this being the norm in situations of humanitarian need.

This sanctions regime has compounded the difficulties facing humanitarian organisations operating in south-central Somalia, a highly volatile area mostly controlled by Al-Shabaab. Funding has declined by half between 2008 and 2011, mainly as a result of a drop in US contributions, and humanitarian organisations are being asked to introduce extensive risk mitigation measures. These include pre-vetting finance checks, tracking systems, real-time monitoring, verification of partners' shareholders, a bond system (requiring a deposit of 30% of the value of goods transported) and the contractual assumption of 100% financial liability for shipments lost or stolen by contractors. While risks of aid diversion certainly need to be mitigated, these requirements far exceed what is considered acceptable in other contexts. Several interviewees noted the high cost of such far-reaching measures, both financially and to the flexibility and responsiveness of emergency operations. There are also concerns that these

measures increase the risk to aid workers by aligning them with a regime that explicitly targets one actor in the conflict – and one that is already hostile towards aid agencies. This alignment is compounded by the fact that humanitarian organisations that fall within the terms of the exemption in Resolution 1916 are required to assist the UN Humanitarian Aid Coordinator for Somalia in their reporting every 120 days to the UN Security Council on any instances of diversion of assistance, as well as on the implementation of the exemption.

Combined with Al-Shabaab's hostility towards aid agencies and the uncertain security environment, these external measures have led to a progressive deterioration in humanitarian access since 2008, with humanitarian organisations becoming increasingly unable to operate in Al-Shaabaab-controlled areas. Despite the array of risk management measures employed, funding to humanitarian organisations has remained low. Several organisations report being unable to spend what funds they have quickly because of all the pre-vetting checks and other risk management procedures they are required to adopt in order to comply particularly with OFAC regulations. This has inevitably slowed down the response.

The current famine in Al-Shaabaab-controlled areas has placed these restrictions in the spotlight, with the critical humanitarian situation forcing donors to relax their requirements. In the US OFAC restrictions have been eased and licences granted to the State Department, USAID and their partners and contractors to operate in Somalia. OFAC has also announced that non-USAID partners can work in Somalia without a licence,³⁸ and that 'incidental benefits' to Al-Shabaab, such as food and medicine that might fall into their hands, are 'not a focus for OFAC sanctions enforcement'.³⁹ However, any organisations facing demands for large or repeated payments are required to consult OFAC prior to proceeding with their operations.⁴⁰ Several interviewees noted that this announcement has created confusion, as it is neither a firm guarantee that OFAC will not take action in the future, nor does it bar prosecution under US criminal law in relation to the material support statute.⁴¹ As a result, humanitarian organisations remain cautious, even though the humanitarian situation in south-central Somalia is predicted to worsen.⁴²

³⁵ See 'List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 1, 3, and 7 of Security Council Resolution 1844 (2008)', http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf.

³⁶ Resolution 1916, paragraph 5. The original exemption was to last for 12 months, and its effects to be reviewed every 120 days. It was renewed and extended for 16 months by Resolution 1972 on 17 March 2011. See also Resolution 2002 (2011) of 29 July 2011.

³⁷ Mackintosh, 'Holder v. Humanitarian Law Project'.

³⁸ Office of Foreign Assets Control Frequently Asked Questions Regarding Private Relief Efforts in Somalia, 4 August 2011.

³⁹ *Ibid.*

⁴⁰ *Ibid.*

⁴¹ See also G. Rona and K. Guinane, 'How To Help Somalia', *The Hill*, 2 September 2011, <http://thehill.com/blogs/congress-blog/foreign-policy/179385-how-to-help-somalia>.

⁴² OCHA, *Somalia Situation Report No. 12*, 6 September 2011.

Case study: Gaza

Israel and the Quartet on the Middle East (the UN, US, EU and Russia) imposed sanctions on Hamas after it won legislative elections in January 2006. Major donors have subsequently made aid grants conditional on assurances that there would be no contact with or benefit for Hamas. As Hamas represents the government authorities this is not possible, and a number of NGOs have been forced to limit or suspend their operations.⁴³ A power struggle between Fatah and Hamas has meant that Hamas' authority is largely restricted to Gaza, and its designation as a terrorist organisation in many jurisdictions, including the US and EU member states, has affected humanitarian operations in the coastal strip.⁴⁴ A recent *rapprochement* between Hamas and the Palestinian Authority (PA) may see US restrictions extended to the West Bank too.

The designation of Hamas has meant that aid organisations operating in Gaza have to bypass central and local government officials. Training programmes for elected municipal authorities have had to stop as they were potentially in breach of US legislation, even though the US government was not actually funding these particular programmes. It is not clear whether paying the NGO registration fee required by the Ministry of Interior in Gaza could be seen as providing 'material support' to Hamas, which would benefit from this revenue. The same applies to the use of materials smuggled from Egypt (often the only means to rapidly source goods), as Hamas provides licences to smugglers and levies taxes on smuggled goods. Some agencies are unable to work in municipalities with a Hamas-affiliated mayor, or have to pull out when a new mayor is elected who is affiliated to Hamas. Relations with the authorities have deteriorated, compounded by the fact that the Consolidated Appeal Process (CAP) calls on clusters to coordinate and work with the relevant line ministries of the Palestinian Authority – the 'official' line ministries operating in the West Bank rather than those controlled by Hamas in Gaza.

Tensions between Hamas and humanitarian organisations have further escalated after Hamas announced its intention to verify the accounts of Western-financed NGOs operating in Gaza, and to conduct a financial and programme audit. The Ministry of Interior demanded access to NGO offices to physically search files and records in response to allegations that NGOs were

mismanaging funds and not targeting the most vulnerable. Palestinian NGO law is unclear, but it essentially requires NGOs to report to their relevant line ministry only if there is an egregious problem. Whilst EU donors did not take a formal stance on this request, USAID announced that it would suspend funding to any NGO that allowed the audit to take place. When the first organisation targeted by the Ministry, the International Medical Corps (IMC), objected to the audit, Hamas closed down the organisation's office in Gaza. USAID briefly suspended all funding to NGOs on 12 August, and only resumed it after Hamas agreed to delay the audit of NGOs for three months thanks to high-level UN mediation.

The restrictions have also created additional bureaucracy for humanitarian agencies, which now have to devote staff time and resources to applying for exemptions and checking that partner organisations are not listed. OFAC licences in Gaza have to be applied for on a project-by-project basis, with evidence that all the necessary checks have been carried out on partners and prospective beneficiaries. Several organisations now employ personnel whose sole task is to carry out these checks on staff, partners and beneficiaries.⁴⁵ Inevitably operational costs have sharply increased. Counter-terrorism legislation has also restricted the pool of 'suitable' local partners, and relations between partners and foreign NGOs have suffered from a loss of trust and resentment at the lack of transparency in partner vetting processes. International NGOs are increasingly moving towards implementing their own relief and development programmes in order to avoid the legal hurdles of partnering. In addition, as agencies are prevented from coordinating their programmes with local structures, parallel services and structures are being created.⁴⁶ In the housing cluster, for example, beneficiary lists have been created by the cluster members in addition to the lists drawn up by the authorities.

Islamic NGOs have been particularly affected by the sanctions regime; some report that, following the imprisonment of the Trustees of the Holy Land Foundation, trustees of other Islamic charities have become profoundly risk averse, leading some organisations to stop their operations in Gaza

(continued)

⁴³ See Caroline Abu-Sada, 'A Perilous Transition: MSF in the Gaza Strip' in Claire Magone, Michael Neuman and Fabrice Weissman (eds), *Humanitarian Negotiations Revealed: The MSF Experience* (London: Hurst & Co., 2011).

⁴⁴ Hamas was designated as a terrorist organisation by the US Office of Foreign Assets Control in 1995, meaning that a licence was required to deal with it financially, and as a Foreign Terrorist Organization by the Secretary of State in 1997, bringing 'providing material support or

resources' to Hamas under the scope of US criminal law. The EU designated Hamas as a terrorist organisation in September 2003 (see Council Common Position 2003/651/CFSP, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003E0651:EN:HTML>).

⁴⁵ Larissa Fast, *Aid in a Pressure Cooker: Humanitarian Action in the Occupied Palestinian Territory* (Boston, MA: Feinstein International Center, 2006).

⁴⁶ *Ibid.*

Case study: Gaza *(continued)*

altogether. This is partly as a result of the broad interpretation of the definition of ‘material support’. Some fear that even straightforward humanitarian activities, such as the provision of school supplies, could be seen as a prosecutable action as they could potentially allow Hamas to free up funds that could be used for military activities.

As in other contexts, humanitarian organisations find the legislation confusing. While none of the legislation examined here prohibits talking to a proscribed organisation, for example to negotiate humanitarian access, donors have different positions with regards to contact with Hamas. As a result, organisations tend to engage only with officials at the lowest technical level.

Conclusion

The application of counter-terrorism legislation and other measures to humanitarian operations is challenging principled humanitarian action. Complying with conditions in donor funding agreements and curtailing operations in areas controlled by designated individuals or groups has affected the ability of humanitarian organisations to provide assistance according to the principles of neutrality and impartiality. Whilst preventing material support to terrorist acts is an important objective, the steps many states are taking to achieve this are having an unnecessarily adverse impact on efforts to provide life-saving assistance to those caught up in conflicts.

While there have been only a small number of prosecutions of humanitarian actors for ‘material support’ offences, the threat of criminal sanction will continue to undermine humanitarian operations, at least until there is greater clarity on the interpretation and application of the laws to humanitarian operations. Meanwhile, the range of regulatory measures that have been introduced are raising operating costs, slowing down administrative functions, curtailing funding, undermining partnerships, preventing access and altering the quality and coordination of assistance. Islamic charities have been most severely affected, but the impact has been felt across the humanitarian sector.

As this study demonstrates, dialogue on this issue between humanitarian organisations and donor governments has not been constructive or even transparent. Many donor officials working for the humanitarian branches of their governments are sympathetic to the concerns of humanitarian actors regarding the impact of these laws on their operations, but there are clear differences of opinion within donor governments and Finance, Home and Justice Departments hold the upper hand on these issues. As in other areas, there is also a lack of communication between donor offices at country level and headquarters, with the latter usually unaware of the full scope of the issues at

country level. It is essential that any dialogue between humanitarian organisations and donors is not limited to government aid departments, but engages the key decision-makers in other parts of government too, both at headquarters and in individual countries. A more transparent dialogue is essential as ‘don’t ask, don’t tell’ policies have created a climate of confusion and fear.

A coherent dialogue with donor governments is not possible if humanitarian organisations do not first share information amongst themselves on the specific requests made by donors in grant agreements, how they have responded to these demands and what impact any restrictions are having on their operations. Some organisations are negotiating the terms of any counter-terrorism clauses in contracts to ensure adherence to the principles of humanitarian action, but the vast majority are quietly complying with these demands. In the absence of more information, it is not clear exactly what is being asked by donors, or what specific conditions are included in counter-terrorism clauses, and so it is impossible to develop a coherent response. Reaching a common understanding, and a common position within the IASC, is essential to developing a more constructive dialogue with key humanitarian donors. Greater transparency and a shared understanding of donor demands will also allow humanitarian organisations to develop appropriate, and ideally shared, risk management frameworks which can help provide greater reassurance to donors around the use of resources, and help increase their appetite for risk.

One useful course of action would be to reframe the legitimate goals of much counter-terrorism law and policy in terms of IHL. The commitment to protecting civilians from attacks, including those specifically designed to spread terror, is shared by proponents of counter-terrorism laws and humanitarian actors. Similarly, both donors and humanitarian actors recognise that providing protection and assistance to populations in an impartial manner is the foundation on which humanitarian action is based. IHL provides a framework in which these and

other goals are thoughtfully addressed in a way that preserves neutral and impartial humanitarian action, and protects the ability of victims of conflict to receive relief. Dialogue on these issues between humanitarian organisations and donor governments could be structured around these basic points of consensus, and resulting agreements – contractual or otherwise – framed in terms of IHL. This would help avoid the compromises to neutrality involved in many current donor arrangements, and ensure that the humanitarian imperative is central in any discussions about how to provide assistance in sensitive regions.

Reaffirming humanitarian principles is central to mitigating a broader trend in many conflicts, whereby established providers of humanitarian assistance are increasingly seen as agents of Western governments. Rigid and over-zealous application of counter-terrorism laws to humanitarian action in conflict not only limits its reach in that context, but undermines the independence and neutrality of humanitarian organisations in general, and could become an additional factor in the unravelling of the legitimacy and acceptance of humanitarian response in many of the world's worst humanitarian crises.