Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action

Kate Mackintosh and Patrick Duplat
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Independent study commissioned by

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Acknowledgments
The study benefited greatly from the advice and counsel of the Advisory Group, who periodically ensured that the research was attempting to answer the right questions and raise the most pertinent issues. Members of the Advisory Group also contributed individually by sharing their knowledge and reviewing sections according to their expertise. They acted in their personal capacity.

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This research would not have been possible without the active participation of several dozen legal experts and humanitarian practitioners in UN agencies, international organizations, the Red Cross and Red Crescent movement, umbrella organizations, NGOs, think tanks and academia. We hope the Study reflects the many opinions and examples that they have contributed anonymously.

The researchers are also very grateful for the level of co-operation and assistance provided by government officials in capitals and embassies. The report attempts to air the views of a wide-range of stakeholders and it would not have been possible without the open discussions and off-the-record conversations with many government officials.

Finally, the study benefited from guidance, supervision and logistical support of colleagues in the United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council.

Disclaimer

The statements, findings, interpretations, conclusions and recommendations expressed in this study are those of the research team and do not necessarily reflect the views of, or are endorsed by, the United Nations, the Norwegian Refugee Council or the study's Advisory Group.

GLOSSARY

AMISOM	African Union Mission in Somalia
ATC	Anti-Terrorism Certification
BPRM	Bureau for Population, Refugees and Migration
CAP	Consolidated Appeals Process
CTAG	Counter-Terrorism Action Group
CTC	Counter-Terrorism Committee
CTED	Counter-Terrorism Committee Executive Directorate
CTITF	Counter-Terrorism Implementation Task Force
DFID	Department for International Development
ECHO	Humanitarian Aid and Civil Protection Department of the European Commission
ECJ	European Court of Justice
FATF	Financial Action Task Force
FPA	Framework Partnership Agreement
FTO	Foreign Terrorist Organisation
IASC	Inter-Agency Standing Committee
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IEEPA	International Emergency Economic Powers Act
NGO	Non-governmental organisation
NPO	Non profit organisation
NRC	Norwegian Refugee Council
OCHA	UN Office for the Coordination of Humanitarian Affairs
OECD	Organization of Economic Co-operation and Development
OFAC	Office of Foreign Assets Control
OFDA	Office for US Foreign Disaster Assistance
OIC	Organization of Islamic Cooperation
oPt	occupied Palestinian territory
PIO	Public international organisation
PVS	Partner Vetting System
UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution
USAID	US Agency for International Development
WFP	World Food Programme

Foreword

The attacks on the United States on September 11th, 2001, ushered in a new era of expansive counter-terrorism laws and policies which have had an impact on the funding, planning and delivery of humanitarian assistance and protection activities to people in need.

This independent study, commissioned by the Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council on behalf of the Inter-Agency Standing Committee (IASC), aims to increase the understanding of existing counter-terrorism laws and policies and their impact on our work.

Humanitarian principles require that assistance and protection be provided wherever it is needed, impartially and with preference for those in greatest need. This foundation for humanitarian action is based in international law and has been repeatedly reaffirmed by States.

In some situations, certain donor counter-terrorism measures have presented humanitarian actors with a serious dilemma. If we abide by our principles, we may break the law and face criminal prosecution. Adherence to some counter-terrorism laws and measures may require us to act in a manner inconsistent with these principles. This could undermine the acceptance of humanitarian workers among the different parties engaged in conflict and the communities in which they work, preventing them from protecting and assisting those most in need. There is an urgent need to strike a better balance between the aims of counter-terrorism laws and measures on one hand, and humanitarian action which adheres to these principles, on the other.

The case studies of the occupied Palestinian territory and Somalia highlight some of the impacts of counter-terrorism measures on humanitarian actors. These include increased administrative procedures for procurement or vetting of partners; undermined ability to support people in areas where armed groups designated as terrorist may be active; and a tendency towards self-censorship and other negative coping strategies by humanitarian actors. The case studies also highlight the differential impact of counter-terrorism measures across different types of humanitarian organisations.

The study presents practical recommendations both for donors and humanitarian actors. If implemented, these recommendations could help resolve some of the challenges identified in the study and allow humanitarian actors to end some of the negative coping strategies that they employ on the ground. We are committed to ensuring, in open dialogue with donors and together with the IASC and other partners, that these recommendations are carefully considered and, where appropriate, implemented.

Striking a better balance between counter-terrorism measures and humanitarian action requires genuine and sustained dialogue among the actors concerned. It requires increased awareness raising and changes to some policies and practices. We will all need to work together and play our part.

Valerie Amos

United Nations Emergency Relief Coordinator and Under-Secretary-General for Humanitarian Affairs

Toril Brekke

Secretary-General, Norwegian Refugee Council

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I Introduction

As counter-terrorism law and measures have developed substantially over the last decade, humanitarian actors including United Nations (UN) agencies and international and national non-governmental organisations (NGOs) have begun to feel, or fear, their impact on their work.[1] A number of studies and reports have indicated potential incompatibility between neutral, impartial and independent humanitarian action and counter-terrorism objectives. Key problem areas have been identified and some legal analysis has been carried out.[2]

The framework for humanitarian action in situations of armed conflict is provided by international humanitarian law (IHL), a body of rules that aims, among other things, to protect the life, health and dignity of civilians. Humanitarian action is provided for as a means to that end. IHL obliges the parties to an armed conflict to undertake relief actions themselves or allow impartial and humanitarian organisations to do so. A number of well-established principles are also relevant to humanitarian action.[3] Key among them is the principle of humanity, the aim of which is to prevent and alleviate human suffering wherever it may be found. Closely related to the principle of humanity is that of impartiality, requiring that no discrimination be made on the basis of nationality, race, religion or other similar criteria and that assistance and protection be given only in proportion to need. Additionally there are principles of neutrality between the parties to an armed conflict and independence from political agendas, both of which enable the other core principles to be translated into action on the ground.

The legal framework and these humanitarian principles require humanitarian actors to treat state and non-state parties to an armed conflict on an equal basis and to respond to all victims in proportion to their needs, without consideration of political or other factors. This approach can clash with that of counter-terrorism which designates certain armed actors as terrorist, and therefore criminal, and may impose liability for engaging with them even for humanitarian purposes.

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[1] The measures discussed in the study are the international, regional and national legal instruments and policies related to counter-terrorism that are relevant to humanitarian action

[2] Key publications include; Harvard University, Humanitarian Policy and Conflict Research, *Humanitarian Action under Scrutiny: Criminalising humanitarian engagement*, February 2011 http://www.hpcrresearch.org/research/criminalizing-humanitarian-engagement; Weissman, *Criminalising the enemy and its impact on humanitarian action*, Journal of Humanitarian Assistance, July 2011; Pantuliano et al., *Counter-terrorism and humanitarian action: tensions, impact and ways forward*, Overseas Development Institute – Humanitarian Policy Group, October 2011 http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7347.pdf; Margon, *Unintended Roadblocks: how US terrorism restrictions make it harder to save lives*, Centre for American Progress, November 2011 http://www.americanprogress.org/issues/regulation/report/2011/11/16/10642/unintended-roadblocks/; Charity and Security Network, *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism measures in the United States*, June 2012 http://www.charityandsecurity.org/system/files/Safeguarding%20Humanitarianism%20Final.pdf. See bibliography for a more exhaustive list

[3] These principles are applicable in conflict and non-conflict settings and are reflected in UNGA resolution 46/182 (1991) and in statements and resolutions of the UN Security Council

Among the principal concerns of humanitarian actors is that counter-terrorism measures will obstruct principled humanitarian action. The fear is that people in areas controlled by non-state armed groups designated as terrorist may have no or diminished access to humanitarian assistance and protection. This may be because fewer funds are available, because of conditions attached to funding or because operational agencies are unwilling to run perceived or actual legal risks. One example of this is the fear of engaging at all with designated groups. The impact of the humanitarian sector's failure to engage with non-state actors on humanitarian access has been widely noted and discussed, and is of increasing relevance.[4] The concern about the negative impact of counter-terrorism measures on humanitarian action is a pressing one because areas in which non-state armed groups designated as terrorist are often those where humanitarian needs are greatest.

There are however points of convergence between counter-terrorism and humanitarian objectives. At the most basic level, both seek to protect civilians from harm. IHL is underpinned by the principle of distinction, according to which the parties to an armed conflict must at all times distinguish between the civilian population and combatants and between civilian objects and military objectives. IHL also prohibits, as war crimes, most of the acts that would be considered terrorist if committed in peacetime (deliberate and direct attacks against civilians and civilian objects, hostage taking and others). It likewise prohibits as a war crime acts or threats of violence that are specifically intended to spread terror among the civilian population.

Beyond this, the principles of neutrality and impartiality require humanitarian assistance and protection to simply relieve the suffering of those in need, not to support the efforts of any party to an armed conflict. They are, therefore, incompatible with funding or assisting any belligerent group, including those that may be designated terrorist. The obligation and commitment of humanitarian actors to adhere to humanitarian principles can be seen, for example, in the development of the *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief* in the early 1990s.[5] Efforts to prevent the diversion of aid and other support intended to benefit the civilian population by armed groups, which have been high on the humanitarian agenda since at least that period, are compatible with effective

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[4] See for example *To Stay and Deliver: good practice for humanitarians in complex security environments*, UN OCHA 2011 http://reliefweb.int/report/world/stay-and-deliver-good-practice-humanitarians-complex-security-environments-enar; *Report of the Secretary-General on the protection of civilians in armed conflict,* 2012, S/2012/376 http://reliefweb.int/report/world/report-secretary-general-protection-civilians-armed-conflict-s2012376; Jackson, *Talking to the other side: Humanitarian engagement with armed non-state actors*, Humanitarian Policy Group, 2012 http://www.odi.org.uk/publications/6662-humanitarian-negotiations-non-state-armed-militia-rebel

[5] *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations in Disaster Relief* http://www.ifrc.org/en/publications-and-reports/code-of-conduct/. It reiterates and develops core humanitarian principles to which organisations voluntarily adhere and strive to follow. Other relevant guidelines and mechanisms to regulate humanitarian action include the *Sphere Handbook* (http://www.sphereproject.org/handbook/,) developed in the late 1990s; the *Humanitarian Accountability Partnership International* (http://www.hapinternational.org/), established in 2003, and the more recent *Professional Standards for Protection Work* (2009) http://www.icrc.org/eng/resources/documents/publication/p0999.htm

counter-terrorism efforts undertaken by national authorities to prevent groups designated as terrorist benefitting from humanitarian operations.

The counter-terrorism framework, for its part, explicitly accommodates humanitarian objectives in several areas. Counter-terrorism law and sanctions can include humanitarian exceptions or provide for licences to be granted to humanitarian actors to deal with designated entities. In January 2013 the United Nations Security Council (UNSC) committed to the continued use of humanitarian derogations in Council-imposed sanction regimes applicable to all Member States.[6] It also emphasized that Member States must respect their obligations under international law, including international human rights and humanitarian law, in any measures designed to combat terrorism.[7] The *UN Global Counter-Terrorism Strategy* adopted in 2006 highlights the relationship between humanitarian considerations in the widest sense and counter-terrorism objectives through its recognition of human rights and the rule of law as the fundamental basis of the fight against terrorism.[8] Some international donors specifically refer to international law, core humanitarian principles and sector standards in their overarching counter-terrorism strategies or in funding agreements with humanitarian actors.

Rationale and scope of the study

Despite attention at the global level to counter-terrorism and human rights issues, the impact of counter-terrorism measures on humanitarian action has not been studied in detail. In early 2011, to further advance the research and analysis of these issues, including from a more global perspective, the Inter-Agency Standing Committee's (IASC) Task Force on Humanitarian Space and Civil-Military Relations[9] asked the Norwegian Refugee Council (NRC) and the UN Office for the Coordination of Humanitarian Assistance (OCHA) to commission an independent comprehensive study on the impact of counter-terrorism measures on principled humanitarian action.

The study seeks to examine the impact of donors' counter-terrorism measures on principled humanitarian action. It begins with a review of selected international, regional and national counter-terrorism laws that may criminalise the work of humanitarian actors (Section II). The international legal counter-terrorism framework is explored, as are key international policy initiatives which have set the parameters for many national interventions over the last decade. National counter-terrorism legislation and sanctions regimes from 14 states[10] and one regional organisation, the European Union (EU), are then analysed to clarify the scope and content of laws which could be of relevance to humanitarian action (Section II). As well as contributing to an assessment of the legal risk run by

[6] Statement of the President of the Security Council, 15 January 2013 (S/PRST/2013/1) http://www.un.org/ga/search/view_doc.asp?symbol=S/PRST/2013/1
[7] *ibid*
[8] UN Global Counter-Terrorism Strategy, adopted 8 September 2006 by UNGA (A/RES/60/288) http://www.un.org/terrorism/strategy-counter-terrorism.shtml
[9] http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-common-default&sb=86
[10] Australia, Canada, Denmark, France, Germany, Japan, The Netherlands, New Zealand, Norway, Qatar, Saudi Arabia, Turkey, the United Kingdom (UK) and the United States (US). The states were selected because of their influence on the development of counter-terrorism law, as well as to represent a range of civil and common law jurisdictions. A smaller group of the same states was then selected for study as donors

humanitarian organisations, this analysis outlines the legislative framework for the counter-terrorism policies adopted by donors.

Section III examines the implementation of these national and international counter-terrorism laws in the policies of ten significant humanitarian donors. Funding agreements that limit or impose conditions on humanitarian activities, as well as actions taken by these donors in the context of counter-terrorism risk management more generally, are presented. Any institutional oversight, guidance offered and dialogue with partners is discussed. Areas of good practice, as well as those where particular concerns have been raised by the humanitarian community, are highlighted.

Section IV explores how different humanitarian actors have reacted to such measures and the impact these have had on humanitarian operations in Somalia and the occupied Palestinian territory (oPt). The study ends with conclusions and recommendations to reduce the adverse impact of counter-terrorism law and related donor measures on humanitarian action (Sections V and VI). These recommendations are aimed at states and humanitarian actors, but also more broadly at policy makers both within the humanitarian community and across the counter-terrorism and security sectors.

The study will be supplemented in 2013 by a second component commissioned by OCHA to be carried out by the Geneva Academy of International Humanitarian Law and Human Rights. This will examine the impact on principled humanitarian action of counter-terrorism law and other measures adopted by states within whose territories humanitarian operations are conducted.

Methodology

Underlying this study is a fundamental concern about the impact of counter-terror law and measures on people in need of humanitarian assistance. It tries to trace how restricted or diminished humanitarian action affects the lives of people in need. It generally assumes limits on the quantity or quality of humanitarian aid have a negative effect on people in need of it. The study did not attempt to quantify those negative effects, which may indeed not even be possible. Reliance on a comparison of humanitarian indicators from before and after different counter-terrorism measures were introduced, for example, would overstate the significance of counter-terrorism measures in determining a humanitarian situation. Other factors (in the case of this study's two case studies access restrictions imposed by those in *de facto* control) have a far greater effect on peoples' lives. However, it is assumed that limits or blocks on humanitarian aid will contribute to a deteriorating humanitarian situation.

Definitions of humanitarian action vary, although there is general agreement that it aims to preserve life, prevent and alleviate suffering and protect human dignity. The research team refrained from defining humanitarian action further in interviews in order not to exclude *a priori* any significant areas of impact. Interview subjects were left to reply based on their own understanding of the term. The purpose of the investigation was to determine whether work that donors had funded as humanitarian response, or that actors had carried out as humanitarian interventions, had either been

altered or stopped due to counter-terrorism measures. The examples listed in the report show that impact is felt in a number of areas that can fall within the definition, from life-saving delivery of goods, services and money to education, early recovery and protection.[11]

NRC and OCHA commissioned a group of independent researchers to undertake the study in early 2012 and research was carried out over a one-year period. The research team undertook a desk review of literature from available reports, academic and analytical papers, the most relevant of which are listed in the bibliography. The research into national counter-terrorism law included a questionnaire which was completed by national legal experts. The desk review was followed by telephone interviews with more than 170 humanitarian workers, academics, researchers, lawyers and government officials responsible for humanitarian, security, financial and foreign policies. The selection of donor states as subjects for the study was based on three criteria: (1) donor significance to the humanitarian system; (2) donor significance to the case study countries in particular and (3) representation of established as well as emerging donors.

Somalia and the oPt were chosen for case studies as examples of situations where a designated terrorist group controlled parts of territory and where there are sizeable humanitarian operations. Field research for the two case studies was carried out in Somalia as well as in Nairobi, Kenya (where many humanitarian actors operating in Somalia are based) and in the oPt as well as in Israel. The field research consisted of interviews with humanitarian stakeholders, including senior UN officials, UN humanitarian agency representatives and field staff, donor representatives, international and national NGO directors and field staff.

NRC and OCHA sent out two surveys in mid-2011 and mid-2012 to members of the IASC Task Force on Humanitarian Space and Civil Military Relations[12], including the major umbrella groupings which collectively represent some of the main non-governmental humanitarian organisations.[13] The first survey led to a synthesis report, the catalyst to the present study. The second gathered additional experiences from members on the impact of counter-terrorism measures.

The work of the consultants has been guided by an independent Advisory Group of relevant experts from international and non-governmental organisations, the academic and research communities and government. Members of the Advisory Group participated in their personal capacities.[14]

A preliminary briefing paper summarising the initial findings and some preliminary recommendations was shared at a number of humanitarian fora in Washington, Harvard, Brussels, New York and Geneva in late 2012 and early 2013. These formal and informal discussions, including with a

[11] The study focused on humanitarian action, as opposed to development assistance, although the boundaries between the two are not always clear
[12] http://www.humanitarianinfo.org/iasc/pageloader.aspx?page=content-subsidi-common-default&sb=86
[13] See bibliography
[14] See Disclaimer *infra* Footnote 1

number of donors and UN counter-terrorism bodies, allowed for feedback on initial findings and helped ensure the recommendations were practical and relevant. Governmental donors interviewed as part of the original research were given an opportunity to review their profiles to ensure the factual accuracy of the information. They were also briefed prior to the release of the report.

II Relevant Law and Other Measures

a) Introduction

The following section analyses international and selected national counter-terrorism laws to determine their relevance to humanitarian operations. After setting out the international legal counter-terrorism framework, attention is paid to what kind of contributions to terrorist groups or acts qualify as criminal in the different jurisdictions, and, crucially, what extent of required criminal intent is required to be deemed to fall foul of the law. In addition, it examines who is subject to each nation's laws, in particular whether there is jurisdiction over the states' own citizens or others for acts committed outside the territory; what the penalties are for violation of these provisions, and whether there have been any prosecutions of humanitarian organisations under counter-terrorism laws. As well as contributing to an assessment of the legal risk run by humanitarian organisations, this analysis provides the legislative framework for the counter-terrorism policies adopted by donors, which are examined in Section III. Annex I provides a summary table of comparison of the selected national frameworks.

b) International framework related to terrorism

The web of legal instruments enacted to counter the threat of terrorism is complex. Governments have agreed 18 multilateral treaties addressing different aspects of terrorist acts. One of the most significant for the purposes of this study is the *International Convention for the Suppression of the Financing of Terrorism* (the "Terrorism Financing Convention")[15], which entered into force in April 2002 and has 183 States parties. Agreement on a comprehensive global convention and a common definition of terrorism has been harder to reach (see Box 1), however. A Comprehensive Convention on International Terrorism has been under negotiation for over a decade. In 2006, the UN General Assembly unanimously adopted a *Global Counterterrorism Strategy* which has since been reaffirmed biannually.[16]

This section looks at the central UN Security Council Resolution (UNSCR) 1373, adopted after the September 2001 attacks in the US, other relevant developments in UNSC sanction regimes over the last decade, and important inter-governmental counter-terrorism policy initiatives which have had an influence on national counter-terrorism legal and other measures.

[15] http://www.un.org/law/cod/finterr.htm
[16] A/RES/66/282

UN Security Council Resolution 1373

Adopted on 28 September 2001, UNSCR 1373 obliged Member States to implement a wide range of measures designed to combat and prevent further acts of terrorism. The measures imposed focused on preventing terrorist financing – freezing assets and criminalising fund raising and economic support to terrorist activities – but also extended to such matters as improving judicial co-operation and border controls. The provisions most relevant for the purposes of this study include the requirement for States to "[c]riminalize the wilful provision or collection, by any means, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts"[17], and to:

> *"[p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons".*[18]

No exemption for humanitarian assistance and protection activities was anticipated in Resolution 1373.

The Resolution also created a new Counter-Terrorism Committee (CTC) to monitor its implementation. Member States were required to report to the CTC on steps taken to implement the resolution within 90 days of its adoption. Later, the Counter-terrorism Executive Directorate (CTED) was established to support the work of the CTC.[19] Unlike the earlier Taliban- and Al Qaeda-focused resolutions (discussed below), Resolution 1373 did not aim at any group in particular, and no lists have been created at UN level under its authority. It is left to Member States to determine to whom the UNSCR 1373 sanctions apply through establishment of their own national lists.

UN Security Council Sanction Regimes

The UNSC has imposed sanctions on certain individuals and entities in response to terrorism as a threat to international peace and security through targetted sanctions regimes. In 1999, one year after the bombing of the US embassies in East Africa, the UNSC adopted Resolution 1267, the third in a series of resolutions calling upon the Taliban to cease sheltering terrorists. Resolution 1267 differed from the earlier resolutions in two respects: it mentioned Osama bin Laden by name for the first time (demanding that he be handed over to a relevant state for prosecution) and

[17] UNSCR 1373 para. 1(b)
[18] *Ibid.* para 1(d)
[19] UNSCR 1535

imposed sanctions on the Taliban for failure to comply with the earlier resolutions. UN Member States were ordered to deny permission to Taliban controlled flights to take off or land in their territory, as well as to freeze funds and financial resources belonging to the Taliban (named individuals or entities) and to ensure neither these nor any other resources were made available to the Taliban by "their nationals or by any persons within their territory". Paragraph 4(b) of the resolution provided a mechanism to create humanitarian exceptions, allowing the committee created to oversee the sanctions regime to authorise the transfer of resources otherwise prohibited to listed individuals "on a case-by-case basis on the grounds of humanitarian need". The terms of this exception were later widened considerably to include, *inter alia*, resources determined by Member States to be "necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment, taxes, insurance premiums, and public utility charges"[20] (the application of this humanitarian exception is discussed in the context of EU case law below).

In 2000, Resolution 1333 extended the regime to Osama bin Laden himself, and any individuals and entities associated with him. Soon after the terrorist attacks of September 2001 Resolution 1390 transformed the 1267 regime into a global list of Al Qaeda and Taliban members, without temporal or geographic limitations. In 2011, the Taliban and Al Qaeda sanctions regimes were split.[21] Separate Al Qaeda and Taliban sanctions committees, established by the UNSC, maintain lists of designated individuals and entities and monitor Member States' compliance with the sanctions regimes. These sanctions regimes and associated lists are referred to in this report with reference to UNSCR 1267, for simplicity, although the current Taliban regime is more accurately linked to UNSCR 1988.[22] Member States' implementation of their obligations under the resolutions through domestic law will be discussed further below.[23]

The Al Qaeda and Taliban sanctions regimes are the only targetted UN counter-terrorist regimes, and the only terrorist lists at UN level. In other situations such as Somalia, however, groups or individuals designated on national counter-terrorism lists are subject to UN sanctions imposed on other grounds. In 2008, UNSC Resolution 1844 imposed sanctions on individuals and entities who threatened the peace in Somalia, violated the arms embargo originally imposed in 1992[24] or obstructed humanitarian assistance. In April 2010, the Committee monitoring the arms embargo

[20] UNSCR1452 (2002), para 1(a)
[21] UNSCRs 1988 and 1989
[22] In October 2004, UNSC Resolution 1566 established a working group to consider and submit recommendations on practical measures to be imposed on individuals, groups or entities involved in or associated with terrorist activities other than those designated by the Al-Qaida/Taliban Sanctions Committee. However, this work, particularly in relation to expanded UN lists has not moved forward
[23] Some authors, including the former UN Special Rapporteur on human rights and counter-terrorism, Professor Martin Scheinin, have criticised the UNSC for acting *ultra vires* (beyond its powers) through the creation of a terrorist list that is without temporal or geographical limitations and would therefore not amount to a proper response to an identifiable threat to international peace and security, so that Chapter VII powers are triggered. See Scheinin, Martin. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, (A/65/258), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/478/27/PDF/N1047827.pdf?OpenElement
[24] UNSCR 733

and related sanctions issued a list of individuals and entities concerned, which included Al-Shabaab.[25] By this date, a number of Member States – including the US (February 2008), Australia (August 2009), Canada and the UK (both March 2010) had already designated Al-Shabaab as a terrorist organisation and imposed their own related sanctions. The Somalia sanctions regime is discussed in more detail in the Somalia case-study (Section IV).

Inter-governmental counter-terrorism policy initiatives

Alongside the international legal framework provided by multilateral treaties and resolutions of the UNSC, international policy initiatives also influence the development of counter-terrorism measures at national level. These include the G8's Counter-terrorism Action Group (CTAG), which was established to support the UN Counter-Terrorism Committee and more widely the UN Global Counterterrorism Strategy,[26] the Global Counterterrorism Forum, launched in 2011 with 29 Member States plus the EU and the Financial Action Task Force (FATF).

FATF is particularly influential and relevant for this research. An informal group originally established in 1989 by Organisation for Economic Co-operation and Development (OECD) countries to combat money-laundering, FATF's mandate was expanded to address terrorist financing in the wake of the September 2001 attacks. FATF has issued nine Special Recommendations against terrorist financing to its members (currently 34 states and two regional associations). Former Special Recommendation VIII, now Recommendation 8, is specifically concerned with ensuring that non-profit organisations cannot be misused to finance terrorism. The interpretative note to the Recommendation contains a detailed list of measures Member States should undertake in order to achieve compliance. Other recommendations, such as those on criminalising the financing of terrorism and imposing greater scrutiny on money transfers, are also of relevance to humanitarian operations. Member States are rated on their compliance with FATF recommendations through a regular process of detailed peer review. While FATF recommendations are not legally binding, they can have far-reaching practical effects. It has been argued that the FATF focus on non-profit organisations as particularly vulnerable to exploitation for terrorist purposes is not justified by empirical evidence and has encouraged over-regulation of the sector.[27] This will be discussed further in Section IV.

c) Selected Humanitarian Donor States in Detail

National counter-terrorism laws and other measures both predate specific action by the UN, reflecting each state's particular experience with terrorism, and have been introduced in order to comply with international obligations. Under UNSCR 1373, as discussed above, Member States

[25] The list was updated in February 2011
[26] A/64/818 17 Jun 2010, Regional and subregional organisations and other relevant organisations, Counterterrorism Action Group, para 1
[27] See David Cortright, with Alistair Millar, Linda Gerber-Stellingwerf, George A. Lopez, Eliot Fackler, and Joshua Weaver, *Friend not Foe – Opening Spaces for Civil Society Engagement to Prevent Violent Extremism*, Fourth Freedom Forum and Krok Institute for International Peace Studies (May 2011) http://www.fourthfreedomforum.org/wp-content/uploads/2011/05/Friend-not-Foe_Fnl_May.pdf

were required to report to the CTC on steps taken to implement the resolution within 90 days of its adoption. Many states took this as a deadline for the introduction of counter-terrorist laws and other measures, which were then swiftly enacted, sometimes through executive action.

Most relevant for humanitarian action are measures which seek to prevent financial and other material support to terrorist activities and groups. These fall into two categories: crimes of support to terrorism and counter-terrorism sanctions regimes.

Crimes of support to terrorism

The provision of financial or other material support to terrorism was the focus of UNSCR 1373, and is also dealt with by the *Terrorism Financing Convention*. According to the Convention, an offence is committed when a person "directly or indirectly, unlawfully and wilfully, provides or collects funds, with the intention that they should be used or in the knowledge that they are to be used" to carry out a terrorist act.[28] A state party to the Convention must ensure that this offence is reflected in its domestic law and that it has jurisdiction over the offence when committed on its territory or by one of its nationals, as well as when "the alleged offender is present in its territory and it does not extradite that person to any of the other States Parties" (the principle of *aut dedere aut judicare)*.[29]

States party to the Convention, which includes all states examined here with the exception of Kuwait, thus criminalise at least this act. However, since the crime requires intent or knowledge that the funds provided will be used to carry out a terrorist act, it is of marginal relevance to humanitarian operations. Some jurisdictions go further, and criminalise contributions to terrorism without this knowledge, in particular when the crime is crafted in terms of contribution to a designated group rather than to a terrorist act. To be guilty of contributing to a terrorist act, the contributor will generally have to know, at least, that his or her contribution would assist the commission of a crime. Once an entity is designated as a terrorist group, however, contributions to it may be criminal without further investigation into the intention behind the donation or support. This is significantly more risky for humanitarian organisations.

Counter-terrorist sanctions

When a group or individual is designated as terrorist for the purposes of economic sanctions, a range of measures may be introduced, designed to freeze any existing assets and ensure that no one in the jurisdiction of the state makes any further resources available to them. Transactions with listed entities are prohibited. In general, no intent to support terrorism is required to violate counter-terrorism sanctions. For this and other reasons, such as the effect of sanctions on donor funding – donor money may be unavailable without a licence to enable operations in areas where designated

[28] Article 2
[29] Article 7. The principle of *aut dedere aut judicarer* refers to the legal obligation of states under public international law to prosecute persons who commit serious international crimes where no other state has requested extradition

terrorists are active, for example – sanctions provisions are often the most relevant counter-terrorism measures for humanitarian actors.

The following 14 national and one regional jurisdictions were selected because of their influence on the development of counter-terrorism law and practice and because they are also significant humanitarian donors. A selection of emerging donors of relevance to the case study countries was explicitly included alongside more established humanitarian contributors. The selection was also intended to include a range of both civil and common law legal systems. A second report, produced during phase two of the research project, will complement this with an analysis of counter-terrorism law and measures imposed by states hosting humanitarian operations.

BOX 1: Definitions of Terrorism

There is no internationally-agreed definition of terrorism. Some of the more significant definitions are listed here.

The *International Convention for the Suppression of the Financing of Terrorism*[30] (adopted by the UNGA on 9 December 1999) defines terrorism for the purposes of the convention in Article 2:

1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:

(a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or

(b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organisation to do or to abstain from doing any act.

The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has suggested the following model definition of terrorism:

"Terrorism means an action or attempted action where:

1. The action:

(a) Constituted the intentional taking of hostages; or

(b) Is intended to cause death or serious bodily injury to one or more members of the general population or segments of it; or

(c) Involved lethal or serious physical violence against one or more members of the general population or segments of it;

and

2. The action is done or attempted with the intention of:

(a) Provoking a state of terror in the general public or a segment of it; or

[30] http://www.un.org/law/cod/finterr.htm

(b) Compelling a Government or international organization to do or abstain from doing something; and
(3) The action corresponds to:
(a) The definition of a serious offence in national law, enacted for the purpose of complying with international conventions and protocols relating to terrorism or with resolutions of the Security Council relating to terrorism; or
(b) All elements of a serious crime defined by national law." (A/HRC/15/61 §28)

Although not an internationally agreed definition of terrorism, the UNSC – by means of Resolution 1566 (2004)[31] – has identified conduct which is to be prevented and punished as part of the fight against international terrorism
"criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, [which] are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature…" (S/RES/1566 §3)

IHL specifically prohibits the terrorising of civilians in armed conflict, as well as a range of other acts, such as deliberate attacks on civilians and civilian objects, that would commonly be deemed 'terrorist' if committed outside armed conflict. Specific references to terror relate to "*acts or threats of violence the primary purpose of which is to spread terror among the civilian population*" (prohibited in international armed conflict by *Additional Protocol I to the Geneva Conventions*, article 51(2), and in non-international conflict by *Additional Protocol II to the Geneva Conventions*, article 13(2)), and to "*collective penalties and likewise all measures of intimidation or of terrorism*" (prohibited by Article 33 of Geneva Convention IV). According to the International Committee of the Red Cross (ICRC) the first prohibition is also a rule of customary international humanitarian law applicable in both international and non-international conflicts.

The EU *Council Framework Decision on Combatting Terrorism*[32] defines terrorism as a range of intentional acts or threats to commit these acts, such as attacks on life, seizure of aircraft, kidnapping or hostage taking, "*which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization*" (Article 1).

[31] http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement
[32] http://www.refworld.org/docid/3f5342994.html

The US Code defines international terrorism as "*activities that:*
(A) involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State, or that would be a criminal violation if committed within the jurisdiction of the United States or of any State;
(B) appear to be intended—
(i) to intimidate or coerce a civilian population;
(ii) to influence the policy of a government by intimidation or coercion; or
(iii) to affect the conduct of a government by mass destruction, assassination, or kidnapping; and
(C) occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum" (18 USC §2331).

The UK Terrorism Act 2000, as amended, defines terrorism as the use or threat of certain types of action where "*the use or threat is designed to influence the government or an international governmental organization or to intimidate the public or a section of the public, and the use or threat is made for the purpose of advancing a political, religious racial or ideological cause*." Relevant action either involves serious violence against a person or serious damage to property, endangers a person's life, other than that of the person committing the action, creates a serious risk to the health or safety of the public or a section of the public, or is designed seriously to interfere with or seriously to disrupt an electronic system (Section 1).

Australia

Crimes of support to terrorism

In the aftermath of September 2001 and UNSCR 1373, Australia introduced substantial new counter-terrorist legislation, which passed into law in 2002. In the absence of an international or UN definition, the Australian definition of the crime drew heavily on the UK Terrorism Act 2000 (see box 1 on Definitions of Terrorism). The Australian Criminal Code creates a number of offences in relation to terrorist organisations, including, of relevance to humanitarian actors, providing support or resources to and getting funds to, from or for a terrorist organisation.[33] A terrorist organisation under the Code is either one that has been listed by the Governor-General under division 102.1(2), or an organisation that is found to be terrorist by a court during the course of a criminal trial. In the case of the first crime, the type of support prohibited is not defined, but it must be "support or resources that would help the organization engage in a [… terrorist] activity", and it must be intentionally provided.

For each of these two crimes, different penalties are applied depending on whether the provider knows the organisation is terrorist or is merely reckless as to whether the organisation is terrorist;

[33] Division 102.7 and 102.6 Criminal Code

namely 25 and 15 years imprisonment respectively. Recklessness as to whether an organisation is listed is the lowest level of intent required to commit the crime of support of all the jurisdictions examined in this section. In the case of organisations that are not yet listed, it is unclear whether this language infers an intent to further the commission of terrorist activity, in the first case, and recklessness as to whether terrorist activity would be supported in the second, but that is certainly one possible reading.

Uniquely among the jurisdictions examined for this report, Australia also prohibits associating with a terrorist organisation.[34] However, the Code specifies that this does not apply in a number of situations, including where "the association is only for the purpose of providing aid of a humanitarian nature". There are no other exemptions for humanitarian activities under national counter-terrorism law and no prosecutions of humanitarian actors have occurred under the Criminal Code. Australia claims extra-territorial jurisdiction over these crimes, and can prosecute non-citizens with the consent of the Attorney-General.[35]

Counter-terrorist sanctions

Under the UN Charter Act, the Foreign Minister is empowered to list individuals and entities in the implementation of UNSCR 1373. [36] (The Foreign Minister may also impose sanctions under the 2011 Autonomous Sanctions Act.) Designations by the Security Council under resolution 1267 are automatically incorporated into Australian law. Making an asset available to an individual or entity on the list is an offence subject to a maximum of ten years imprisonment. [37] This is a strict liability offence, in other words no intention to support terrorism is required.[38] In 2010, the Supreme Court of Victoria interpreted this to mean that not even knowledge of proscription but rather recklessness as to whether a group is proscribed is the correct mental test. In the words of the Court: "it is sufficient for the prosecution to show that any accused was aware of a substantial risk of proscription and that such a risk was unjustifiable" (R v Vinayagamoorthy, 2010 [VSC] 148). This case concerned the prosecution of three individuals for making money and electrical components available to the Liberation Tigers of Tamil Eelam (LTTE) in contravention of the UN Charter Act (under which the LTTE had been proscribed). All three pleaded guilty, while insisting that their contributions had been made for humanitarian purposes. In sentencing them, the Judge found that their "general motivation, although having a humanitarian bent, was not solely confined to humanitarian work." and that they "did not intend to support any activity which … [they] would have regarded as terrorist". As a result of these and other factors, all three were given relatively lenient suspended prison sentences.

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[34] Division 102.8 Criminal Code
[35] Division 16.1 Criminal Code
[36] Section 15 UN Charter Act
[37] Sections 21 and 27
[38] For individuals, strict liability is limited to the knowledge that they act outside the scope of authorized dealings according to Section 22, Part 4 UN Charter Act.

Licences can be obtained from the Foreign Minister to deal with proscribed entities.[39] In the case of a "body corporate", it is a defence if it proves that it took reasonable precautions, and exercised due diligence, to avoid making an asset available to a proscribed individual or group. The burden of proof lies with the body corporate.

Australia's counter-terrorism sanctions are applicable to any person in Australia, Australian citizens abroad, companies incorporated overseas that are owned or controlled by Australians or persons in Australia and any person using an Australian flag vessel or aircraft to transport goods or transact services subject to UN sanctions.

Canada

As with many of the jurisdictions examined here, the events of September 2001 and the passage of UNSCR 1373 provoked substantial new legislation in Canada. This created and defined the crime of terrorism for the first time. The new Anti-Terrorist Act was enacted in time for Canada's first report to the Counter-Terrorism Committee at the end of 2001.

Crimes of support to terrorism

Under the Canadian Criminal Code, as amended by the Anti-Terrorist Act, it is a crime to provide or make available property or financial or other related services for terrorist purposes. In order for a crime to be committed, the provider must either intend or know that the resources will be used for terrorist purposes or that they will be used by or benefit a listed or unlisted terrorist group.[40] Entities may be listed as terrorist by the Governor in Council under Section 83.05 of the Criminal Code, introduced by the Anti-Terrorism Act. Hamas was listed under this provision in November 2002. As in a number of other jurisdictions the listing of a group as terrorist introduces the presumption that assistance to the group is assistance to terrorism (see Canada's first terrorist financing case, *R v. Thambaithurai*; where the defendant claimed that he sent money for "humanitarian purposes" to the LTTE, but, nonetheless, pleaded guilty - and was sentenced to six months imprisonment (2011 BCCA 137)). There is a maximum penalty of ten years imprisonment in such cases.

There is no exception for humanitarian activities under these articles of the Code. There has been no prosecution of humanitarian actors under counter-terrorism laws. The Anti-Terrorist Act did, however, introduce new provisions to regulate charities through the Charities Regulation (Security Information) Act. This provides for the ministers of Public Safety and of Emergency Preparedness and National Revenue to issue certificates stating on the basis of intelligence received that there are reasonable grounds to believe that a charity has made or will make resources directly or indirectly available to a terrorist organisation (whether listed or not).[41] The issuing of a certificate would remove the charitable status of the organisation, but this has yet to occur.

[39] Section 22
[40] Criminal Code, Section 83.03
[41] Paragraph 4

Where support is provided to an act which would constitute a violation of an international counter-terrorist convention to which Canada is a party, Canada claims extensive extra-territorial jurisdiction, effectively establishing jurisdiction in all of the optional situations listed in Article 7(2) of the Terrorism Financing Convention.[42] However, as these offences, described in Section 83.02 of the Criminal Code, require intention or knowledge that the property will be used to carry out terrorist attacks, they are unlikely to be relevant to humanitarian action. For the more problematic offence of making property or financial services available to a listed or unlisted terrorist group described in Section 83.03 of the Criminal Code, Canada only claims extra-territorial jurisdiction over its own citizens or residents.[43]

Counter-terrorist sanctions

Under the United Nations Act, two separate sets of regulations implement the UNSCR 1267 lists and establish a Canadian terrorist list pursuant to UNSCR 1373. A consolidated list is maintained by the Office of the Superintendent of Financial Institutions. Exemption certificates may be granted in certain circumstances. The sanctions apply to all Canadian citizens, wherever resident, as well as to any individual or entity in Canada. Violation of the sanctions entails a maximum penalty of 10 years imprisonment.

European Union (regional)

Crimes of support to terrorism

In June 2002, the EU Council passed the Framework Decision on Combatting Terrorism, which introduced a common definition of terrorism for EU Member States (see Box 1), as well as minimum rules on terrorist offences.[44] Member States were required to criminalise a range of acts related to terrorist groups and activities, as well as inciting, aiding and abetting and attempting any of the same. Of relevance for this study is the offence of "participating in the activities of a terrorist group", which is defined 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 group". It should be noted that although this offence concerns contributions to a terrorist group, it requires knowledge that the resources provided will contribute to criminal acts. There are no exceptions for humanitarian activities.

The Framework Decision is binding on Member States and therefore sets out a mandatory list of acts which must be criminalised in the EU. Member States may introduce additional measures into their domestic legislation as long as these do not infringe their other international obligations.

[42] Criminal Code, Section 7(3.73)
[43] Criminal Code, Section 7(3.74)
[44] See Box 1 for definition

The Framework Decision was amended in November 2008 by Framework Decision 2008/919/JHA, in line with UNSCR 1624, to address such issues as incitement, recruitment and dissemination of terrorist materials.

Counter-terrorist sanctions

As an immediate response to UNSCR 1373, the EU adopted the Council Common Position of 27 December 2001 which, among other provisions, ordered the freezing of assets and the prevention of resources being made available to "persons, groups and entities involved in terrorist acts". The relevant list was established by Regulation (EC) 2580/2001 of the same date and is reviewed every six months. EU regulations are directly applicable in all EU Member States. Hamas has been included on the EU list since 2003 and is therefore subject to sanctions from all EU members. Al-Shabaab is not on this list but is subject to separate sanctions (see Somalia case study, below). The UNSCR 1267 list (covering Al Qaeda, the Taliban, and associates) was implemented at EU level by Regulation (EC) No 881/2002. However, following successful due process challenges to inclusion on the list by two applicants in 2008, the EU has revised its implementation of lists issued by the UNSC.[45]

Exemptions can be made available under specific conditions and procedures (e.g. funds necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment.[46] In 2010, the European Court of Justice (ECJ) in *M (FC) & Others v HM Treasury*, was asked by the UK Supreme Court (then the House of Lords) for a preliminary ruling on whether the payment of social security benefits to spouses of individuals designated under EU Regulation 881/2002, as amended (the UNSCR 1267 regime) would fall within the sanctions regime imposed by the EU.[47] The reasoning of the Court is of great relevance. The UK Treasury had argued that the payments could benefit designated persons, for example by being used to purchase a communal meal. The House of Lords considered that this was not the case, but referred the matter to the ECJ. The ECJ, which largely agreed with the House of Lords, based its decision on the purpose of the sanctions, which was to prevent designated persons having access to economic or financial resources that they could use to support their terrorist activities. In the Court's view, the social security benefits in question could not fall into this category. As the Court said:

"…it is hard to imagine how those funds could be turned into means that could be used to support terrorist activities, especially because the benefits at issue are fixed at a level intended to meet only the strictly vital needs of the persons concerned".[48]

[45] 2008 European Court of Justice judgment annulling the prior Kadi and Al Barakaat listings
[46] European Union – Restrictive Measures. http://eeas.europa.eu/cfsp/sanctions/docs/index_en.pdf#2
[47] M (FC) & Others v HM Treasury, Case C-340/08
[48] *Ibid*

This reasoning, which requires a real risk that resources provided might be used for terrorist ends in order to fall foul of counter-terrorism law, runs contrary to the fungibility of resources argument relied on by the US Supreme Court in the *Humanitarian Law Project* case, discussed further below.

There are broader humanitarian exemptions in the Libya and Somalia sanctions regimes, neither of which are specifically counter-terrorist (see Somalia case study in Section IV). An EU official recently commented that despite the possibility of humanitarian derogations in EU-imposed sanction regimes, the fact that they must be implemented at the level of individual Member States means that they are often applied haphazardly and take time, despite the often urgent need for humanitarian assistance.[49]

The sanctions apply not only within the territory of the EU, but also to any EU national, and to any legal person or entity incorporated or constituted under the law of an EU country or doing business within the EU. EU Member States determine the penalties to be imposed for violation of the sanctions regimes.

Denmark

Crimes of support to terrorism

Denmark introduced new explicit terrorist offences into its Penal Code in 2002, in compliance with Resolution 1373 and the European Framework Decision, although the latter was at that stage still in draft. In 2006, additional offences were added, including the provision of financial support or the making of money, other financial assets of financial or other similar services available, "directly or indirectly" to a person or group that commits or intends to commit terrorist acts.[50] There is a maximum penalty of ten years for this crime. A penalty of up to six years also applies to the crime of otherwise furthering the activity of a person, group or association that commits or intends to commit a terrorist act.[51] There are no exceptions for humanitarian activities under the Code and there have been no prosecutions of humanitarian actors under national counter-terrorism laws.

It is not necessary to intend to further or contribute to a terrorist act if the supplier of financial support knows that the individual or group is involved in terrorism. This was confirmed by the Danish Supreme Court in its judgement of 25 March 2009 concerning an attempt by six young Danes to transfer 10,000 Danish Krona (approximately 1,300 Euros) to the Popular Front for the Liberation of Palestine (PFLP) and the Fuerzas Armadas Revolucionarias de Colombia (FARC). Although the court accepted the defendants' assertion that the money was intended only to be used by the two organisations for humanitarian purposes (schools and hospitals), all six were found guilty, and given suspended prison sentences of up to six months.[52]

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[49] Statement of EU Adviser to the EU Counter-Terrorism Coordinator, Principles in Practice: Safeguarding Humanitarian Action Conference, 4 December 2012, Brussels
[50] Section 114b Criminal Code
[51] Section 114e Criminal Code
[52] U2009.1435 H

The Criminal Code is applicable on Danish territory and to Danish nationals and residents for acts committed abroad.[53]

Counter-terrorist sanctions

Denmark imposes sanctions on all those on the EU terrorist lists and does not have an additional national list. Provision of funds to persons or entities on the terrorist lists is punishable by a fine or up to four years imprisonment in aggravated circumstances (Section 110c Criminal Code).

France

The foundation of French counter-terrorism law was laid in 1986. The law has subsequently been amended several times, including in 1996, following the Groupe Islamique Armé bombings in Paris; in 2001, in response to September 2001 and UNSCR 1373 and in 2006 after the bomb attacks in Madrid (2004) and London (2005).

Crimes of support to terrorism

The French Criminal Code penalises the financing of terrorist organisations in the terms set out in the *Terrorism Financing Convention*. Financing is defined to include "providing, collecting or managing funds, securities or any property or giving advice to this end".[54] There is no separate crime of providing other forms of resources or support. In order to commit the crime of financing a terrorist organisation under French law, the provider must either intend or know that the resources provided will be used to commit an act of terrorism, whether or not that act in fact takes place.[55] This is a high level of intent makes the offence unlikely to apply to humanitarian activities. There has been no prosecution of humanitarian actors under national counter-terrorism laws. A penalty of ten years in prison and a fine of 225,000 Euros attaches to these crimes.[56]

French courts claim extra-territorial jurisdiction no matter where the offences were committed and whatever the nationality of the offender if s/he is present on French territory.[57] This reflects the "extradite or prosecute" requirement of the Terrorism Financing Convention.[58]

Counter-terrorist sanctions

The French Department of the Treasury operates economic sanctions against persons and entities on the UNSCR 1267 list, as implemented by EU regulation 881/2002, and the EU terrorist list

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[53] Section 7, Criminal Code
[54] Article 421-2-2
[55] «Constitue également un acte de terrorisme le fait de financer une entreprise terroriste en fournissant, en réunissant ou en gérant des fonds, des valeurs ou des biens quelconques ou en donnant des conseils à cette fin, dans l'intention de voir ces fonds, valeurs ou biens utilisés ou en sachant qu'ils sont destinés à être utilisés, en tout ou partie, en vue de commettre l'un quelconque des actes de terrorisme prévus au présent chapitre, indépendamment de la survenance éventuelle d'un tel acte. »
[56] Code Pénal Article 421-5
[57] Code de Procédure Pénale Article 689-10
[58] Article 7

established by regulation 2580/2001, corresponding to UNSCR 1373. Under the law of 23 January 2006, the French Finance Minister was empowered to create a national list of persons and entities connected with terrorism.

Germany

Crimes of support to terrorism

There are two offences of potential relevance to humanitarian actors in German law. The first is the crime of supporting a terrorist organisation, as defined in the Criminal Code rather than by reference to a separate list. While support is not defined in the Criminal Code, commentaries indicate that this includes logistical and financial support. For a crime to be committed, however, the supporter must share the goals of the organisation, and be at least reckless as to whether the aims of the group and specific terrorist acts will occur, meaning that it was foreseeable that these consequences would ensue and the supporter took the risk nonetheless.[59] The nature of the offence and level of intent required therefore makes it unlikely to apply to humanitarian actors and there have been no prosecutions of humanitarian actors under national counter-terrorism laws. The penalty for supporting a terrorist organisation is imprisonment for between six months and ten years.[60]

The Criminal Code normally applies to acts committed on German territory as well as offences committed abroad against German legal interests or internationally protected legal interests.[61] The crime of supporting a terrorist organisation can also be prosecuted in Germany if committed in the territory of the EU, or otherwise, with the consent of the Federal Ministry of Justice, where the perpetrator or victims are German nationals, or if the offender or victim find themselves on German territory.[62]

The second offence is that of financing terrorism under the 1993 Act on Money Laundering, which was amended to address terrorism financing in 2002. This criminalises financing of terrorism, meaning to collect or provide funds in the knowledge that the money will be used to commit a terrorist offence (in terms of the German Criminal Code or the EC Framework Decision). However, the Act only applies to entities specified in the Act, including credit and financial service institutions, insurance companies, lawyers and persons dealing in commercial goods.[63] As humanitarian actors are not referred to, the Act does not apply to them.

Counter-terrorist sanctions

Like other EU Member States, Germany is bound by the EU regulations implementing the UNSCR1267 lists and the list established pursuant to UNSCR 1373. It thus enforces sanctions against individuals and entities on these lists. The penalty for violation of the sanctions regime is a

[59] Section 129a Criminal Code
[60] Section 129a(5)
[61] Sections 3, 5 and 6 Criminal Code
[62] Section 129b
[63] Section 2

maximum of five years imprisonment, with a lesser penalty of a maximum three years imprisonment or a fine if this is done negligently. There is no autonomous German national terrorist list.

Japan

Crimes of support to terrorism

The Japanese Criminal Code does not contain specific references to terrorism; terrorist offences are punishable under general criminal provisions. However, in 2002 Japan passed the Act on Punishment of Financing of Offences of Public Intimidation, which criminalises the provision or collection of funds for the purpose of committing or facilitating public intimidation.[64] This can correspond to financing of terrorism. In order to violate the provisions of this act, an individual must provide funds for the purpose of facilitating an offence, in other words intending an offence of public intimidation, so it would not apply to humanitarian operations. Japan claims extraterritorial jurisdiction over violations of this act when committed by citizens of any nation,[65] which carry a maximum penalty of ten years imprisonment or a fine of ten million yen.[66] There have been no prosecutions under the Act.

The 2007 Act on Prevention of Transfer of Criminal Proceeds (amended in 2011), which aims to "prevent the transfer of criminal proceeds and to ensure the appropriate enforcement of international treaties, etc., concerning the prevention of terrorism financing"[67] is relevant to humanitarian operations. The law criminalises several acts, including an individual's failure to report suspicious transactions or the provision of false information to government entities[68] and the concealment of customer information.[69] While several of the acts prohibited by the law require a purposeful or knowing mental state, other acts are criminalised regardless of the individual's mental state. Individuals guilty of these crimes may receive one to two years' imprisonment, a fine, or both.[70] The Act provides for support by the National Public Safety Commission.

Counter-terrorist sanctions

Japan implements sanctions against individuals and entities on the UNSCR 1267 lists, as well as against individuals and entities it designates independently, such as Hamas which was designated in 2003.

Kuwait

Crimes of support to terrorism

There are no specific provisions in Kuwaiti law which criminalises terrorism, financing of terrorism or support to terrorist acts or groups. General criminal law would apply to participation in an organised

[64] Article 2
[65] Article 5
[66] Article 2
[67] Article 1
[68] Article 24
[69] Article 25
[70] Articles 23-27

criminal group,[71] or in a criminal act,[72] including a terrorist one. Only intentional or knowing participation in the criminal group or act would constitute an offence. In addition to claiming jurisdiction over offences occurring on Kuwaiti territory, Kuwaiti courts claim jurisdiction over conduct occurring partially outside Kuwait that constitutes a crime in Kuwait.[73] These elements combined make it unlikely that Kuwaiti criminal law could apply to humanitarian operations outside Kuwait. There have been no prosecutions of humanitarian actors for terrorist-related offences.

Counter-terrorist sanctions

Kuwait neither maintains a national terrorist list nor has adopted any specific laws to allow for the freezing of assets of entities or persons listed by the UNSCR 1267 Committee. Any such action is carried out by the relevant government agency, after notification by the Ministry of Foreign Affairs, under general law enforcement powers.[74]

The Netherlands

Crimes of support to terrorism

Support to terrorism is criminalised under Dutch law when it amounts to participation in a terrorist organisation, including those appearing on one of the EU terrorist lists.[75] The Dutch Criminal Code does not define participation, but the Dutch Supreme Court has ruled that a person can only be convicted for participating in a criminal organisation if that person "belongs to" or is a member of the organisation, and "contributes or supports acts that further or are related to the realisation of the organisation's criminal objective".[76] However, according to article 140(a)(3) the supplying of assistance, whether of a financial or other nature, amounts to participation. This implies the criterion of belonging to the organisation does not need to be separately established. Such an interpretation is supported by remarks made by the Minister of Justice. The Dutch Supreme Court has not yet had the opportunity to clarify this apparent discrepancy. Knowledge of the terrorist objective of the organisation is always required.[77] There are no humanitarian exceptions in the Dutch Criminal Code and there has been no prosecution of humanitarian actors under national counter-terrorism laws. The penalty for participation in a criminal group is a maximum of 15 years imprisonment.

There is also liability for violation of the Terrorism Financing Convention under Article 4 of the Criminal Code. As discussed above, in order to violate the Terrorism Financing Convention, funds must be provided with the intention or knowledge that they will be used to carry out a terrorist act, a high standard of criminal intent which would not apply to humanitarian operations.

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[71] Article 30 Penal Code
[72] Articles 47-49 Penal Code
[73] Penal Code
[74] FATF report
[75] Article 140.2 and 140a Criminal Code
[76] Judgement of 18 November 1997, NJ 1998, 225, unofficial translation
[77] Supreme Court, 8 October 2002, NJ 2003, 64

As a general rule, the Netherlands claims jurisdiction over crimes committed on Dutch territory and by Dutch nationals abroad. In the case of crimes amounting to violations of the Terrorism Financing Convention, non-Dutch perpetrators can be prosecuted in the Netherlands for crimes committed abroad against Dutch victims, or when they are found on Dutch territory, as required by the Convention. In addition, Dutch courts have jurisdiction over terrorist crimes committed abroad by foreigners if those crimes were committed "with the objective of causing fear in (part of) the Dutch population, forcing a Dutch government or an institution situated in the Netherlands or organisation of the European Union, to do something, not to do something or to tolerate certain actions, or to seriously disrupt or destroy the fundamental political, constitutional, economic and social structures of the Netherlands, an institution situated in the Netherlands or an organization of the European Union".[78]

Counter-terrorist sanctions

Like the other EU Member States, the Netherlands has implemented sanctions against individuals and entities on the two EU terrorist lists. The Foreign Minister, in agreement with the Minister of Security and Justice and the Minister of Finance, may also decide to apply sanctions against additional individuals and entities. There is a maximum penalty of six years imprisonment for deliberate violation of the sanctions.

New Zealand

Crimes of support to terrorism

New Zealand introduced the Terrorism Suppression Act in October 2002 in fulfilment of its international obligations under UNSCRs 1267 and 1373, as well as under the international terrorism conventions to which New Zealand is a party. Two offences under the Act are of potential relevance to humanitarian organisations. The first is the prohibition of the financing of terrorism under Section 8 of the Act, which attracts a maximum sentence of 14 years imprisonment. This crime concerns support of a terrorist act, rather than of a designated terrorist group. In keeping with the majority of jurisprudence examined here, knowledge or intention that the support will be used to carry out the terrorist act is therefore required. This makes it unlikely to apply to humanitarian operations.

The second potentially relevant offence concerns the making available of any property or financial or other service to a designated terrorist entity under Section 10 of the Act. A designated entity is either one that appears on the UN 1267 lists or that is designated by the Prime Minister under Sections 20 or 22 of the Act. As is customary, the required mental element of this crime is simply knowledge that the group is a designated entity; no intention to support a terrorist act, or even knowledge that a terrorist act would be so supported, is necessary. There is a maximum penalty of seven years imprisonment.

[78] Article 4, Section 15, Criminal Code

Uniquely among the jurisdictions surveyed here, the offence of providing support is drafted to exclude humanitarian assistance to a designated terrorist individual in need. The offence is only committed when property is made available "without reasonable excuse". According to subsection 10(3):

> *"an example of making property available with a reasonable excuse, for the purposes of subsection (1), is where the property (for example, items of food, clothing, or medicine) is made available in an act that does no more than satisfy essential human needs of (or of a dependant of) an individual designated under this Act".*

It is also possible to obtain authorisation from the Prime Minister for activities that might otherwise be prohibited under this section.[79] There has been no prosecution of humanitarian actors under national counter-terrorism laws.

Looking ahead, the New Zealand Justice Ministry has signalled that the Anti-Money Laundering and Countering Financing of Terrorism Act 2009, which came into full force in June 2013 and targets financial institutions, may apply to some charitable entities. This requires them to undertake risk assessments, conduct due diligence and account monitoring and report suspicious transactions to the police. The Justice Minister may grant exemptions from obligations under the Act if the level of regulatory burden is considered unjustified in relation to the terrorist financing risk presented by the organisation in question.[80]

When an offence is committed New Zealand claims extra-territorial jurisdiction over all acts committed by its own citizens abroad. In cases of terrorist financing,[81] jurisdiction is also claimed where a terrorist act results which targets New Zealand interests or harms New Zealand citizens. In line with the *Terrorism Financing Convention*, offenders who are on New Zealand territory may be prosecuted, regardless of their nationality or where the crime was committed, if they are not extradited to another jurisdiction.

Counter-terrorist sanctions

The provisions of the Terrorism Suppression Act discussed above implement sanctions against terrorist entities, whether designated by the Prime Minister or under UNSCR 1267.

Norway

Crimes of support to terrorism

In June 2002, Norway amended its Criminal Code of 1902 to include acts of terrorism and financing of terrorism. Section 147b, related to the financing of terrorism, criminalises both: (1)

[79] Section 11
[80] Section 157
[81] Section 8

obtaining or collecting funds or other assets with the intention that they be used to finance terrorist acts; and (2) making funds or other assets available to persons or enterprises involved in terrorism. The second area is of relevance to humanitarian actors as it does not require that the funds or "other assets" in question be directly meant for or utilised in connection with terrorist actions. It is sufficient that they benefit persons or enterprises described in Section 147(b) which include enterprises controlled by or acting on behalf of persons or enterprises that commit or attempt to commit terrorist acts. There are no exemptions for humanitarian activities. The maximum penalty for financing terrorism is ten years.

The preparatory work for the bill makes clear that the intention of Section 147b was to criminalise willful violations. It appears to be sufficient that the person making funds or other assets available regarded it as is likely that the recipient group *inter alia* commits or intends to commit acts of terrorism.[82] However, there is no jurisprudence to indicate how this article would be applied as there has been no prosecution of humanitarian actors for counter-terrorism related offences. Further, there is no practice in Norway or indication in the preparatory work regarding the types of "other assets" that are covered by the terrorist financing provisions. It thus remains unclear whether humanitarian assistance and protection could fall within this type of assistance.

The two terrorism related provisions are included within a list of crimes within the Criminal Code over which Norway exerts both territorial (acts committed in Norway) and personal (acts committed abroad by Norwegian nationals or residents) jurisdiction.[83] In addition, Norway may prosecute any foreign national, who has committed violations of Section 147a and 147b abroad if the so-called 'double-criminality' criterion is met. This means that foreign nationals may be tried for terrorism or financing of terrorism in Norwegian courts to the extent that the offence is a crime under both Norwegian law and the law of the country where the relevant act was committed (or took effect).

Counter-terrorist sanctions

Norway implements the UNSCR 1267 lists through the 1968 Statute on the Implementation of Mandatory decisions of the UN Security Council. Norway does not fall under the EU legal framework, but previously followed the EU on the proscription of terrorist entities. In 2006, this support for the EU terrorist list was withdrawn on the grounds that continued alignment could cause difficulties for Norway in its role as a neutral facilitator in certain peace processes.[84] This has been viewed by some Norwegian officials as giving them more scope to act and engage in dialogue with power holders in conflicts in such places as Afghanistan, Sri Lanka and the oPt.[85] Norway does not maintain its own national list.

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[82] Ot.prp. nr. 61 (2001 – 2002), p. 3 and p. 69
[83] Section 12 Norwegian Criminal Code
[84] Dudouet, V. (2011), Anti-Terrorism Legislation: Impediments to Conflict Transformation, Berghof Policy Brief No. 02, Berghof Conflict Research. http://www.berghof-conflictresearch.org/documents/publications/PolicyBrief02.pdf
[85] Interviews with Norwegian Government representatives, January 2013

Qatar

Crimes of support to terrorism

Qatar has adopted a number of counter-terrorism laws since the September 2001 attacks. According to Law No. 3 of 2004 on Combatting Terrorism, all crimes listed in the Qatari Penal Code or in any other law will be considered terrorist crimes if committed for a terrorist purpose (as defined in Article 1), and will receive an enhanced punishment. Under Article 4, it is a crime to provide (*inter alia*) material or financial support information, equipment, or provide supplies or raise money for a group or organizations formed to commit a terrorist crime, as long as the provider knows of the group's terrorist purpose. There are no exceptions for humanitarian activities. The penalty for this crime is life imprisonment. Although it is not made explicit in the Act, it appears that this crime applies only on the territory of Qatar. This can be inferred from comparing it with Article 7 of the Act, which concerns the commission of terrorist crimes in association with a group abroad; this latter crime is punishable by five to 15 years imprisonment.

The Qatari Penal Code asserts jurisdiction over all nationals for "crimes of international terrorism" committed abroad, if and when they enter Qatari territory.[86] However, it does not further define crimes of international terrorism. This may refer to violations of the international counter-terrorism treaties to which Qatar is a party.

Law No. 4 of 2010 on Combating Money Laundering and Terrorism Financing further establishes the crime of terrorist financing. It defines it as an act:

> *"committed by any person who, in any manner, directly or indirectly, and willingly, provides or collects funds, or attempts to do so, with the intention to use them or knowing that these funds will be used in whole or in part for the execution of a terrorist act, or by a terrorist or terrorist organization".*[87]

This crime carries a maximum penalty of ten years imprisonment and a fine of up to two million Riyals. It is also a crime under this law, punishable by up to three years in prison and a fine of 50,000 Riyals, to fail to implement a range of preventative and risk management measures to avoid money laundering and terrorist financing.[88] Relevantly, in both cases the penalties shall be doubled if the perpetrator committed the crime by "abusing his authority or powers in [inter alia, an] … NPO [Non-Profit Organization]".[89] There is also a specific provision in Law No. 3 regarding directors of associations or private institutions who use their position to comment terrorist crimes: they shall receive life imprisonment or the death penalty.[90]

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[86] Penal Code, Article 17
[87] Article 4
[88] Article 3
[89] Article 72
[90] Article 6

Liability will not be imposed, however, on organisations engaging in "suspicious transactions" where the organisation reports their suspicions "in good faith"[91]. Qatar distinguishes suspicion of terrorist financing from actual knowledge. Suspicion *"requires a degree of satisfaction that may not amount to belief, but should extend beyond mere speculation and be based on some foundation that money laundering or terrorist financing has occurred or is about to occur"*.[92]

There has been no prosecution of humanitarian actors under national counter-terrorism laws.

Counter-terrorist sanctions

Qatar does not maintain its own national list of terrorist organisations. The UNSCR 1267 list has not been implemented in Qatari law but rather circulated to the relevant financial, supervisory and security bodies.[93]

Saudi Arabia

Crimes of support to terrorism

Saudi Arabian counter-terrorism law currently focuses on the prevention of terrorist financing. The Anti-Money Laundering Law of 2003 includes the financing of terrorism, terrorist acts and terrorist organisations in its definition of money laundering.[94] Participation in terrorist crimes through assistance, facilitation and the provision of advice is also a crime under the Act.[95] While the 2003 law does not specify the mental state required for an individual to be guilty of money laundering, subsequent implementing regulations issued by royal decree note that knowledge is an element of the crime and "can be inferred from the objective and factual conditions and circumstances".[96]

Individuals who commit money laundering or terrorism financing crimes may receive up to ten years imprisonment and a fine of five million Riyals[97]. This is increased to a maximum of 15 years imprisonment and a fine of seven million Riyals if the crime is committed through a charitable institution.[98] However, persons who violate the law "in good faith" will not be punished.[99] There has been no prosecution of humanitarian actors for financing of terrorism.

In 2010, the Council of Senior Ulema issued a *fatwa* on terrorism and terrorist financing forbidding any help to a terrorist act. A draft Penal Law for Crimes of Terrorism and Financing of Terrorism was circulated in 2011 for review but has not been approved.

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[91] Article 82
[92] Guide to Money Laundering and Terrorist Financing Suspicious Transaction Reporting, Qatar Financial Information Unit (p.4). http://www.qfiu.gov.qa/files/QFIU%20STR%20Guidance.PDF
[93] Report to 1276 Committee, 2003
[94] Article 2
[95] Article 3
[96] Anti-Money Laundering Law and its Implementing Regulations, Ministry of Interior, Kingdom of Saudi Arabia (p.5)
http://www.sama.gov.sa/sites/samaen/MoneyLaundry/Documents/The%20AML%20Law%20and%20its%20Implementing%20Regulations%20Issued%20by%20Royal_v2_en.pdf
[97] Article 16
[98] Article 17
[99] Article 21

Counter-terrorist sanctions

Saudi Arabia maintains a national list of individuals and entities involved in terrorism pursuant to UNSCR 1373 in addition to those on the UNSCR 1267 lists. Freezing, seizure and confiscation of assets associated with terrorism and terrorist financing is authorised by the Anti-Money Laundering Law and its implementing regulations. No provision for humanitarian exception is applicable in the law related to seizures and implementing regulations.[100]

Turkey

Crimes of support to terrorism

On 15 February 2013 the Law on Prevention of the Financing of Terrorism (Law No. 6415) entered into force.[101] It was adopted in part to implement the Terrorism Financing Convention and Turkey's responsibilities under UNSC sanction regimes[102] and also in response to pressure from FATF to address shortcomings they had identified in Turkey's previous definition of a terrorist financing offence.[103] Turkey had defined the crime of terrorism in its Law to Fight Terrorism (1991) in terms of acts directed against the Turkish state and did not include the targeting of other entities such as foreign states or international organisations.

Any persons who provide or collect funds for a terrorist or terrorist organisation "with the intention that they are used or knowing and willing that they are to be used"[104] in a terrorist crime will be guilty under the new law. Funds include money, property, rights and other claims which could be represented by money. The nature of the offence and level of intent make it unlikely to apply to humanitarian action. There have been no prosecutions under the new law. The crime is punishable by between five and ten years in prison.

Counter-terrorist sanctions

Turkey implemented UNSCR 1267 sanctions in December 2001 through an asset freezing decree issued by the Council of Ministers and published in the Official Gazette.[105] The list is regularly updated. No additional national terrorist list is maintained for sanctions purposes, although four organisations – the Kurdistan Workers Party (PKK), the Revolutionary People's Liberation Party-Front (DHKP-C), Hezbollah and Al Qaeda – are described by the Turkish police on its website as "Terrorist Organizations in Turkey", though other organizations may also be designated as such.[106]

The 2013 Law on the Prevention of the Financing of Terrorism references relevant UNSC counter-terrorism sanctions resolutions and also the freezing of assets in response to requests from foreign

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[100] Anti-Money Laundering Law and its Implementing Regulations, Ministry of Interior, Kingdom of Saudi Arabia (p.5)
[101] Article 3(a) and (c)
[102] Article 1
[103] FATF Public Statement, 22 February 2013. See http://www.fatf-gafi.org/topics/high-riskandnon-cooperativejurisdictions/documents/fatfpublicstatement22february2013.html
[104] Article 4 (1)
[105] Law No. 6415 on the Prevention of the Financing of Terrorism Article 5(1)
[106] http://www.turkishnationalpolice.gov.tr/terrorist_organizations.html

countries and on the basis of Turkey's own decision to list individuals based on an "Assessment Commission" established under the law.[107] A government department, the Financial Crimes Investigation Board (MASAK) within the Ministry of Finance, is responsible for executing asset freezing decisions. The 2013 law authorises MASAK to take steps to ensure "the subsistence of the person about whom a decision on freezing of asset has been made and of the relatives of who he/she is obliged to take care of".[108]

The United Kingdom

Crimes of support to terrorism

The UK had recently enacted comprehensive counter-terrorism legislation – the Terrorism Act (2000) – when the events of September 2001 occurred. In December 2001 this was, nonetheless, amended and expanded by the Anti-Terrorism, Crime and Security Act. The definition of terrorism in the Terrorism Act is wider than that in many other jurisdictions (see Box 1), including not only the commission but the threat to commit a range of acts.

Under the Act, the Home Secretary (the UK term for the minister of the interior) is empowered to proscribe organisations "concerned in terrorism", and belonging to a proscribed organisation is a crime in itself. This is not the case in some other jurisdictions, such as the US. UK criminal law also extends to arranging or addressing a meeting to further the activities of a proscribed organisation,[109] although this only applies to meetings on UK territory and to being present at a place used for terrorist training.[110]

Financial or other material support crimes are framed not in terms of support to listed groups but to terrorist acts. An offence is committed if a person "provides money or other property, and knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism",[111] or if he "enters into or becomes concerned in an arrangement as a result of which money or other property is made available or is to be made available to another, and he knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism".[112] The Act also provides that action taken for the purposes of terrorism includes action taken for the benefit of a proscribed organisation.[113] In other words, a crime is also committed if the person concerned has reasonable cause to suspect that the money or other property will or may be used for the benefit of a listed group. The penalty for these offences is a maximum of 14 years imprisonment and/or a fine.[114]

[107] Article 9
[108] Article 13(2)
[109] Section 12(2)(b) Terrorism Act 2000
[110] Section 8 Terrorism Act 2006
[111] Section 15 Terrorism Act 2000
[112] Section 17 Terrorism Act 2000
[113] Section 1(5) Terrorism Act 2000
[114] Section 22

There are no exceptions for humanitarian activities and there has been no prosecution of humanitarian actors under counter-terrorism laws. Charities suspected of having links with terrorism are first investigated by the Charity Commission, an independent regulatory body which both advises, monitors, investigates and can ultimately take over or close down a charity.

UK asserts extra-territorial jurisdiction over these offences when committed by its own nationals.

Counter-terrorist sanctions

UNSCR 1373 and its counterpart EU Council Regulation 2580/2001 have been implemented in the UK by the Terrorist Asset Freezing Act of 2010, as have UNSCR 1267 and associated EU Regulation 881/2002.[115] In addition, the Anti-Terrorism, Crime and Security Act empowers the Treasury to designate persons, but not groups, as terrorist independently of international or regional decisions. It is prohibited to make funds, financial services or economic resources available to those on any of these lists. The penalty for violating the sanctions is a maximum of seven years in prison and/or a fine. As with most sanctions regimes, there is no need for the provider of resources to intend to further any terrorist activity for a violation to be committed, making this legislation the most relevant for humanitarian actors. Licences to deal with listed entities or individuals can be granted by the Treasury. The regulations cover acts outside UK territory for UK nationals and UK companies.

The United States

Crimes of support to terrorism

The 2010 US Supreme Court judgement in the case of *Holder v. Humanitarian Law Project et. al.* brought the US material support statute to the attention of humanitarian actors.[116] The prohibition of material support to terrorism was introduced in 1994, and has been slightly modified since, including by the USA PATRIOT Act passed in the wake of the September 2001 attacks. Material support is defined as "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 (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials".[117]

When originally enacted, material support excluded "humanitarian assistance to persons not directly involved in [terrorist] violations". This was amended to the current limited exception for medicine and religious materials in the wake of the 1995 Oklahoma City bombing.[118] The result of this amendment is unclear: humanitarian assistance to persons not directly involved in terrorist acts should still not fall within the scope of the material support statute. The maximum penalty for

[115] Al Qaeda Asset Freezing Regulation 2011
[116] 130 S. Ct. 2705 (2010), hereafter "the Humanitarian Law Project case"
[117] 18 USC §2339A
[118] 1996 Antiterrorism and Effective Death Penalty Act

providing material support to terrorism is life imprisonment if the death of a person results and 15 years otherwise.

In line with the distinction noted above, there are separate articles relating to providing material support to terrorist crimes and support to Foreign Terrorist Organizations.[119] Foreign Terrorist Organizations (FTO) are designated by the Secretary of State as foreign organisations which engage in terrorism and threaten the security of the United States or its nationals.[120] While the general prohibition on material support to terrorist crimes 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, material support to a designated FTO does not require such an intent. It suffices for the provider to know either that the organisation is a designated terrorist organisation or that it has engaged or engages in terrorist activity.

While this (low) standard of intent for the crime of support to a designated group is not exclusive to the United States (see information regarding Australia, Denmark and Canada above), the expansive interpretation of this provision by the US Supreme Court in the Humanitarian Law Project case has caused alarm in the humanitarian community. According to that judgement, it would seem that the provision of any material support or resources to a designated FTO or its members, with the exception of medicine or religious materials but including any other humanitarian relief, advice or training, would fall foul of the US criminal law. There is no requirement that the provider of such relief intend or know that it will be used in preparing or executing a terrorist attack. The Humanitarian Law Project case suggests that even the likelihood of any support being used to assist a terrorist attack is irrelevant. The Supreme Court deferred to the US Government view that "all contributions to foreign terrorist organizations (even those for seemingly benign purposes) further those groups' terrorist activities".[121] The Court held that any support to a terrorist organisation can free up resources to be put to violent ends. This approach, relying on the notion of fungibility of resources, can be seen as contrary to that taken by the European Court of Justice in the *M & Others* case discussed above (EU section). The Humanitarian Law Project judgement may, nonetheless, have influence beyond the US legal system as courts in other common law jurisdictions, such as the UK, take each other's jurisprudence into account.

The *Humanitarian Law Project case* was not a prosecution but a pre-enforcement challenge to the material support statute. There have however been prosecutions under the statute of relevance to humanitarian actors and eight US-based charities have been designated by the Treasury Department for providing support to, or acting on behalf of, designated terrorist organisation.[122]

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[119] 18 USC §2339A and 18 USC §2339B, respectively
[120] 18 USC §1189
[121] Syllabus, page 5; Opinion of the Court, pp.28-29
[122] US Government official response to US donor profile, 4 April 2013 (see also the Treasury Department's FAQs: http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/Treasury%20Charity%20FAQs%206-4-2010%20FINAL.pdf. The Charity and Security Network in December 2011 reported that nine

Two related prosecutions of Al Qaeda affiliated doctors examined the scope of the exception for medicine in the material support statute. In the cases of *United States v. Shah*[123] and *United States v. Farhane*[124] the courts found that the medicine exception did not cover medical treatment as this necessitated the application of medical expertise, but was restricted to simple handover of drugs. As a result the doctors in question could not rely on the statutory exception of medicine from the definition of material support to exempt their medical activities from liability. However, the judges also considered the theoretical case of an NGO, such as Doctors without Borders, providing medical treatment. NGO doctors would not violate the statute, according to the court, because they would not be "acting under the "direction or control" of a designated foreign terrorist organisation knowing that said organisation engages in terrorism or terrorist activity". (The court appeared to consider this example in the category of provision of personnel, which, under the statute, is not a crime unless the personnel provided work under the direction or control of the FTO).

An alternative analysis, but with a similar outcome, was offered by a US court in a civil case brought against a major US Islamic charity, the Holy Land Foundation for Relief and Development (for an account of the criminal prosecution of the charity directors see the discussion of impact on humanitarian organisations, below). The case was brought by the relatives of a young man killed by Hamas in Israel.[125] This court also considered the boundary between material support and humanitarian activities through a hypothetical example concerning Doctors Without Borders. If Doctors Without Borders were to know that it was treating wounded Hamas fighters, the court opined, "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." There would therefore be no liability under the material support statute.

These judicial comments are not binding on future cases, but may indicate the position courts would be likely to take in the case of well known independent humanitarian organisations (although see the Humanitarian Law Project case, above).

The US claims jurisdiction under the material support statute for acts committed anywhere in the world if certain other conditions are met, including that the perpetrator is a US national or resident, or if the perpetrator enters US territory at any time after commission of the crime. This jurisdictional claim reflects Article 7 of the *Terrorist Financing Convention*, according to which states shall ensure that alleged offenders present in their territory are either extradited or prosecuted by the state

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US-based charities had been shut down for supporting terrorism, including seven Islamic organisations: "US Muslim Charities and the War on Terror: a decade in review", Charity and Security Network, December 2011. http://www.charityandsecurity.org/system/files/USMuslimCharitiesAndTheWarOnTerror.pdf

[123] 474 F. Supp. 2d 492 (S.D.N.Y. 2007) at 499

[124] 634 F.2d 127 (2d Cir. 2011)

[125] Boim v. Holy Land Foundation for Relief and Development, 549 F.3d 685 (7th Cir. 2008) (en banc)

where they are present, but extends it to a broader range of crimes than provided by the Convention (which criminalises wilfully providing funds with the intention that they should be used or in the knowledge that they are to be used to carry out a terrorist act, see above).

Counter-terrorist sanctions

The prohibition of material support to designated FTOs is supplemented in the US by counter-terrorism sanctions regimes. The US President is empowered to impose economic sanctions on designated individuals and groups, for example pursuant to binding UNSC resolutions[126] or, more usually against states, under a declared state of emergency under the International Emergency Economic Powers Act (IEEPA).[127]

Twelve days after the attacks of September 2001 and just before the passage of UNSCR 1373 (although citing earlier UNSC resolutions on terrorism such as Resolution 1267 concerning Osama Bin Laden and the Taliban) President Bush exercised his powers under the IEEPA to impose economic sanctions on a list of individuals and organisations designated as terrorist. Declaring a state of emergency to deal with grave acts and threats of terrorism committed by foreign terrorists against the US, the President issued Executive Order 13224 "Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism".

Under the IEEPA, there is an automatic exception for "donations … of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering", which can nonetheless be overridden in three cases, to be determined by the President: where such donations "would seriously impair his ability to deal with any national emergency"; where they "are in response to coercion against the proposed recipient or donor"; or 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".[128] Executive Order 13224 overrode the humanitarian exception on the grounds that to allow 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.

This followed the precedent set by President Clinton in 1995, when he issued Executive Order 12947, "Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process". It similarly determined the existence of a national emergency due to acts committed by foreign terrorists and prohibited transactions with and blocked the assets of a list of groups and persons, in that case including Hezbollah and Hamas. The humanitarian exception built into the IEEPA was overridden on the grounds that it would seriously impair the President's ability to deal with the national emergency.

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[126] U.N Participation Act, 22 USC §287
[127] 50 USC §§1701-1706
[128] 50 USC §1702(3)(b)(2)

These and other US sanctions are administered and enforced by the Department of the Treasury's Office of Foreign Assets Control (OFAC). In addition to the two terrorist sanctions regimes imposed by Executive Order mentioned here,[129] OFAC also implements regulations relating to FTOs designated by the Secretary of State as referred to in the material support statute discussed earlier.[130] OFAC maintains up-to-date lists of those subject to these regimes and can issue licences in exceptional circumstances to do business with those on the list. Specific and general licences can be applied for on a case-by-case basis.

All US citizens, permanent residents, entities organised under the laws of the US (including foreign branches), or any person in the US are covered by US sanctions. Violation of the sanctions is punishable by fines of up to $10,000,000 and imprisonment for a maximum of 30 years for wilful violations. There are also civil penalties of up to $1,075,000 for each violation.

d) General Remarks

It is clear from this overview of selected national counter-terrorism laws that humanitarian action in areas where individuals or groups designated as terrorist are active, carries with it the risk of criminal liability. The risk varies significantly between different jurisdictions. (See Annex I for comparison of select national counter-terrorism laws).

In the normal course of humanitarian operations, three different types of interaction could potentially be regulated by counter-terrorism law:

(1) Engagement with designated armed groups and their members, for example to negotiate access to civilians living in areas under the control of the group

(2) Incidental transactions and logistical arrangements with designated (or undesignated)[131] armed groups and their members which are necessary for the provision of humanitarian assistance and protection to the civilian populations in their territory of operations or areas under their control

(3) Provision of humanitarian assistance and protection to an individual member or members of a designated (or undesignated) armed group in need of that assistance and protection.

[129] Regulated by 31 CFR parts 594 and 595
[130] §2339B; 31 CFR part 597
[131] Some jurisdictions criminalise support to individuals and groups determined to be terrorist on an *ad hoc* basis. Support to an undesignated group later found to be terrorist would only be a crime if the criminal purpose of the group was known

Engagement with members of terrorist groups

None of the laws examined in this study prohibits contact with terrorist groups for humanitarian purposes. The one jurisdiction which does criminalise associating with a terrorist organisation, Australia, excludes situations where "the association is only for the purpose of providing aid of a humanitarian nature".[132] As will be seen in the case study on the oPt in Section IV, there may be government policies, rather than laws, dictating that government or inter-governmental representatives should limit contact with designated terrorist groups. Grants may transfer this obligation to implementing partners but violation of these policies would not attract a penal sanction.

Incidental transactions and logistical arrangements with terrorist groups

Where designated groups control territory their presence is likely to be so pervasive and deeply ingrained in daily life that individuals and organisations working there will have to have some degree of interface, possibly extending to the making of logistical and other arrangements. Depending on the level of intent required to constitute a crime, these arrangements might violate domestic criminal law.

In some jurisdictions it is virtually inconceivable that such provisions could apply to humanitarian operations, such as where intent to support a terrorist act is required for criminal liability. This is the case, for example, in France, Japan and Kuwait. In other jurisdictions, however, the crime is (also) framed in terms of contributions to a listed or unlisted terrorist group. In these cases, knowledge that the group is listed, or that it engages in terrorist activity, will generally, although not always, be sufficient to make contributions to the group illegal. In other words, once a group is designated terrorist, no intent to contribute to a crime or knowledge that commission of a crime would be assisted, tends to be required. This is the case for example in Denmark and the US, where there is a real risk that any contribution to a group found to be terrorist, whatever the intention of the provider, will be a criminal offence if it is known that the group is designated. In the UK this goes further, as the provider need only have "reasonable cause to suspect" that the resources may be used for the benefit of a listed group. In Australia, recklessness as to whether the group is listed is sufficient. This significantly increases the possibility that ancillary engagement, or even humanitarian action itself, or could fall foul of the law.

In all jurisdictions the risk of falling foul of counter-terrorism sanctions is higher than that posed by material support laws, as no intent to support a crime is generally required for this offence. Penalties for violation of sanctions provisions are generally lower than for the crime of financial or other material support. According to the *M & Others* decision of the ECJ, however, it may be necessary to show a real risk that the resources would be diverted to terrorist activity in order to violate EU

[132] The UK Terrorism Act 2000 prohibition on arranging or addressing a meeting to further the activities of a proscribed organisation has also caused concern. This applies only on UK territory and so is of less relevance to humanitarian operations in situations of crisis

sanctions as implemented in EU Member States. Although it is traditional for sanctions regimes to contain some form of humanitarian exemption, this is not always the case. As was examined in this section, the statutory humanitarian exemption in US sanctions law (under the IEEPA) was overridden in the case of US counter-terrorist sanctions.

An alternative type of humanitarian exemption is offered by the provision of a licence or waiver for one or more humanitarian organisations to operate in contexts subject to sanctions. However, as these licences apply to liability under economic sanctions regimes they do not provide any kind of legal immunity from prosecution under material support laws in jurisdictions where material support could encompass humanitarian action.

Sanctions apply to acts committed anywhere by nationals and entities of the sanctioning state. Importantly, all of the states examined here claim jurisdiction over the crimes of financial and other material support to terrorism, as defined in their own laws, when committed by their own nationals abroad. Most claim jurisdiction over nationals of any country when the contribution amounts to a violation of the *Terrorism Financing Convention*, and some states, such as the US and Australia, can prosecute foreigners for crimes of material support which fall well below this threshold.

Provision of humanitarian assistance and protection to individual members of terrorist groups

Most concerning to humanitarian actors from a principled point of view is whether undertaking humanitarian assistance and protection activities could be characterised as a crime. The prohibition of humanitarian assistance to any individual in need is contrary to medical ethics and to fundamental international human rights and humanitarian law. The US exempts the provision of medicine and religious materials from its prohibition on material support. New Zealand goes further and exempts all humanitarian assistance to designated individuals and their dependants in need from its criminal law.

In other jurisdictions, where no specific exception is made, the type of assistance provided may, nonetheless be relevant. For example, Australian and Canadian law only criminalise support given to an identified terrorist organisation if that support would help it engage in terrorist activity. A similar interpretation of sanctions law has been handed down by the ECJ. In the US, on the other hand, recent jurisprudence has indicated that any assistance to a designated terrorist group – apart from the statutorily exempt medicine and religious materials – will be seen as furthering that group's terrorist activities, relying on the notion of fungibility of resources. Humanitarian aid that goes beyond the provision of medicine and religious materials to designated individuals is therefore likely to be prohibited in that jurisdiction.

III Donor Requirements

a) Introduction and Overview

This section looks at the operationalisation of national counter-terrorism legislation and sanction regimes by international donors with humanitarian partners. Donors' counter-terrorism policies have evolved overtime. This section outlines counter-terrorism related conditions in funding agreements with humanitarian implementing partners as well as other risk management approaches adopted by a select number of donors in the context of counter-terrorism. It looks at what, if any, counter-terrorism clauses donors now include in standard funding agreements with humanitarian partners and any other relevant measures that donors rely on to ensure that humanitarian assistance is in line with counter-terrorism law and related policies.

Nine national (Australia, Canada, Denmark, the Netherlands, Norway, Qatar, Saudi Arabia the UK and the US) and one regional organisation (the EU) are reviewed. These donors were selected due to the size of their overseas humanitarian aid programmes, their influence on humanitarian aid globally and the balance between traditional and emerging donors. Australia, Canada, Denmark, the EU, Netherlands, Norway, the United Kingdom and United States collectively provided more than $74 billion in humanitarian aid between 2001 and 2010 – as monitored by Global Humanitarian Assistance reports. [133] These eight donors are among the top 20 donors of international humanitarian aid as monitored through the Organization of Economic Co-operation and Development (OECD) Development Assistance Committee. Qatar and Saudi Arabia are increasingly responding to humanitarian situations, providing aid through both the multi-lateral system (such as in response to OCHA Consolidated Appeals Processes) and through bilateral and other channels.

b) Selected Humanitarian Donor States in Detail

Australia

Australia's development and humanitarian agency, AusAID, includes references to counter-terrorism legislation in its "Multilateral Strategic Partnerships and Funding Agreements". The Australian Government has noted that terrorist organisations may "target" Non-Profit Organisations (NPOs) for a number of reasons including their enjoyment of public trust and their access to relatively large financial resources. It argues that NPOs are "sometimes subject to 'lighter touch' regulation by government and subject to less official scrutiny" and therefore NGOs must identify the risk to their organisation and "take necessary precautions". [134]

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[133] Global Humanitarian Assistance *Global Humanitarian Assistance 2012*, (June 2012). http://www.globalhumanitarianassistance.org/report/gha-report-2012

[134] Australian Government, *Safeguarding your organization against terrorism financing: A guidance for non-profit organizations* (2009). http://www.nationalsecurity.gov.au/www/agd/rwpattach.nsf/VAP/(084A3429FD57AC0744737F8EA134BACB)~Safeguard+your+Organisation+WITHOUT+CASE+STUDIES.pdf/$file/Safeguard+your+Organisation+WITHOUT+CASE+STUDIES.pdf

Counter-terrorism conditions

AusAID's funding agreements contain counter-terrorism clauses that vary depending on the recipient: multilateral organisation, NGO, contractor or other. Examples of standard clauses for AusAID Contracts and Agreements include:[135]

Standard counter-terrorism clauses for multilateral organisations:

> *Consistent with UN Security Council Resolutions relating to terrorism, including UNSC Resolution 1373 (2001) and 1267 (1999) and related resolutions, both AusAID and [Multilateral Organization] are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism. It is the policy of AusAID to seek to ensure that none of its funds are used, directly or indirectly, to provide support to individuals or entities associated with terrorism. To those ends, [Multilateral Organization] is committed to taking appropriate steps to ensure that funding provided by AusAID to support [Multilateral Organization] is not used to provide assistance to, or otherwise support, terrorists or terrorist organizations, and will inform AusAID immediately if, during the course of this [agreement name], [Multilateral Organization] determines that any such funds have been so used.*

Standard counter-terrorism clause for contractors:

> *The Contractor must in carrying out its obligations under this Contract comply with those laws in relation to organizations and individuals associated with terrorism, including 'terrorist organizations' as defined in Division 102 of the Criminal Code Act 1995 (Cth) and listed in regulations made under that Act and regulations made under the Charter of the United Nations Act 1945 (Cth). The Contractor must ensure that funds provided under this Contract do not provide direct or indirect support or resources to organizations and individuals associated with terrorism. If, during the course of this Contract, the Contractor discovers any link whatsoever with any organization or individual associated with terrorism it must inform AusAID immediately.*

Standard counter-terrorism provisions for NGOs:

> *10.4 The Organization must use its best endeavours to ensure: (a) that individuals or organizations involved in implementing the Activity are in no way linked, directly or indirectly, to organizations and individuals associated with terrorism; and (b) that the Grant is not used in anyway to provide direct or indirect support or resources to organizations and individuals associated with terrorism.*

[135] Written submission by AusAID to study questionnaire, September 2012

10.5 The Organization must have regard to the Australian Government guidance "Safeguarding your organization against terrorism financing: a guidance for non-profit organizations", available at http://www.nationalsecurity.gov.au/npo.

10.6 If, during the course of this Agreement, the Organization discovers any link whatsoever with any organization or individual listed on a Relevant List it must inform AusAID immediately.

10.7 If, during the course of this Agreement, the Organization is listed on a World Bank List or Similar List it must inform AusAID immediately.

Other measures

AusAID uses a number of counter-terrorism financing risk management strategies. These include an accreditation scheme for Australian NGOs which since 1996 have participated in the AusAID-NGO Cooperation Program (ANCP). Accreditation assesses the systems and procedures used by NGOs to ensure that they do not provide support to organisations or individuals associated with terrorism. This includes a review of the systems and processes used by NGOs such as formal anti-terrorism policies ratified by the governing body, the screening of partners and how anti-terrorism requirements are passed on to partners through agreements and communications.

Pre-requisites for accreditation include NGO partners to be a compliant signatory to the Australian Council for International Development (ACFID) Code of Conduct for Non-Government Development Organizations. This is a voluntary, self-regulatory industry code that reflects agreed standards of good practice and aims to improve the transparency and accountability of signatory organisations.[136] It is an AusAID requirement that organisations be signatories to the Code before they can be accredited with AusAID and receive funding under the ANCP. The Code includes a commitment that "funds or resources will be disbursed in accordance with relevant laws including taxation, counter-terrorism financing and anti-money laundering legislation (…)".[137]

While AusAID does not have a specific policy addressing the risk of counter-terrorism legislation it has stated that it trains all policy officers to make informed assessments of risk during all stages of aid management based on an established 'Risk Management Framework'. Attached to standard grant templates is a 'Statement of International Development Principles' which requires grantees to put in place procedures to "mitigate against the vulnerability of not for profit organizations to potential exploitation by organised crime and terrorist organizations" and states that "AusAID reserves the right to undertake an independent audit of an organization's accounts, records and assets related to funded activity, at all reasonable times."[138]

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[136] See http://www.acfid.asn.au/code-of-conduct/acfid-code-of-conduct
[137] October 2010. http://www.acfid.asn.au/code-of-conduct/acfid-code-of-conduct
[138] AusAID annex to Standard Grant Templates Schedule 2 'Statement of International Development Principles'

Oversight, guidance and dialogue with partners

AusAID has published guidance for NGO partners including the "Guidelines for Strengthening Counter-Terrorism Measures in the Australian Aid Program"[139] and the Australian Government has produced more general guidance for non-profit organisations: "Safeguarding your organization against terrorist financing: a guidance for Non-profit organizations".[140] These documents provide an introduction to relevant Australian counter-terrorism laws as well as best practices (or suggested strategies) for NGOs. Examples of due diligence provided include that NPOs should know their beneficiaries and third parties they work with and "should regularly check that beneficiaries and third parties are not listed individuals or organizations".[141] In relation to beneficiaries the guidance does note that individual beneficiary vetting may not always be practical. Therefore humanitarian actors should ensure that they have an understanding of the particular group being assisted and be satisfied that assistance provided to that beneficiary will not be misdirected for the purpose of terrorism financing. AusAID is currently developing additional guidance for NGOs participating in the ANCP regarding their anti-terrorism obligations.

Remarks

AusAID engages with a number of different types of humanitarian organisations and while its approach differs depending on the organisation the clauses have two key components: they require multilateral organisations and NGOs to use their "best endeavours" to comply with the law; and that the other party inform AusAID immediately if, during the course of the agreement, any link whatsoever to a proscribed person or entity is discovered. AusAID explains that the phrase "best endeavours" is used in recognition of the difficulties that may be encountered in ensuring that indirect support is not provided, particularly, when there are multiple layers of decision-making between the partner and its beneficiaries. The phrase, however, denotes a positive obligation to act. For the purposes of the second reporting requirement (finding a link to a listed group) AusAID understands a "link" in its broadest sense. It thus requires that it be informed as soon as information is discovered. AusAID will then determine, in consultation with the funded organisation what, if any, actions are necessary. AusAID emphasises that the obligation to notify does not confer an active intelligence-gathering responsibility. Further explanatory notes add that the existence of the clause does not release individuals or organisations from their legal obligations under Australian laws.[142]

Some NGOs have expressed reservations about Australia's counter-terrorism legislation and its potential criminalisation of humanitarian action. While one NGO has reported that AusAid has been pragmatic in their dialogue with humanitarian partners, they have expressed concern about explicit references in the ACFID Code of Conduct to national counter-terrorism legislation as examples of 'good sector practice'.

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[139] September 2004. http://www.ausaid.gov.au/Publications/Documents/ctm_guidelines.pdf
[140] 2009. http://www.nationalsecurity.gov.au/agd/WWW/nationalsecurity.nsf/Page/What_Governments_are_doing_Risk_of_Misuse_-_Terrorism_Financing
[141] *Ibid* p.8
[142] Guidelines for Strengthening Counter-Terrorism Measures in the Australian Aid Program, AusAID September 2004 http://www.ausaid.gov.au/Publications/Pages/3068_5667_7689_8674_4936.aspx

Canada

Canada's International Development Agency (CIDA) includes clauses related to counter-terrorism as part of its funding agreements with partner organisations. The nature of the clauses is dependent upon the type of partner.

Counter-terrorism conditions

CIDA funding agreements require partners to be aware of Canadian anti-terrorism legislation and Canadian national lists of terrorist organisations and individuals. The specific contractual clauses depend on the nature of the partners but clauses used for funding agreements with NGOs specify that funding shall not be used to benefit terrorist groups or individual members of these groups, or for terrorist activities, either directly or indirectly. The NGO should refer to the relevant section of the Criminal Code for Canada for definitions of the terms 'terrorist group' and 'terrorist activity'. Clauses also specify that the organisation is expected to include a corresponding provision in any sub-agreements that it enters into with organisations that will be the recipient of CIDA project funds.

Clauses in agreements with multilaterals and international organisations include requirements that local partners be screened to ensure they do not knowingly work with any entity appearing, *inter alia*, on the UN Security Council's 1267 Committee list. UN agencies should include clauses in their agreements with implementing partners that request recipients to use their best efforts to ensure that no funds provided under the agreement are used to benefit individuals or entities associated with terrorism.

Other measures

In addition to counter-terrorism clauses, the Canadian government uses a range of less formal measures to ensure robust and preventative risk management and that safeguards are in place. These include due diligence, monitoring, guidance and engagement with partners. This risk management approach seeks to mitigate risk for CIDA, its personnel and its partners against a number of factors, including, but not exclusively, counter-terrorism issues.

Interviewed CIDA officials stressed that counter-terrorism is only one aspect of due diligence to engage in proper stewardship of Canadian funds. Others include, but are not limited to, assessing an organisation's track record in achieving results and demonstrating sound organisational governance and financial management capacities. When CIDA is considering funding an organisation there is a process of due diligence with regards to counter-terrorism. Canadian legislation requires Canadian based organisations, Canadian staff, and any non-Canadian organisations which receive Canadian funding, to exercise measures to ensure that Canadian funds do not directly or indirectly benefit terrorists or terrorist activities. CIDA officials working with their West Bank and Gaza programme commented that when addressing this risk, a key focus of the assessment is on those persons with decision-making authority over where the funding is allocated.

Oversight, guidance and dialogue with partners

The Charities Directorate within the Canada Revenue Agency is responsible for: reviewing applications for registration as a charity; providing information, guidance and advice on maintaining registered status and supporting the Canada Revenue Agency's role in combating the financing of terrorism in support of the Charities Registration (Security Information) Act. The act's key purpose is to demonstrate Canada's commitment to participating in concerted international efforts to deny support to those who engage in terrorist activities. The act enables the Minister of Public Safety and the Minister of National Revenue to sign certificates that would remove the charitable status of the organisation if, based on information available, they believe there are reasonable grounds to believe the charity had, or will make available any resources, directly or indirectly, to a terrorist entity (see Section II).

CIDA has developed a guidance document for staff to help ensure that Canadian anti-terrorism legislation is taken into account. Steps to be taken include: assessing the risk, the likelihood the event will occur and the impact of the risk; placing anti-terrorism clauses in funding agreements; making reasonable inquiries as to who the funds will be disbursed to; and ensuring the eligibility of the organisation or initiative is maintained through ongoing monitoring.

Foreign Affairs and International Trade Canada (DFAIT) provides general guidance to Canadian partners but is not in a position to provide legal advice to NGOs or others. Officials acknowledged this places a burden of compliance on partners to then independently access legal advice.

The Canadian government has informally discussed counter-terrorism legislation issues with other donors, particularly those at missions abroad. In addition to participating in international fora or bilateral discussions with other donors officials report that they follow informal structures that address counter-terrorism issues, such as Harvard University's Program on Humanitarian Policy and Conflict Research (HPCR).

Remarks

CIDA and DFAIT engage in dialogue with humanitarian partners on counter-terrorism issues and discuss relevant Canadian legislation. In February 2012, CIDA held a dialogue with its local partners in the oPt about the potential impact of counter-terrorism clauses in funding agreements. Its objective was to ensure they had the capacity and mechanisms in place to respond to screening and monitoring requirements. The reluctance of local partners to agree to those clauses, according to CIDA, was in many instances because of weak capacity and mechanisms to fulfill the screening and monitoring requirements. This led in part to CIDA shifting funding to larger international NGOs and UN organisations.

Officials commented that overall funding levels had not been impacted by counter-terrorism legislation. In the case of Somalia, officials stated that counter-terrorism legislation did not impact

on the level of CIDA funding or a shift in CIDA's partners. However, it did result in delays in funding in 2010 when Al-Shabaab was first included in the Government of Canada's list of terrorist entities. These delays were related to negotiations with the Government of Canada to ensure humanitarian funding to Somalia was compliant with anti-terrorism legislation.

CIDA and DFAIT engage in dialogue with their respective legal departments and at the political levels of government in order to raise awareness of the potential negative impact of counter-terrorism legislation on their humanitarian actors. The outcome of this dialogue after consultation with representatives in the field and partner organisations has been an approach that focuses on engaging in risk management strategies but not to vet all the way down to the beneficiary level.

DFAIT's officials noted the importance of a pragmatic approach that aims to ensure partners delivering humanitarian assistance are able to operate in the field in a manner consistent with counter-terrorism legislation. They raised concern about the onerous administrative or other pressures on partners in order to ensure compliance against very specific requirements. They reported that in Somalia the ability to ensure in-depth monitoring and follow up is made more difficult by the operational context. CIDA documentation reflects this concern, commenting that the increased cost of ensuring due diligence might mean the CIDA budget includes additional resources to cover the cost burden.

Denmark

Denmark, through its humanitarian and development agency, DANIDA, does not include clauses or specific restrictions with regard to counter-terrorism as part of funding agreements with partner organisations.

Other measures

The humanitarian section of DANIDA has a risk management approach and implements a risk assessment framework with its partners. It is broad and seeks to mitigate risk against a number of factors, including but not exclusive to, counter-terrorism issues.

Partnership agreements are based on two-way donor/recipient accountability, adherence to humanitarian principles and standards with the aim to promote lesson learning. Partners are expected to undertake risk management and be aware of UN and EU terrorist listings. This is not prescriptive and can be based on partners' own practices and procedures. Recommendations are given on a voluntary basis. Risk is discussed on an annual basis with NGO partners with three categories of risk being taken into account: operational, reputational and institutional. In addition, Denmark conducts risk assessments with UN agency partners and has participated in several workshops over the past two years focusing on risk management and assessment.

DANIDA has been shifting its humanitarian portfolio towards more strategic relations with a smaller number of partners. This reflects the lack of capacity to monitor a wide range of partners and

projects and the focus on promoting deeper and more accountable relationships with partners. This reduction in partners has not been influenced by counter-terrorism related concerns. However, partners are expected to have sufficient field level capacity, with accountability systems in place to minimise risks, particularly in challenging contexts such as southern Somalia.

Whilst counter-terrorism issues are not specifically mentioned in the context of risk management policies and procedures, concerns around the risk of diversion of humanitarian aid to Al-Shabaab played a role in Denmark's decision to provide capacity support in risk management with partners in Somalia. Other initiatives include support to an OCHA-led risk management project as well as a risk assessment of the Danish contribution to the Somalia Common Humanitarian Fund.[143] The Ministry of Foreign Affairs' (MoFA) 2011 Evaluation of the Danish Engagement in Somalia[144] found that DANIDA had been able to manage risk by working closely with its embassies, diversifying partners and interventions, working through the UN Development Programme (UNDP), and increasing expenditure in and around Somalia.

Oversight, guidance and dialogue with partners

Guidance documents are not currently provided to staff on risk management but a draft concept note and guidelines are being developed. Danish humanitarian action is guided by the vision and principles embedded in the European Consensus on Humanitarian Aid as well as the Good Humanitarian Donorship principles.[145] The MoFA submits an annual report to Parliament which outlines the main focus areas around counter-terrorism to be considered while implementing projects.[146]

Annual consultations also take place between MoFA and six "framework NGOs", as well as with four umbrella organisations and the few individual NGOs that receive humanitarian funds. According to interviewed officials, NGOs have initiated dialogue with MoFA around US legislation which is seen as concerning because of its impact on humanitarian responses.

Remarks

The risk of humanitarian actors violating counter-terrorism legislation is an issue described as being "on the radar" by officials interviewed from the MoFA Counter-terrorism Unit , particularly in relation to Al-Shabaab, Hamas, Hezbollah as well as, in the past, the LTTE in Sri Lanka and Maoist groups in Nepal. The officials report that each situation is flexibly evaluated on its own merit.

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[143] Interview with DANIDA official
[144] Ministry of Foreign Affairs of Denmark, *Evaluation of the Danish Engagement in and Around Somalia 2006-10*, September 2011
[145] http://www.goodhumanitariandonorship.org/gns/principles-good-practice-ghd/overview.aspx
[146] Annual Report of the Ministry of Foreign Affairs of Denmark 2011. : http://um.dk/en/news/newsdisplaypage/?newsid=d7bcc380-36f4-4dc3-ba85-9be0a201f0cf

European Union (regional)

The European Commission's Director General for Humanitarian Aid and Civil Protection (ECHO) follows the European Consensus on Humanitarian Aid which sets out the values, guiding principles and policy scope of EU humanitarian aid.[147] ECHO does not include counter-terrorism clauses in funding agreements.

Other measures

ECHO implements humanitarian operations through non-governmental and international organisations with which it has signed Framework Partnership Agreements (FPA), UN bodies or agencies that are signatories of the UN-EC Financial and Administrative Framework Agreement (FAFA) and specialised agencies of EU Member States. While these FPAs do not currently include counter terrorism related funding conditionalities, they provide for compliance with the applicable international law, national legislation of the country where the Action is implemented and humanitarian principles. In addition, all relevant laws of the country of establishment of the ECHO NGO partner continue to apply to the latter (including those concerning counter-terrorism issues).

ECHO officials interviewed stated that since no FPA has been, or will be, signed with a listed organisation, the risk of ECHO funds being used directly to support terrorist activities is non-existent at that level. (This is due to the necessity to comply with strict eligibility and suitability criteria, checked through a detailed selection process prior to the signature of the FPA). They noted that ECHO partners should be aware of the EU and EU Member States relevant legislation and their related exposure to criminal prosecution at a Member State level should funds be diverted to listed organisations. (In any event, ECHO notes that any such diversion would also be in breach of the FPA and the General Conditions governing grant agreements, as (part of) the aid would not reach its intended recipients.) ECHO's partners are also required to assure an effective supervision and control of the action and are fully responsible for all related activities implemented by their implementing partners and contractors.

Oversight, guidance and dialogue with partners

ECHO gives guidance to partners on risk management strategies that are appropriate to upholding humanitarian principles, in accordance with the European Consensus on Humanitarian Aid. An EU official has stated that there are no vetting requirements for the EU with regard to beneficiaries.[148] Where situations of beneficiary vetting have come to the attention of ECHO officials, they asked for this practice to stop.

The Member States have primary responsibility for counter-terrorism. The EU plays a supportive role as set out in the EU Counter-Terrorism Strategy adopted by the European Council which also created the role of an EU Counter-Terrorism Coordinator to strengthen overall coordination within

[147] *European Consensus on Humanitarian Aid* : http://ec.europa.eu/echo/policies/consensus_en.htm
[148] Statement of EU Adviser to the EU Counter-Terrorism Coordinator, Principles in Practice: Safeguarding Humanitarian Action Conference, 4 December 2012, Brussels

the EU. With the Lisbon Treaty, counter-terrorism has become a shared competence, allowing for the European Commission to make legislative proposals which are adopted according to the regular co-decision procedure. (However, national security remains the exclusive competence of the Member States). Given the multi-faceted nature of counter-terrorism, many different players in the EU institutions are involved in policy making. All are bound to respect international law and the EU Charter of Fundamental Rights.

Remarks

ECHO officials interviewed, report that they are aware of the potential legal exposure of implementing partners should funds be diverted by, or to the benefit of, designated terrorist groups. ECHO is considering whether a more formal approach to risk management and due diligence needs to be adopted, beyond current monitoring and audit measures. Specific outcomes of these assessments could include a formal policy position, the introduction of specific legal tools (relevant clauses) in the FPA and the provision of guidance to partners on existing EU legislation and due diligence systems. The new FPA may introduce more oversight and control of implementing partners, partly due to changes introduced by the new EU Financial Regulation, which became applicable as of 1 January 2013.

ECHO officials have attempted to engage with policy processes across EU institutions in order to diminish any negative humanitarian impact of counter-terrorism measures and sanctions regimes. For example, ECHO is currently working on a proposal to the Service for Foreign Policy Instruments (FPI) – responsible for implementing sanctions regimes – for a joint FPI/ ECHO/Commission of Legal Service to consider a standard humanitarian derogation/exemption clause for future EU sanctions decisions which could potentially also be used as a basis for amending existing regulations.

ECHO officials have noted their concerns about the potential negative impact of US legislation on ECHO partners. This has been raised, for example, within the bi-annual dialogue with the US State Department Legal Advisor on all aspects of International Law and Counter-terrorism.[149] This dialogue is led by the Presidency and undertaken under the auspices of the Council Working Party on Public International Law (COJUR). It involves legal advisors of Member States' foreign ministries, representatives from the Commission Legal Service, the Council Legal Service and the Legal Service and Human Rights Department of European External Action Service (EEAS).

The Netherlands

The Netherlands' Ministry of Foreign Affairs (MinBuZa) does not include counter-terrorism related conditions in funding agreements.

[149] Interview EEAS and Statement of EU Adviser to the EU Counter-Terrorism Coordinator, Principles in Practice: Safeguarding Humanitarian Action Conference, 4 December 2012, Brussels

Other measures

MinBuZa officials reported that they are aware of the potential impacts of other countries' counter-terrorism legislation on actions of humanitarian organisations. However, MinBuZa does not have formal risk management processes in relation to counter-terrorism and humanitarian assistance. There is an expectation from MinBuZa that risk management procedures of humanitarian agencies they fund (predominantly ICRC and UN agencies) will be sufficient to mitigate any risk of contravening counter-terrorism legislation.

Remarks

Officials from the office of the National Coordinator for Counter-terrorism and Security recognise the potential for aid to be diverted to proscribed terrorist organisations and for humanitarian organisations to therefore contravene counter-terrorism legislation. According to officials, there has yet to be pro-active coordination and communication across relevant government departments on the issue – although there was some informal discussion on the risks in relation to Somalia where the "trusted partner" approach was decided to be sufficient. Unless there is an event to "bring things to a head" (for example the arrest of aid workers), it is viewed as unlikely the government will formulate a formal position.

Norway

Norway does not include any formal counter-terrorism conditions in its funding agreements. It instead adopts a risk management framework, which includes risk assessment and an emphasis on the due diligence of partner organizations.[150]

Other measures

Specific reference is made in grant letter templates issued by the Norwegian Ministry of Foreign Affairs to all grant partners on the need for the grant recipient to organise the project in such a way as to prevent corruption, irregularities and the misuse of funds. There is no specific reference to counter-terrorism. The grant letters refer to the need to ensure that project implementation respects IHL, international human rights law and international humanitarian principles. However, Norwegian officials also recognised that in some cases a more specific counter-terrorism clause "may be beneficial".[151]

Oversight, guidance and dialogue with partners

Interviews with officials suggest that there is a cohesive cross-government perspective on counter-terrorism issues that extends to understanding of the potential impact associated with counter-terrorism financing activities on principled humanitarian action. Dialogue and information sharing takes place across departments in order to ensure that legislation and humanitarian instruments are not constraining humanitarian action. Discussions have been held with Norwegian humanitarian

[150] Interviews with Norwegian Government representatives (2013)
[151] *Ibid*

organisations regarding their risks in relation to US legislation and advice provided to partners on the need to be aware of this legislation in project implementation.[152]

Remarks

The Government of Norway's Foreign Policy Strategy for Combatting International Terrorism (2006) highlights the need to work within the framework of international law and human rights law in the fight against terrorism. The government has been vocal in voicing concerns regarding the potential restrictions on principled humanitarian action of national counter-terrorism legislation.[153] In December 2012 the Norwegian Minister of Foreign Affairs stated that "anti-terrorist rules and legislation limit the freedom of action of humanitarian actors".[154] Norway, on behalf of all Nordic countries, raised this issue within an Open Debate on Counter-Terrorism in the UN Security Council in January 2013.[155] Norway spoke of the need to ensure clarity on the scope and applicability of counter-terrorism laws and measures in order to ensure that they do not undermine humanitarian commitments and that full and unimpeded humanitarian access is ensured.

Qatar

The National Commission for Counter-Terrorism and Money Laundering and the Financial Information Unit within the Qatar Central Fund provide the practical framework for Qatar's counter-terrorism initiatives. Qatar, however, does not include any formal counter-terrorism conditions for its national and international partners in the use of state funds.

Oversight, guidance and dialogue with partners

Previously the Qatar Authority for Charitable Activities (QACA) oversaw domestic and international activities, including approving international fund transfers by charities and monitoring overseas humanitarian projects. QACA was dissolved in 2010 following establishment of an International Development Department within the Ministry of Foreign Affairs.

National NGOs operate according to basic regulations and norms as set by the Directorate of Private Organizations and Foundations within the Ministry of Social Affairs. All foreign partners (local, national and international) must be vetted by the Ministry of Social Affairs and receive relevant permits and accreditation prior to funding (although reportedly no clear criteria for assessment is provided by government authorities).[156] NGOs report that general information requested from authorities regarding local partners in places like Somalia and the oPt (such as

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[152] *Ibid*
[153] *Ibid*
[154] Norwegian Minister of Foreign Affairs, statement, Principles in Practice: Safeguarding Humanitarian Action Norwegian Refugee Council Conference, Brussels, 4 December 2012- High-level panel: "The values and purpose of humanitarian action". http://www.regjeringen.no/en/dep/ud/Whats-new/Speeches-and-articles/e_speeches/2012/brussel_nrc.html?id=709219
[155] http://www.norway-un.org/Statements/Security-Council/SC-Open-debate-on-counter-terrorism/
[156] Interviews, Doha, September 2012

copies of constitutions, details of boards of directors and bank account details) is often unavailable and therefore they cannot enter into partnership.[157]

Remarks

Despite a lack of formal regulation, national NGOs have noted the impact of the government's counter-terrorism risk management on humanitarian action. Some NGOs expressed concerns that neutrality of the humanitarian sector is undermined by the government's appointment of senior staff and secondment of government officials to NGOs, thus framing the overall focus areas of the organisation and selection of its projects.[158] The government, however, has noted that humanitarian organisations continue to retain a high level of independence.[159]

NGOs noted that in the absence of clear government donor policies related to counter-terrorism, Qatari NGOs put in place their own internal restrictions to mitigate perceived risks of counter-terrorism legislation including additional conditions on local partners.[160] This has impacted operations with one interviewee stating that the "lack of regulation" resulted in the organisation freezing their overseas operations for a number of years until they could clarify the requirements of Qatar's counter-terrorism donor framework.[161] Some NGOs report that the impact on the delivery of humanitarian aid has gradually reduced as better working relations have been established with relevant Qatari authorities.[162]

As with some other donors, risk management, including related to counter-terrorism, has led to the channeling of Qatari humanitarian aid to fewer and more trusted partners such as international NGOs and the Red Crescent Society.

Saudi Arabia

Saudi Arabia does not include any formal counter-terrorism conditions for its national and international partners in the use of state funds. However since 2001, Saudi officials have taken significant steps towards strengthening the regulation of national charitable organisations operating both inside and outside the country.

Other measures

In the context of anti-money laundering and terrorist financing, Saudi Arabia has put in place a number of financial regulations for national non-profit and charitable entities which are automatically considered to be "high risk" and subject to enhanced due diligence.[163] The local charitable sector has been significantly regulated. It is monitored by the Ministry of Social Affairs according to the Charity Associations Law and numerous other rules and regulations. Local charities are subject to

[157] Interview, Doha, 10 September 2012
[158] Interviews, Doha, September 2012
[159] Permanent Mission of the State of Qatar to United Nations Office in Geneva, 21 March 2013
[160] Interviews, Doha, September 2012
[161] Interviews Doha, 9 September 2012
[162] Interviews, Doha, September 2012
[163] Rules, Article 11

annual audits and monitoring their activities including through Ministry of Social Affairs accredited accounting offices.[164] Rules issued by the Saudi-Arabian Monetary Authority (SAMA) in 2012 note that banks and money exchanges should implement "policies, procedures, and controls" in accordance with SAMA requirements "regarding the handling of accounts and transactions for charity organizations and non-profit entities".[165] Local charities are also prevented from collecting cash donations at mosques and other public places, a traditional source of fund-raising for Saudi charities.

Since July 2003 all national NGOs have been barred from sending funds abroad.[166] This ban, including for national charities working abroad, is reportedly in place until the Saudi High Civil Commission for Relief and Charitable Work Abroad begins its work (though officially established in 2004, it is not yet operational).[167] The 2012 SAMA rules noted that the ban on overseas transfers is regardless of where the funds originate from (including from legal entities, multi-national organisations, or independent/public charities). There is an exception in the case of "permitted entities". [168] Permitted entities are not defined further in the 2012 Rules although reportedly they include the Government's High Relief Committee and the Red Crescent Association.[169] Several NGOs interviewed reported that banks are enforcing the ban and have not permitted them to transfer funds to NGO partners overseas. (Others, however, noted that some foreign transactions have been allowed after the government was informed about the financial transaction and the numbers of beneficiaries were provided).[170]

Saudi Arabia is considering a number of draft laws to further regulate national humanitarian actors. Draft Regulations of Associations and Civil Organizations (2006), a draft Law for Non-Government Regulations (2008) and a draft Law Regulating Civil Society Organizations (2009) have been prepared but none have been formally adopted.

Oversight, guidance and dialogue with partners

A number of government entities play a role in the regulation of charitable institutions including the Ministry of Interior (including the Financial Intelligence Unit), the Ministry of Social Affairs (which oversees the registration and monitoring of local charitable foundations operating inside Saudi Arabia), the Capital Market Authority and SAMA. National charitable organisations are governed

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[164] Communication with Saudi Arabian Permanent Mission to the United Nations, 28 March 2013
[165] Rules Governing Ant-Money Laundering and Combating Terrorism Financing (Third Update) (February 2012), Banking Inspection Unit, Saudi Arabian Monetary Agency (SAMA), Article 4.6.6. http://www.sama.gov.sa/sites/samaen/RulesRegulation/Rules/Pages/B%20and%20E%20AML%20CTF%20Rules%20Final%203rd%20Update.pdf
[166] Kroessin, Mohammed. *Islamic Charities and the "War on Terror: Dispelling the Myths*, Overseas Development Institute, Humanitarian Practice Network, Humanitarian Exchange, Issue 38, June 2007. http://www.odihpn.org/humanitarian-exchange-magazine/issue-38/islamic-charities-and-the-war-on-terror-dispelling-the-myths
[167] Communication with Saudi Arabian Permanent Mission to the United Nations, 28 March 2013
[168] *Ibid*
[169] Interviews, 1 & 2 January 2013
[170] Interviews, 1 & 2 January 2013 and Riyadh and Jeddah, 23 – 25 February 2013

generally by the Resolution of the Council of Ministers No. 74, which sets out the requirements for the establishment and registration of charitable organizations. The planned Saudi National Commission for Relief and Charity Work Abroad will reportedly regulate all oversees charitable work when it begins its work (see above).[171] International organisations with headquarters in Saudi Arabia are governed by headquarters agreements negotiated with Saudi authorities.[172]

National humanitarian actors interviewed noted that new rules and regulations have been introduced by the government without consultation in a "top-down approach".[173] A general lack of awareness about these new measures has meant that national humanitarian organisations are unsure about their application and fear inadvertently operating outside the law.[174] Saudi officials commented that such measures are necessary to ensure the continuation of humanitarian work abroad whilst ensuring that it does not benefit terrorist groups.[175]

The establishment of national civil society umbrella organisations for self-regulation is one measure to ensure better oversight and coordination among humanitarian actors. However, there is some concern that this type of monitoring and coordination body could result in unnecessary constraints on humanitarian work.[176] Some NGOs fear the increasing reach of the government into civil society under the pretext of counter-terrorism.[177]

Remarks

The increased restrictions on Saudi Arabia humanitarian actors transferring funds overseas have curtailed significantly the activities of some of the large Saudi based charities. These restrictions are applied to the Organization of Islamic Cooperation (OIC), headquartered in Saudi Arabia, but also foreign humanitarian organisations with offices in the kingdom. This has impacted their electronic fundraising and thus funds available for humanitarian work abroad.[178] The "prevention" measures enforced by the government include additional financial regulation such as the banning of public fundraising and electronic donations and criminalising the collection of money and in-kind donations in mosques and other public places. These have significantly impacted the charitable sector in Saudi Arabia. Interviewees report that there are positive impacts of the increased government attention, such as holding charities more accountable for the money that they raise, educating the public about their right to trace their funds and receive reports on how the money is used.[179] However, they report that there is a need for *bona fide* humanitarian actors to be move involved in developing appropriate regulation to ensure that legitimate humanitarian action is not negatively impacted.[180]

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[171] Communication with Saudi Arabian Permanent Mission to the United Nations, 28 March 2013
[172] *Ibid*
[173] Interviews, Riyadh and Jeddah, 23 – 25 February 2013
[174] *Ibid*
[175] Communication with Saudi Arabian Permanent Mission to the United Nations, 28 March 2013
[176] Interviews, Riyadh and Jeddah, 23 – 25 February 2013
[177] *Ibid*
[178] Interviews, Jeddah, 24 February 2013
[179] Interviews, Riyadh and Jeddah, 23 – 25 February 2013
[180] *Ibid*

Some humanitarian actors have continued to try to operate through partnering with private sector and/or overseas humanitarian actors but this has increased the overhead costs of humanitarian work, delayed implementation and "out-sourced" humanitarian work to third parties, thus resulting in less oversight.[181] Government and civil society representatives interviewed noted the increasing concern of charitable funds being moved through cash and outside of *bona fide* humanitarian actors so as to circumvent government regulation.[182]

The United Kingdom

In high-risk contexts the UK Government's Department for International Development (DFID) includes specific clauses within Memoranda of Understanding (MoU) with partner organisations in order to obtain assurances that they will not in any way provide direct support to a listed organisation.

Counter-terrorism conditions

DFID states that it recognises the risk of aid diversion to proscribed groups, and the concurrent threat of exposure of partners to prosecution under counter-terrorism legislation. In certain contexts, where the risk is deemed to be very high, DFID inserts a clause in MoUs with partner organisations in order to get assurances they will not in any way provide direct support to a listed organisation. Standard clauses follow the following format:

> *"The (name of grant recipient) and DFID are committed to taking appropriate steps to ensure that funds provided by the United Kingdom Government are not used to provide assistance to, or otherwise support, terrorists or terrorist organizations. No such funds, other financial assets and economic resources will be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity associated with terrorism consistent with relevant United Nations resolutions, European Union measures and other international standards, such as those of the Financial Action Task Force, relating to counter terrorism in particular the financing of terrorism".*

This legislation applies to all UK natural or legal persons which may include DFID partners. Additionally these clauses protect UK staff from criminal liability.

It is at the discretion of the Heads of DFID Country Offices to determine whether counter-terrorism clauses are necessary. DFID Head Office provides guidance on a case-by-case basis both on the wording of the clauses and whether clauses are necessary from a UK perspective (see examples in case studies).

[181] Interviews, Jeddah, 24 February 2013
[182] Interviews, Riyadh and Jeddah, 23 – 25 February 2013

Other measures

The issue of diversion of aid and contravention of counter-terrorism legislation by humanitarian partners is viewed as an internal control and risk management issue alongside fraud, bribery and corruption. Counter-terrorism related risks and mitigation measures are expected to form part of Country Offices' Operational Plans. In high risk contexts, DFID places a premium on working with partners whom they understand to have effective risk management procedures and due diligence processes.

DFID also implements a due diligence assessment framework with partners when initiating a funding agreement. The framework assesses partners on their governance and control and risk management structures and processes. DFID is currently developing policies and guidance for staff on counter-terrorism awareness and mitigation.

Oversight, guidance and dialogue with partners

DFID participates in committees on counter-terrorism financing together with the Foreign and Commonwealth Office (FCO), the Home Office, the Treasury and the Cabinet Office. DFID's updated due diligence framework is a response to cross-government commitments on counter-terrorism financing.

The Charity Commission, the independent regulator and registrar for charities in England and Wales, provides guidance in line with UK legislation. This is based on a Counter-Terrorism Strategy which was first produced in 2008 and updated in April 2012[183] to take into account changes in the UK government's strategy for countering international terrorism, a strategy known as CONTEST.[184] The Commission's counter-terrorism strategy focuses on awareness, oversight and supervision, co-operation and intervention. It outlines approaches to safeguarding the charity sector from terrorist abuse, as well as recognising and addressing risks in operating internationally. The updated Strategy notes that a Home Office review in 2007 acknowledged that "actual instances of abuse have proven very rare" and the Commission's own experience indicates that the number of cases where charities have supported terrorist activity is very small in comparison to the size of the sector.[185] The Strategy explicitly recognises the potential damage that over-regulation can provide and "the differing stances taken by members of the international community to certain organisations, which often impose varying conditions on aid they provide to these areas"[186].

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[183] http://www.charitycommission.gov.uk/Our_regulatory_activity/Counter_terrorism_work/ctstrategy.aspx
[184] http://www.homeoffice.gov.uk/counter-terrorism/uk-counter-terrorism-strat/
[185] Charity Commission's Counter-Terrorism Strategy, p.5. http://www.charitycommission.gov.uk/our_regulatory_activity/counter_terrorism_work/ctstrategy.aspx
[186] *Ibid* at p.7

The Commission has a "compliance toolkit" which includes a chapter on counter-terrorism legislation and operational guidance on Charities and Terrorism.[187] A specific guidance note was produced in July 2011 for charities raising funds for and/or carrying out humanitarian operations in response to the crisis in Somalia and East Africa (see Somalia case study in Section IV).

In addition to working with charities, the Commission engages government departments to raise awareness of the regulatory framework and to support the implementation of the CONTEST strategy. It has worked with DFID in relation to the due diligence framework for funded partners. Where there is a suspicion that abuse has taken place the Commission is mandated to take regulatory action independently, or in conjunction with, the relevant law enforcement agencies.

Remarks

DFID officials interviewed, stated that the introduction of conditionalities in funding agreements has not, to date, restricted DFID from providing support to regular partners except in extremely rare cases. A 2009 EU funded study into initiatives for improving transparency and accountability of non-profit sectors praised the Charity Commission, noting that its counter-terrorism strategy is the only explicit strategy addressing counter-terrorism within the not-for-profit sector published by a European regulator.[188]

The United States

Particularly since the attacks of September 2001, the US has been at the forefront of counter-terrorism efforts. This is reflected in its humanitarian donor contracting requirements. The regulation of the non-profit sector, including humanitarian NGOs, is seen as a critical component in these efforts. The US includes a number of counter-terrorism clauses as part of its grants agreements.

Counter-terrorism conditions

The US Agency for International Development (USAID)'s Office for US Foreign Disaster Assistance (OFDA) is the US Government's lead coordinator for international disaster response and provides substantial humanitarian funding to a range of NGO and public international organisation (PIO) partners. USAID/OFDA primarily awards funding through US federal grants and cooperative agreements. USAID's policy, which flows from US federal law, both legislative and administrative, requires USAID's NGO partners to sign a number of Certifications and Assurances in order to receive federal funds. These include Certification and Assurances regarding terrorist financing in addition to other laws and regulations.[189] PIO partners are not required to sign these Certifications and Assurances. However, in some circumstances, USAID/OFDA grant awards (both to NGOs and

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[187] *Protecting Charities from Harm* : http://webarchive.nationalarchives.gov.uk/+/http://www.charitycommission.gov.uk/our_regulatory_activity/counter_terrorism_work/protecting_charities_landing.aspx

[188] European Center for Not-for-Profit Law, *Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union,* (April 2009) http://ec.europa.eu/home-affairs/doc_centre/terrorism/docs/initiatives_improving_transparency_accountability_npos_avr09.pdf

[189] http://transition.usaid.gov/our_work/humanitarian_assistance/disaster_assistance/resources/

PIOs) may also contain references to sanctions, as well as licenses granted by Treasury/OFAC and Commerce. USAID/OFDA has in some specific circumstances stipulated that partners must exercise "enhanced due diligence" in the course of performance.

In particular, USAID requires all funding recipients to sign an Anti-Terrorism Certification (ATC) confirming that they do not provide material support or resources to any terrorist individual or entity. The ATC derives from Executive Order 13224 (see Section II) and a version of it was first inserted into USAID grants in 2002. The first paragraph of the Certification states:

> *The Recipient, to the best of its current knowledge, did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts, as that term is defined in paragraph 3.*

The definitions of material support and terrorist acts are as defined in US law (see Section II).

The State Department's Bureau for Population, Refugees and Migration (BPRM) has primary responsibility within the US Government for formulating policies on population, refugees, and migration, as well as for administering U.S. refugee assistance and admissions programmes. It primarily funds UN and other international agencies such as the ICRC although it does fund NGO programmes that are coordinated with the multilateral system and fill critical gaps. PRM requires the full details of sub-contractors/sub-recipients and the NGO must "describe how these organizations were vetted to comply with US Executive Order and law, which prohibits transactions with and the provision of support to organisations associated with terrorism".[190] Further each PRM assistance award includes specific provisions regarding the responsibility of the award recipient to ensure compliance with the applicable Executive Orders, laws, regulations, treaties and policies as they relate to terrorism. However, PRM partners are not required to sign ATCs.

Other measures

The Partner Vetting System (PVS)[191] is the formal expression of an enhanced vetting procedure that has been in place in West Bank and Gaza since 2002 for USAID grantees. Its stated objective is to "help ensure that USAID funds and other resources do not inadvertently benefit individuals or entities that are terrorists, supporters of terrorists or affiliated with terrorists." PVS was first proposed by USAID in 2007 and its scope and procedure has been a subject of contention between the humanitarian community and the US Government. In the FY2010 Appropriations Act

[190] US State Department's BPRM, *General NGO Guidelines for Overseas Assistance*. http://www.state.gov/j/prm/funding/index.htm

[191] For an introduction to the objectives and discussions on PVS see the Federal Register : https://www.federalregister.gov/articles/2012/02/14/2012-3239/partner-vetting-in-usaid-acquisitions#p-3; and also : "Note to Resident Coordinators and Resident/Humanitarian Coordinators on the US Partner System" on behalf of the IASC Task Force on Humanitarian Space and Civil-Military Relations (April 2012)

the US Congress instructed USAID to restrict the PVS to five pilot countries (Guatemala, Kenya, Lebanon, Philippines and Ukraine) to validate the model and determine its costs and benefits. The roll-out officially commenced in March 2012, though USAID has implemented vetting procedures for a number of years in the oPt and Afghanistan and had been planning to do so in Somalia until the famine outbreak in July 2011 caused a delay. USAID also reportedly conducts *ad hoc* screening for some of its headquarters managed programmes.

The PVS holds USAID's implementing partners responsible for collecting information on any US citizens, the directors, officers and key employees of contractors, sub-contractors, grantees and sub-grantees.[192] Vetting may go down to the beneficiary level (as currently in place through the *sui generis* vetting system in the oPt) and this will depend on the type of programme. Programmes providing small loans and other cash assistance will be vetted but potentially not in-kind programmes or those focused on service delivery (such as health). [193] Reportedly, "humanitarian assistance" will not be subject to vetting up front but there may be a "post-obligation vetting on humanitarian aid". [194] The definition of humanitarian assistance and the nature and consequences of post-obligation have yet to be clarified with NGO partners by USAID/the State Department. The information collected is passed on by the primary grantee (including on behalf of any sub-grantees) to the government through a secure web-portal to be screened against classified US databases to determine the risk of US funds benefiting groups and individuals linked with terrorism. The PVS does not apply to UN agencies or the ICRC.

Oversight, guidance and dialogue with partners

The US Treasury Department follows the four-pronged approach recommended by FATF to prevent the use and abuse of the non-profit sector for terrorist financing, namely outreach to the non-profit sector; supervision and monitoring; effective investigation and information gathering and effective mechanisms for international co-operation.[195] Treasury officials report that assisting the US NGO sector to minimise its exposure to the various forms of terrorist abuse is a key objective in combating terrorist financing. An essential element of Treasury's approach is raising awareness across the NGO sector and the general public of: (i) the ongoing exploitation of charitable assistance by terrorist groups and their support networks; (ii) actions that the Treasury Department is taking to address this threat and (iii) steps that the charitable sector and donor community can take to protect themselves against such abuse.

Treasury notes that the extent of the terrorist financing risk for US-based charities varies dramatically depending on the operations and activities of the charity. There are approximately 1.8 million charities in the US, the vast majority of which face little or no terrorist financing risk

[192] USAID briefing for NGO partners, 27 February 2013 based on summary notes provided by InterAction
[193] *Ibid*
[194] USAID briefing for NGO partners, 27 February 2013 based on summary notes provided by InterAction
[195] Interpretive Notes to Special Recommendation 8 in *International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation: The FATF Recommendations*, February 2012

according to Treasury. However, those US-based NGOs operating abroad, particularly in high-risk areas where listed terrorist groups are most active, can face significant risks. Treasury officials noted that there are demonstrated cases of terrorist groups and their supporters taking advantage of NGOs to infiltrate the NGO sector and exploit charitable funds and operations to support their activities.

The US Treasury conducts outreach and develops guidance to assist the NGO sector in better understanding the terrorist threat mitigation. Over the past several years, Treasury has developed, promoted and updated a wide range of documents published on its website to assist donors and NGOs.[196] Treasury Department officials have stated the importance of outreach in providing guidelines to assist the charitable sector in developing and implementing effective safeguards against terrorist abuse, given the lack of regulatory regime or supervisory mechanism to specifically address terrorist abuse of charities.

However, there has been opposition. For example, in 2002, the US Treasury issued guidelines for US-based charities, including humanitarian NGOs. A coalition of 70 US-based non-profit actors was engaged in a Treasury Guidelines Working Group with officials to amend what they saw as "confusing and ineffective"[197] guidelines. The Working Group was eventually disbanded at the instigation of the non-profit sector coalition due to the perceived unwillingness of the Treasury Department to make any substantial changes to its approach and the Guidelines.[198] The Treasury Department issued a response to the comments received, as well as the updated guidelines, last dated 2007.[199] Answers to Frequently Asked Questions were published in 2010 to "provide general information about the Treasury Department's approach to combating terrorist abuse of charities and references additional guidance to the charitable sector on ways to mitigate the threat posed by terrorist groups and their support networks".[200]

The Treasury Department, through its implementation of Executive Order 13224, has designated eight NGOs located in the US as providing support to, or acting on behalf of, designated terrorist organisations.[201] Such designation includes an asset freeze and US persons are prohibited from engaging in transactions with the designated individual or entity unless otherwise authorised.

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[196] http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-index.aspx

[197] Charity and Security Network 'Nonprofit Groups End Talks with Treasury about Ineffectual Guidelines' (1 December 2010. http://www.charityandsecurity.org/news/Nonprofit_Groups_End_Talks_With_Treasury about_Ineffectual_Guidelines

[198] Charity and Security Network 'Nonprofit Groups End Talks with Treasury about Ineffectual Guidelines' (1 December 2010. http://www.charityandsecurity.org/news/Nonprofit_Groups_End_Talks_With_Treasury about_Ineffectual_Guidelines

[199] Both documents can be found on Treasury's website: http://www.treasury.gov/resource-center/ terrorist-illicit-finance/Pages/protecting-charities-intro.aspx

[200] US Department of the Treasury: Protecting Charitable Giving Frequently Asked Questions, June 4, 2010

[201] US Government official response to US donor profile, 4 April 2013 (see also the Treasury Department's FAQs: http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/Treasury%20Charity%20 FAQs%206-4-2010%20FINAL.pdf. The Charity and Security Network in December 2011 reported that nine US-based charities had been shut down for supporting terrorism, including seven Islamic organizations: Charity

Responsibility for policy and oversight of the humanitarian sector on counter-terrorism issues is shared across a number of different departments. These include Treasury, the State Department (including USAID/OFDA) and the Justice Department. Additionally, the US Internal Revenue Service has some oversight functions related to tax exempt status for NGOs.

The US plays a leading role in promoting international standards of oversight of the non-profit sector, including humanitarian NGOs. There is bilateral co-operation between government departments, or through international channels, such as the recently created Global Counterterrorism Forum.

Remarks

The US humanitarian community has expressed its concern that taken together, US legislation on material support, sanctions and counter-terrorism conditions in funding agreements have considerably curtailed their ability to provide humanitarian aid. In response, the US government has on several instances tried to reassure humanitarian NGOs that good faith efforts are not a concern to US counter-terrorism efforts. Such pronouncements, through public statements, guidance documents and FAQ, have not necessarily diminished the perceived risk of legal exposure of humanitarian NGOs operating in contexts with a pervasive presence of entities designated for their support to terrorism.

In interviews, officials from the State Department, USAID and Treasury stated that they were aware of the issues raised by the humanitarian community, but are not convinced that those measures have a significant negative impact. US officials noted that they have not seen a decrease in NGOs applying for funding in areas where designated groups are operating and US humanitarian funding continues to grow, including in such areas as Afghanistan, Pakistan, the Democratic Republic of Congo, Somalia, Mali and Syria. Officials did note that the totality of measures may have a "chilling effect", causing humanitarian actors to think twice before implementing programmes in areas where there may be a real or perceived risk. US Officials also perceived additional administrative tasks such as vetting in order to avoid US government funding providing support to terrorist organisations as a necessary cost of "doing business"; costs which the US as a donor would be willing to mitigate (by, for example, increasing the dollar value of grants dedicated to these internal processes). These tasks are seen as due diligence: a way to strengthen monitoring mechanisms and diminish the risk of legal and reputational damage.

The Treasury Department has been particularly criticised by humanitarian actors. Some report that decision-making is very slow and accompanied by a lack of transparency as to the rationale for specific decisions, which diminishes opportunities for external scrutiny and accountability. The

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and Security Network. *US Muslim charities and the war on terror: a decade in review*, January 2012 http://www.charityandsecurity.org/system/files/USMuslimCharitiesAndTheWarOnTerror.pdf

Treasury's voluntary guidelines have not been well-received by operational agencies, who feel they fail to reflect the challenges faced in the field. Humanitarian NGOs maintain that their concerns were not taken on board despite being given an opportunity to comment. Treasury officials, on the other hand, point to the Department's sustained initiatives over many years to reach out to humanitarian NGOs while continuing to publish a wide range of guidance and noted that the approach follows international recommendations (for example, FATF Recommendation 8). Several NGOs said they felt the non-profit sector was stigmatised and that Treasury does not trust them.

Another example of opposition between humanitarian NGOs and government agencies is the PVS. The humanitarian community has voiced its ongoing opposition to the PVS for several years. This dialogue has been between NGOs, government officials including USAID, the State Department, the Office of Management and Budget and members of Congress. The principal objections of the humanitarian community are that the PVS is unjustified programmatically; that it promotes the perception of NGOs as intelligence sources (and thus increases the security risk for aid workers); and that it is detrimental to the US' foreign policy objectives as it undermines the trusted relationship with USAID's partners, grantees and sub-grantees, as well as its beneficiaries. Furthermore US NGOs are concerned that the PVS and similar vetting schemes might contradict the US Congress' intent to restrict the programme's implementation in time and place. For their part, US officials noted that it is necessary given the US Government has identified persons with "terrorist associations" within the applicants for humanitarian funding that it has vetted.

c) General Remarks

Operationalising national counter-terrorism legislation in the context of humanitarian action is now a standard part of many donors' overall humanitarian response. While the approach of the donors researched for the study differs, there is a consistent and clear burden on humanitarian partners to be aware of and respond to national legislation and related donor risk management policies.

Counter-terrorism clauses in funding agreements

A number of donors including Australia, Canada and US now insert specific counter-terrorism clauses in all levels of funding agreements (the UK has discretion to insert clauses in "high-risk" contexts). While the wording of these clauses, and the action required of humanitarian partners can differ depending on the grantee (multilateral organisation, NGO or contractor), these conditionality clauses require humanitarian actors to be aware of counter-terrorism legislation and to take concrete steps to ensure that no funds are used directly or indirectly to support terrorism and/or designated groups. Most of the contractual clauses also require that these obligations be passed on to any implementing partners, contractors or sub-grantees by the primary grant recipient.

The language employed in these clauses in terms of required action on the part of humanitarian actors includes "best endeavours", "appropriate steps" and "to the best of its knowledge." For at least some donors interviewed, this is an explicit attempt to take into account the realities of humanitarian assistance and protection in the field. However, the exact nature of the obligations

imposed is often left to the humanitarian organisation to interpret despite the potential serious consequences for humanitarian actors, including criminal liability, reputational damage and funding cuts. All counter-terrorism clauses in funding agreements also contain some type of requirement to notify donors where funds are utilised by, or a "link" discovered to, an entity designated as terrorist leading some to question whether this could undermine the neutrality, real or perceived, of humanitarian actors in the field.

Counter-terrorism in the context of risk management

More generally, donors have sought to address counter-terrorism within broader risk management frameworks. Such measures include putting in place initial partner accreditation schemes which assess NGO partners' compliance with counter-terrorism legislation (Australia), or requiring general compliance with policies related to partner risk management. Many states issue guidelines which refer to the need to be aware of national counter-terrorism legislation (Denmark, Canada, EU, the Netherlands, the UK and the US). These informal and formal risk management frameworks place the burden on humanitarian partners to ensure compliance, and that they have appropriate procedures in place to mitigate potential risks. Some donors have acknowledged the increased administration and bureaucracy that counter-terrorism measures have imposed on implementing partners. Some are also engaged in dialogue with humanitarian actors to mitigate any unintended consequences of counter-terrorism measures on humanitarian action.

A second approach is to more directly regulate and oversee humanitarian action to ensure compliance with international and national counter-terrorism frameworks. One example is government-imposed restrictions on overseas financial transactions of Saudi-based humanitarian actors which have significantly impacted the ability of national Saudi NGOs and international NGOs with offices in Saudi Arabia to fundraise and channel funds for overseas humanitarian action. Another is increased partner vetting (formal or informal) as seen in the Qatar and US donor responses, where the donor requires a number of pieces of information to vet the partner and determine its suitability including against counter-terrorism guidelines. In the case of the US in the oPt, such vetting extends in certain circumstances to the beneficiary level, meaning that people in need can be excluded from individual assistance if they are flagged as having links to terrorism.

Changes in types of humanitarian partners

One of the consequences of increased donor focus on counter-terrorism is to channel aid through fewer and more "trusted" partners such as international organisations (UN and others), international NGOs. This may not always be in specific response to counter-terrorism policies but some donors (the Netherlands and Denmark for example) highlighted how developing more accountable relationships with fewer partners is one aspect of general risk management including that related to counter-terrorism. The change in aid partners was also apparent in the case of Saudi Arabia and Qatar where official government assistance is reportedly being increasingly channeled through international NGOs or more established associations such as the National Red Crescent societies

and at least in part due to the perception of their ability to manage risks associated with counter-terrorism.

IV Impact

a) Introduction and Overview

This study seeks to investigate the impact of counter-terrorism measures on principled humanitarian action. Underlying this, of course, is the more fundamental question of the impact on populations in need of humanitarian assistance. However, drawing a direct line between counter-terrorism measures and a given humanitarian situation is fraught with difficulty. It became clear early on in the research that comparing baseline data on a humanitarian situation, even if it were available, with data from after the imposition of counter-terrorism measures would be of little help. The humanitarian situation is the result of a range of different factors, and political, economic and social forces tend to play a greater role in shaping these than counter-terrorism measures, at least in the two cases studies presented below.

The research therefore focuses on an assessment of the impact of counter-terrorism measures on humanitarian response. The assumption made is that positive and negative impacts on the work of humanitarian organisations translate, through decreased quantity or quality of aid, into positive and negative impacts on the populations they assist: impact on humanitarian action is used as a proxy indicator for the impact on populations. In order to establish a chain of causation, this study has used direct interviews with humanitarian stakeholders to understand how counter-terrorism measures have affected their decision-making processes and ability to execute programmes according to the principles of humanitarian action. The resulting impact on affected populations was documented, wherever possible.

Counter-terrorism legislation and measures can be considered to have an impact on humanitarian action on three levels: (I) structural, affecting the framework of action itself and the standard operating procedures for humanitarian organisations; (II) operational, affecting programmatic decisions; and (III) internal, affecting the functioning of and coordination between humanitarian actors.

Structural

The effects of structural shifts, such as limitations on the ability of organisations to operate according to their guiding principles of neutrality, impartiality and independence, or to meaningfully engage with local actors, are felt through resulting programme decisions where they are most quantifiable. However they may also have a higher-level impact on how the organisation, or sector, is perceived in specific humanitarian situations as well as globally by beneficiaries, parties to conflicts and policy makers. This too can have negative effects on the ability to reach people in need.

Structural shifts are also significant in that, by altering the framework of action, they are likely to create skewed programme decisions in the future.

Operational

Operational impacts are likely to be felt most directly by beneficiaries. They include:

(1) Changes or restrictions in funding to geographic areas, beneficiaries or partners
(2) Changes or restrictions in programmes by donors or humanitarian organisations
(3) Self-censorship or self-imposed limitations by humanitarian actors because of perceived legal or reputational risks
(4) Decisions not to take funding from certain donors
(5) Other programmatic decisions linked to counter-terrorism measures

The operational impacts are more tangible than the structural ones, but can still be difficult to quantify, especially in cases of self-censorship on the part of humanitarian actors. For obvious reasons it is problematic to measure the impact of humanitarian projects which did not go ahead.

Internal

The third level of impact is internal, having to do with increased administrative burden and impediments to transparency and coordination between humanitarian actors. For many NGOs in particular, the multiplication of administrative requirements has been considerable. The effort required to understand and implement the various legal and policy requirements has slowed operations and increased costs. These impacts are likely to have a more indirect effect on beneficiaries. It seems logical, however, that for a finite amount of humanitarian funding and resources, any additional budgetary and time restrictions result in a decreased quantity and likely also quality of aid, as resources are spread more thinly. Certainly, for many of the humanitarian actors interviewed, these represent the most immediate counter-terrorism-related obstacles to effectively carrying out their work. For donors on the other hand, additional administrative work was often seen as part of necessary due diligence which agencies are expected to carry out, the costs of which some donors are explicitly willing to fund.

The two case studies presented below were chosen based on prior interviews and literature review indicating that in both contexts, counter-terrorism measures were relevant to humanitarian action. Both were examples of contexts where a designated terrorist group controlled territory and where there were sizeable humanitarian operations. It should be stressed that both Somalia and the oPt are difficult operational environments for humanitarian actors irrespective of counter-terrorism measures. Great care has been exercised to take these challenges into account in the research.

b) Case Study 1: Somalia

Context

Somalia, and in particular the south and central areas of the country, has faced repeated humanitarian crises for the past two decades. As of January 2013, more than one million people were considered in a humanitarian emergency and crisis (this figure had reduced by more than 50 per cent in the previous twelve months).[202] The country is host to one of the largest humanitarian operations in the world: the 2013 - 2015 Somalia Consolidated Appeal Process requested $1.3 billion for 177 participating humanitarian agencies for the first year. Emerging donors such as the United Arab Emirates (UAE), Saudi Arabia, Qatar and other Gulf States are increasingly responding to the humanitarian crisis and playing a larger role in the Horn of Africa including Somalia. In 2011 alone, Saudi Arabia provided more than $58 million according to UNOCHA's Financial Tracking System. Turkey's TIKA opened an office in Mogadishu in 2012 and called on other donors to open offices in Somalia. The Organization of Islamic Cooperation (OIC) has also played a humanitarian coordination role in response to the Somalia crisis.

In July 2011, famine was declared in two areas of southern Somalia, later expanding to six areas affecting an estimated 750,000 people.[203] Several areas where famine occurred were under the de facto control of Al-Shabaab, an entity subject to sanctions by the UN and listed as a terrorist organisation by a number of states including Canada, Norway, Sweden, the UK and the US. In February 2012, the UN's Food Security and Analysis Unit declared the end of the famine but warned that 2.34 million people throughout the country remained in crisis.[204]

One of the main factors that has contributed to the humanitarian crisis over the past few years, or at least shaped the international community's response to it, has been the lack of humanitarian access. For the past four years, the majority of international humanitarian organisations, including UN agencies, have been prevented at one time or another and to varying degrees from working in areas under the d*e facto* control of Al-Shabaab.[205]

As stated earlier, this study focuses on the impact of counter-terrorism measures on humanitarian response as a proxy indicator for the humanitarian situation. It should be noted that in southern Somalia, the impact of humanitarian action itself on alleviating humanitarian needs is particularly hard to track as organisations (and donors) are often prevented from monitoring and evaluating projects, thus highlighting many donors' concern that aid can be diverted or used for other purposes,

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[202] OCHA, Somalia: Humanitarian Dashboard – January 2013 (issued 28 February 2013). http://reliefweb.int/map/somalia/somalia-humanitarian-dashboard-january-2013-info-graphic

[203] Specifically : southern Bakool, Lower Shabelle region, the Balcad and Cadale districts of Middle Shabelle region, Bay region, the IDP settlements of the Afgooye Corridor, and the Mogadishu IDP community

[204] OCHA Somalia Situation Report No. 34, February 2012

[205] Obstruction of humanitarian assistance, including denial of access, has been a recurring problem in Somalia involving all parties to the conflict. This study has focused on events in Al Shabaab controlled areas to understand the impact of counter-terrorism measures on humanitarian action

including strengthening support for organisations on terrorist lists.[206] Humanitarian actors have relied, particularly over the past few years, on remote management from neighbouring Kenya, as well as implementation of programmes through local partners.

Timeline of selected events related to counter-terrorism concerns

2008	February	US lists Al-Shabaab as a terrorist organization
	October	Al-Shabaab expels two US NGOs
	November	UNSC Res. 1844 adds targetted sanctions to the Somalia sanctions regime
2009	August	Australia lists Al-Shabaab as a terrorist organisation
	April-October	US listing impacts USAID humanitarian aid in some parts of Somalia where Al-Shabbab was active
	November	WFP suspends operations in Al-Shabaab-controlled areas
		ECHO-funded projects in Al-Shabaab-controlled areas are suspended at the request of INGOS
2010	January	Al-Shabaab expels WFP
	March	Somalia Monitoring Group reports on instances of aid diversion by Al-Shabaab
	March	UNSC Res. 1916 introduces humanitarian exception to sanctions
		Canada and UK list Al-Shabaab as a terrorist organisation
	April	UN Somalia sanctions committee issues list of individuals and entities subject to sanctions under UNSC Res. 1844, including Al-Shabaab
		US adds Al-Shabaab to its List of Specially Designated Nationals pursuant to Executive Order 13536
2011	July	UN declares famine in parts of southern Somalia
		US Treasury issues OFAC license for USAID and US State Department projects and their grantees
	November	Al-Shabaab expels 6 UN agencies, 9 INGOs and 1 Somali NGO

[206] As an example, though the inability to evaluate projects predates this particular report, a Somalia Monitoring Group report (13 July 2012) states: " (…) aid agencies seeking to respond to crisis conditions encountered a variety of sophisticated strategies to attract, control and divert humanitarian assistance. (…) Such tactics, combined with adverse security conditions, undermined the ability of aid organizations to verify whether aid was actually reaching the intended beneficiaries or if those beneficiaries even existed." : http://www.un.org/sc/committees/751/mongroup.shtml

2012	January	Al-Shabaab bans the ICRC from areas under its control
	February	UN declares end to the famine
	October	Al-Shabaab bans large Islamic INGO

Specific legal framework

In November 2008, the UNSC adopted Resolution 1844, which imposed targetted sanctions on individuals and entities designated as having violated an arms embargo, resulting from UNSCR 733 (1992).[207] That is, they had engaged in acts threatening the peace or stability of Somalia by opposing the Transitional Federal Institutions or the African Union Mission in Somalia (AMISOM) – or obstructing the delivery, access to or distribution of humanitarian assistance. These criteria were expanded in July 2011 to include individuals and entities found to be recruiting or using children in armed conflicts or to be responsible for the targeting of civilians.[208]

The UN list of designated individuals was issued in April 2010, and subsequently updated in February 2012. It lists Al-Shabaab and 13 individuals.[209] UN listed individuals and entities are subject to a targetted arms embargo, a travel ban and an assets freeze. Under the terms of the assets freeze, UN Member States are ordered to "ensure that any funds, financial assets or economic resources are prevented from being made available by their nationals or by any individuals or entities within their territories, to or for the benefit of such individuals or entities".

In March 2010, the UNSC adopted Resolution 1916. Among other matters, this resolution provided that the 1844 targetted sanctions "shall not apply to the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia". In the eyes of several members of the humanitarian community, UNSCR 1916 effectively acknowledged the reality of delivering aid in Somalia and prioritised the humanitarian imperative over watertight enforcement of the sanctions. The exemption applies to delivery of assistance by UN agencies and "humanitarian organizations having observer status with the United Nations General Assembly" – which includes the ICRC and the International Federation of Red Cross and Red Crescent Societies (IFRC) – and their implementing partners. The UNSC requested the Humanitarian Coordinator in Somalia to report to it on the implementation of the

[207] The arms embargo as modified by subsequent resolutions was partially lifted in March 2013 for a period of 12 months. UNSCR 2093 (6 March 2013)
[208] UNSCR 2002
[209] List http://www.un.org/sc/committees/751/pdf/1844_cons_list.pdf. The list charges Al-Shabaab with having "engaged in acts that directly or indirectly threaten the peace, security, or stability of Somalia, including but not limited to: acts that threaten the Djibouti Agreement of August 18, 2008, or the political process; and, acts that threaten the Transitional Federal Institutions (TFIs), the African Union Mission in Somalia (AMISOM), or other international peacekeeping operations related to Somalia. Al-Shabaab has also obstructed the delivery of humanitarian assistance to Somalia, or access to, or distribution of, humanitarian assistance in Somalia."

exemption, as well as on any impediments to the delivery of humanitarian aid, initially every 120 days. The exemption was continued in March 2011[210] and July 2012.[211]

The EU implemented resolutions 1844 and 1916 through a Council Decision on 26 April 2010.[212] The humanitarian exemption in 1916 is reproduced verbatim. The EU Regulations are directly applicable in EU Member States, meaning that the humanitarian exemption is also part of national law. In France, the text of the EU regulation was slightly modified to make clear that the humanitarian exemption applied to NGOs who were part of the CAP for Somalia.[213] In the UK, an additional test was introduced. The text of the UNSC Resolution exempts only economic or other resources necessary to ensure the timely delivery of humanitarian assistance, without indicating who should decide whether they are necessary. The UK implementing regulations specify that the person making the resources available should believe them to be necessary and there should be no reasonable cause for that person to suspect otherwise.[214]

Most other jurisdictions have also implemented the humanitarian exemption. The US did not include the exemption in its initial implementation of the sanctions, which were enacted by Executive Order 13536 on 12 April 2010, as soon as the associated list was issued. The standard humanitarian exception in the US IEEPA Act was overridden, and the 1916 exemption was omitted. However, after famine was declared in July 2011, the US Treasury issued a broad licence to the State Department and USAID in terms similar to the 1916 exemption. A group of NGOs lobbied the US government to issue a general licence, which would apply to non-US government funded humanitarian operations in Somalia, through the NGO consortium InterAction, but this was not successful.[215] Nationals and organisations of most of the jurisdictions examined here, with the exception of US organisations operating exclusively with private funds,[216] were not therefore in violation of the sanctions regimes where resources are transferred to Al-Shabaab within the terms of the UNSCR 1916 exemption (as implemented in the domestic jurisdiction).

However, there may still be some criminal liability in some jurisdictions. The term "terrorism" is not referred to in the UNSCR1844 sanctions regime but Al-Shabaab is listed as a terrorist organisation by a number of states. Criminal law prohibitions on supporting (foreign) terrorist groups in those jurisdictions therefore apply to transactions with Al-Shabaab.

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[210] UNSCR 1972
[211] UNSCR 2060
[212] EU Council Decision 2010/231 and associated regulation 356/2010
[213] Doc E7185, 20 March 2012
[214] Somalia (Asset Freezing) Regulations 2010
[215] USAID did allow US-funded NGOs to include activities funded by other donors that were consistent with the USAID-funded programme into the USAID award. This "leveraging" in effect broadened the scope of the license
[216] US organisations not receiving US Government funding, and therefore not covered by the State Department/ USAID licence, can, nonetheless, apply for an individual licence for their activities

Donor policies

The following section lays out donor policies and conditions in funding agreements which have been specifically developed for Somalia and thus operate in parallel or in addition to broader counter-terrorism donor policies and conditions outlined in Section III.

Canada

Canada has developed an internal document as a tool to help its programme officers better understand the possible risks to partners in Somalia of violating Canada's counter-terrorism laws. This document includes questions on the partner organisation's reliability and credibility, as well as details on the project's implementation related to potential breaches of the Criminal Code of Canada. It has been developed as a notional guide or "aide memoire" and has not become part of Canada's standard due diligence requirements for project funding.

The United Kingdom

The UK may include specific counter-terrorism clauses in its partner agreements in high risk contexts such as Somalia (see Section III). In Somalia, the Foreign and Commonwealth Office (FCO) has also included the following clause in its Accountability Grant Agreement related to 'Information on Employees/Sub-contractors':

> *11(1) The Grantee shall provide to the Authority upon request and to the extent permitted by the Data Protection Act 1998 any and all information regarding each of its employees and sub-contractors (including confidential personnel information) as the Authority may require in order to carry out any checks which the Authority (in its absolute discretion) deems necessary.*

While the clause is included in stabilisation contracts and therefore not strictly for humanitarian action, the distinction between humanitarian, development and stabilisation activities is not always clear, especially in conflict settings. The broad language of the clause related to information on sub-contractors has been taken by some grant recipients to require *de facto* partner vetting as the grantee must provide the FCO on request "any and all information regarding each of its … sub-contractors … as the Authority may require in order to carry out checks".

In addition, the Charity Commission for England and Wales issued a guidance document on "raising funds for or carrying out humanitarian operations in response to the crisis in Somalia and East Africa" in July 2011.[217] This coincided with the debate in the humanitarian community on how to reconcile responding to the famine, with means proportionate to the crisis, with the risk of contravening UK and other legislation on providing support to terrorist groups. The purpose of the guidance was to "to help these charities by highlighting the key issues for trustees to consider and

[217] http://www.bond.org.uk/data/files/jobs/2011_07_22_E_Africa_crisis_-_guidance_for_charities.pdf

what they need to do to ensure they manage as far as they can their exposure to these risks, do not inadvertently support proscribed terrorist groups and ensure they work within the law."

Acknowledging that, in Somalia, charities were likely to have "some degree of contact and interface with" terrorist groups, the guidance reminds trustees they "must ensure that their charity does not commit any criminal offence under UK counter-terrorism legislation; this includes not providing funds or financial assistance to any terrorist groups". The Charity Commission's guidance to organisations operating in the area was summarised in four points. Charities should:

(1) Be vigilant to ensure that the charity's funds, property, volunteers and aid are not used for illegal purposes and activities
(2) Be alert to ensuring the charity does not inadvertently appear to support or condone terrorist groups, their activities or any other activities which are inappropriate for charity
(3) Not base their decisions on an automatic acceptance that all organisations, and those they work with, have an association with terrorist groups
(4) Ensure the safety and security of their staff

The United States

USAID has specific restrictions in its humanitarian grants to partners operating in Somalia. Since the listing of Al-Shabaab by the US State Department as a Foreign Terrorist Organization and Specially Designated Global Terrorist in February 2008, USAID includes "Somalia Special Conditions" in its agreements as part of enhanced due diligence requirements. The conditions, as written after the OFAC license was issued, state[218]:

> *1. The Grantee agrees that it and/or its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) will take all reasonable steps to minimize knowing and voluntary payments or any other benefits to al Shabaab, or to entities controlled by al Shabaab, or to individuals acting on behalf of al Shabaab (collectively, "excluded parties"). Such payments or other benefits would include:*
> *a) cash facilitation fees or other similar fees at roadblocks, ports, warehouses, airfields or other transit points to excluded parties;*
> *b) purchases or procurement of goods or services from excluded parties; and*
> *c) payments to al-Shabaab as the de facto municipal authority.*
> *2. The Grantee and its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) agree to exercise enhanced due diligence when providing assistance to Somalia under this agreement to avoid such payments or benefits to excluded parties.*
> *3. In the event that the Grantee or its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) makes a payment or provides a benefit to*

[218] Prior to the OFAC license being issued, the conditions precluded all payments to Al-Shabaab, whereas the conditions reproduced above mention "all reasonable steps" to minimise benefits to Al-Shabaab

excluded parties, the Grantee shall, in accordance with 22 CFR 226.51(f) and within ten days after becoming aware of such payment or provision of benefit, notify the Agreement Officer in writing, with a copy to the AOTR, of such payment or provision of benefit. This notification shall include the following information:

a) Factual description of each such event;

b) Amount of funds expended or other benefit provided for each such event;

c) Safeguards and procedures, including management and oversight systems, that were in place to help avoid the occurrence of such event; and

d) Explanation of the reasons for each such payment or each such benefit provided, including whether it was made or provided knowingly, voluntarily, accidentally, unintentionally, incidentally, or forced.

On 29 July 2011, after the UN had declared famine in parts of southern Somalia and following several months of negotiations within government but also pressure from the humanitarian community, the Treasury Department's OFAC provided a license to the State Department and USAID authorising them to:

> *engage in certain transactions as requested by Secretary Clinton on behalf of the Administration (…) associated with the provision of US funds to: (a) the United Nations and its specialized agencies or programs; (b) humanitarian organizations having observer status with the UN General Assembly that provide humanitarian assistance; (c) their implementing partners; or (d) other humanitarian organizations participating in the current United Nations Consolidated Appeal for Somalia, for the provision of urgently needed humanitarian assistance in Somalia, notwithstanding that benefit from such transactions may be received directly or indirectly by individuals and entities with whom transactions are otherwise prohibited by the Global Terrorism Sanctions Regulations, 31 C.F.R. Part 594, the Foreign Terrorist Organizations Sanctions Regulations, 31 C.F.R. Part 597, or the Somalia Sanctions Regulations, 31 C.F.R. Part 551.* [219]

The effect of this clause was similar to that of the UNSCR 1916 humanitarian exception in that provided greater flexibility to humanitarian actors in providing assistance in areas under the de facto control of Al-Shabaab.

In an attempt to clarify what was legally permissible for humanitarian operations not covered by the licence on 4 August 2011, the Treasury published online guidance.[220] In relation to a query about inadvertent cash payments to Al-Shabaab it noted that:

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[219] SOM-7a, renewed for a year in August 2012

[220] *Frequently Asked Questions Regarding Private Relief Efforts in Somalia* www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia_faq.pdf

> *"to the extent that such a payment is made unintentionally by an organization in the conduct of its assistance activities, where the organization did not have reason to know that it was dealing with al-Shabaab, that activity would not be a focus for OFAC sanctions enforcement."*[221]

This message reinforced one given by the State Department two days earlier which had stated that "good faith efforts to deliver food to people in need will not risk prosecution".

The legal consequences of this policy guidance were not entirely clear. Humanitarian organisations were concerned that acting within the terms of the guidance still might not protect them from prosecution by the Department of Justice under the material support statute (see further discussion in impact section, below).

The declaration of famine also delayed the implementation of a proposed vetting system for Somalia. NGOs had been unhappy with the proposal. They felt it represented the introduction by stealth of the PVS, which had been approved by Congress for limited pilot only in five (other) countries, and to which the NGO community was voicing strenuous objections. In a letter dated April 2011 to the USAID/OFDA Director, seven US NGOs asked that the vetting procedure, known as the Information Sheet, be revoked. They argued it would significantly impede US humanitarian assistance, undermine existing due diligence approaches and pose security risks to aid workers. The letter made it clear that such an approach at a time when famine remained a "serious possibility" was particularly unwelcome.

Other

Australia, the EU, Denmark, Netherlands, Norway Qatar, Saudi Arabia and Turkey do not have counter-terrorism conditions specific to Somalia.[222]

Examples of impact

This section provides a list of impacts on humanitarian action that can be traced back to counter-terrorism legislation, UN sanctions and consequent restrictions in funding agreements. These are clear instances where humanitarian action was affected on structural, operational and internal levels.

Structural

The denial of access by Al-Shabaab and counter-terrorism measures are distinct but probably related obstacles to humanitarian action. The expulsions of international humanitarian actors from south central Somalia over the past few years are due to a variety of reasons, including a climate of distrust between the humanitarian community and belligerents as well as the conflation of humanitarian and political agendas. While the long list of accusations levelled against humanitarian

[221] : http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#som
[222] The paper only considers the selected donor states

agencies by Al-Shabaab, show that access is not solely correlated to perceptions of strict neutrality and impartiality, counter-terrorism measures are viewed, especially by humanitarian practitioners, as having contributed to an already polarised environment in which humanitarian actors are not perceived as neutral, impartial or independent.[223] For example, Islamic Relief was banned by Al-Shabaab on 8 October 2012 for, among other things, "covertly extending the operations of banned organizations, particularly WFP".[224] Islamic Relief subsequently took the decision to freeze operations in areas controlled by Al-Shabaab.

The listing of Al-Shabaab as a terrorist organisation by the US in February 2008 and subsequently by a number of other Western countries may have led Al-Shabaab to impose greater restrictions on humanitarian assistance. Shortly after the US listing, Al-Shabaab banned two major American NGOs from operating in areas under its control. The inclusion of "obstructing the delivery of humanitarian assistance to Somalia" as one of the grounds for sanctions –in what had originally been an arms embargo – worried humanitarian actors. They were concerned that including humanitarian operations within the purview of the sanctions would jeopardise their ability to engage with groups targetted by the sanctions, which by April 2010 included Al-Shabaab.[225] Indeed, the neutrality of humanitarian action, or lack thereof, remains a contested issue. Controversially, the former Special Representative of the Secretary-General accused humanitarian agencies of supporting Al-Shabaab by operating in southern Somalia.[226] In November 2011, sixteen humanitarian actors were expelled following accusations by Al-Shabaab of, among other things, "collecting data" and "lacking complete political detachment and neutrality with regard to the conflicting parties in Somalia".[227]

The perception that the humanitarian community was taking sides against Al-Shabaab was potentially strengthened by the reporting requirement associated with the humanitarian carve out in UNSCR 1916. As noted earlier, the resolution requested the Humanitarian Coordinator in Somalia to report to the UNSC on the implementation of the humanitarian exemption. Relevant UN agencies and humanitarian organisations having observer status with the UNGA were asked to provide information relevant to the report. In practice, this meant that humanitarian actors – later defined as those participating in the CAP and/or attending cluster meetings – were to report all instances of aid diversion or payments made that could benefit Al-Shabaab or listed individuals. For many in the humanitarian community, this was a cause for concern as it required them to pass on information on one party to the conflict and involved them in the sanctions process, thus putting their neutrality in jeopardy. Thus far, reports by humanitarian actors have been irregular and rather brief.

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[223] This is a viewpoint widely held in the humanitarian community, and one which was confirmed through interviews with individuals in contact with Al-Shabaab

[224] See for instance Al-Shabaab's twitter feed *HSM Press Office* at http://twitter.com/HSMPress. The account has been suspended since January 2013

[225] Interviews, Nairobi, March 2012

[226] Interview with Humanitarian Coordinator for Somalia, Nairobi, 26 March 2012

[227] : http://theunjustmedia.com/Islamic%20Perspectives/Nov11/Harakaat%20Al-Shabaab%20Al%20Mujahideen%20OSAFA%20Fact-finding%20Committee%20Conducts%20Organisation%20Performance%20Appraisal.htm

Counter-terrorism or other measures taken against Al-Shabaab by the international community cannot solely shoulder the blame for the humanitarian community's woeful lack of access. It could be argued that the community had, as a whole, compromised its principles over the course of the past two decades by failing significantly to distance itself from political and military efforts. As an ODI paper suggests: "wittingly or unwittingly, directly or indirectly, for many aid agencies working in Somalia in the post-UNOSOM period humanitarian access has often not been compatible with a strict interpretation of humanitarian principles."[228] However, counter-terrorism measures may have contributed to placing humanitarian actors in opposition to Al- Shabaab and to reducing the former's ability to implement life-saving humanitarian action.

Operational

At an operational level, the correlation between counter-terrorism measures and humanitarian action is more straightforward. Perhaps most significantly, US funding was considerably curtailed as a direct result of counter-terrorism measures from mid-2009 to mid-2011.[229] Some months after the listing of Al-Shabaab by the US State Department, USAID reviewed its portfolio of projects. In mid 2009, USAID stopped processing new humanitarian grants to UN agencies and NGOs and existing grants agreements were not renewed. According to humanitarian actors and government officials interviewed, the funding reduction was due to USAID concerns about contravening US law. The listing of Al-Shabaab as a terrorist organisation in 2008 meant that a single instance of diverted aid or payments to local authorities was now potentially a crime under US law for which both USAID and its partners could be held accountable. There was an impasse for seven months before negotiations over the terms of funding between USAID and its partners were successful and USAID funding was resumed. Among the new conditions introduced were the enhanced due diligence requirements set out above. Between 2008 and 2010, earmarked US aid to Somalia went down 88 per cent whereas other donors' funding remained relatively constant.[230] Most of the remaining US humanitarian funding shifted north to more stable areas of Somalia, namely Puntland and Somaliland, where, however, humanitarian needs were less acute.

The drying up of USAID funds had a significant impact on the quantity of life-saving goods and services humanitarian organisations relying on USAID funds were able to deliver. As OCHA noted in its August 2009 Humanitarian Overview: "the delay in reaching a decision on humanitarian funding for Somalia by the US government is already impacting on many agencies and their programmes, creating a planning challenge. (…) The more immediate concerns relate to the food aid pipeline to

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[228] Hammond, Laura and Hanna Vaughan-Lee. *Humanitarian Space in Somalia: A Scarce Commodity*, HPG Working Paper, April 2012, , p.15 http://www.odi.org.uk/publications/6430-humanitarian-space-somalia-aid-workers-principles

[229] The following chain of events has been compiled from off-the-record interviews with humanitarian actors and government officials

[230] U.S. humanitarian funding to Somalia was approximately $237m in 2008, $99m in 2009 and then further dropped to $29m in 2010. The combined contributions of the European Union, Japan and the UKover the same period increased by 18 per cent

which the US government is a major contributor." WFP confirmed that the US funding shortfall had an impact, though mitigated in part by funding agreements negotiated prior to the suspension of aid. In September 2009, OCHA noted that WFP assisted 1.3 million people with 22,168 metric tons of assorted food commodities when its requirements for that month were 48,000 metric tons for three million Somalis, well over double that amount. Shortly after, WFP ceased operating in areas under the control of Al-Shabaab completely, for reasons which are still the subject of dispute. Some speculate that it was to avoid liability under US counter-terrorism law. According to WFP, it was due to restrictions on access imposed by Al-Shabaab.[231]

At least three American NGOs stopped operating in southern Somalia in 2010, citing lack of funding as one of their reasons.[232] In an April 2011 letter to the USAID/OFDA Director, seven US NGOs explained that they "subsequently shifted OFDA-funded activities to the Northern and Central regions which are beyond Al-Shabaab control. Deteriorating security conditions in the South contributed to this shift, but as a practical matter the OFAC Conditions preclude OFDA-funded activities in Shabaab-controlled areas even if the security environment improves." This sentiment was echoed by humanitarian actors who confided that US Embassy officials were concerned that an interruption in US funding would adversely affect not only the beneficiaries of US assistance but the broader humanitarian system in Somalia.[233]

Other donors shared concerns about potential liability arising from aid diversion in southern Somalia and payments or other inadvertent support to Al-Shabaab. As a head of a UN humanitarian agency explained: "when the US stops funding, there is a snowball effect on other donors." [234]

Denmark was reported to have seriously considered suspending its aid in September 2009, but took a different path after discussion at the highest level within the Ministry of Foreign Affairs. Characterising the halting of assistance as contrary to humanitarian principles, the Ministry instead provided capacity support in risk management to its partners in the Horn of Africa, and committed to developing a set of operational principles in dialogue with other donors to minimise misuse of aid.[235] In November 2009, some ECHO-funded projects were suspended in southern Somalia, though the suspensions were initiated by the international NGOs in an attempt to take a common principled position in the face of demands from Al-Shabaab.[236]

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[231] Interviews, Nairobi, March 2012
[232] Interview with INGO, Washington, DC, March 23 2012; Interview with Humanitarian Coordinator for Somalia, Nairobi, 26 March 2012
[233] Interviews, Nairobi, March 2012
[234] Interview, Nairobi, 28 March 2012
[235] Interview, September 2012
[236] Interviews, Nairobi, March 2012. In the end, the suspensions were lifted after two to fourmonths when it was apparent that Al-Shabaab would not lift the demands but would also not enforce them fully

Taxation by Al-Shabaab was a concern for humanitarian actors both because they felt it pushed the limits of acceptable compromise, and because it could constitute a potential criminal offence[237]. The degree to which counter-terrorism liability influenced decision-making on this varied between organisations. One NGO interviewed, which managed in the end to avoid paying the tax, had taken a decision at headquarters to close desperately needed programmes rather than pay tax to Al-Shabaab if the latter could not be avoided. The extensive discussions leading up to this decision revolved around humanitarian principles rather than counter-terrorism law.[238] Another, who did stop a project for three months in 2010 over the refusal to pay tax to Al-Shabaab, cited compliance with counter-terrorism law as a major factor in their decision.[239] More broadly, there is evidence that in response to what was a Horn of Africa-wide food crisis, several large NGOs allocated a disproportionate amount of aid to Kenya and Ethiopia in part due to counter-terrorism concerns.[240]

Some humanitarian actors reported that counter-terrorism legislation in countries such as Canada, Denmark, the UK and the US, as well as restrictions in funding agreements, had a "chilling effect."[241] Operational decisions were made not strictly according to need but, in part, to minimise organisations' exposure to legal liability. This "chilling effect" was also due to uncertainty. As one aid worker explained: "the level of understanding of counter-terrorism measures amongst the humanitarian community was low." Many were unsure what was permitted, whether licenses were needed and whether organisations and individuals could be held liable. The confusion, which arguably could have been prevented through better risk and knowledge management by individual organisations and clarification of policies/better guidelines by donors, resulted in a range of behaviours, from dismissal of the risk to refusal to operate in certain areas or to take funding from certain donors.[242] One UN agency tapped into alternative pooled funding mechanisms partly as a result of counter-terrorism restrictions from Canada, the UK and US that were considered problematic.[243] In such circumstances, the risk for humanitarian actors is not only legal but also reputational. If an aid group is linked in the public eye with an entity listed as terrorist, the potential ramifications for funding and reputation with their stakeholders could be serious.

This difficult environment, in which humanitarian aid was under scrutiny, was compounded by the publication in March 2010 of the report by the Monitoring Group on Somalia.[244] Widely published in the media, it included a number of instances of aid diversion and raised questions about accountability of aid in southern Somalia. According to an UN official, it pushed donors to make more stringent demands on NGOs.

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[237] Direct and indirect taxation or payments to Al-Shabaab remain an issue. See Monitoring Group report at: http://www.un.org/sc/committees/751/mongroup.shtml - 13 July 2012
[238] Interview, Nairobi, 27 March 2012
[239] Interview, Nairobi, 28 March 2012
[240] Interviews, Nairobi and London
[241] Interviews with humanitarian NGOs, Nairobi, March 2012
[242] Interview, Nairobi, 28 March 2012
[243] Interview, Nairobi, 29 March 2012
[244] http://www.un.org/sc/committees/751/mongroup.shtml - 10 March 2010

Thus a number of factors contributed to an unfavourable climate for humanitarian operations in 2010 and early 2011. During that period, FAO's Food Security and Nutrition Analysis Unit (FSNAU) and USAID's Famine Early Warning Network (FEWSNET) issued a number of warnings about the effects of the drought on the nutritional situation, particularly in southern Somalia. Yet the 2011 Consolidated Appeal was 23 per cent lower than in 2010. As the IASC Real Time Evaluation of the Somalia drought crisis response describes:

> *(…) agencies and donors were slow to wake up to full implications of the early warning information. Various factors were at work here. The funding climate was poor, donors were highly risk averse in the light of the Monitoring Group's report, and full US OFAC restrictions were still in place – meaning in effect that the US was out of the picture as a donor until the middle of 2011. (…) The lack of available funding in the period August 2010 to June 2011 was a major constraint on early action in response to the crisis.*[245]

The situation changed dramatically with the declaration of famine in July 2011. There was significant public pressure for donor governments to respond. Several international NGOs, however, particularly those which might be affected by US legislation, were still holding back. As detailed in the donor conditions section, above, the US administration took action. Within a week from July 29, the Department of the Treasury had issued a license to USAID to engage in certain transactions otherwise prohibited in Somalia in terms similar to the UNSCR 1916 carve out, and had informed other actors not in receipt of US government funds that incidental benefits to Al-Shabaab were not a focus for OFAC sanctions enforcement. The US Department of State held a briefing in which they communicated that "good faith efforts to deliver food to people in need will not risk prosecution."

The US NGO community was ambivalent about these measures.[246] First, the OFAC license for Somalia covered the US State Department, USAID and their contractors and grantees, thus it did not cover all charities and their (private) donors.[247] Second, the statements from the US State Department and OFAC were not binding on the US Department of Justice and so provided no real protection against prosecution under the material support statute. Nonetheless, humanitarian actors engaged with USAID and the US State Department and implemented humanitarian programmes to respond to the famine.

The reaction to the famine declaration from other donors was also swift. The 2011 CAP was doubled in August to more than $1 billion - and subsequently was funded up to 86 per cent (the total contribution was $1.3 billion, including contributions outside the appeal). If humanitarian actors

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[245] IASC Real Time Evaluation of the Somalia drought crisis response (3.1.2; 6.2.1; 6.5), http://reliefweb.int/report/somalia/iasc-real-time-evaluation-humanitarian-response-horn-africa-drought-crisis-somalia

[246] See for example http://thehill.com/blogs/congress-blog/foreign-policy/179385-how-to-help-somalia

[247] NGOs operating with private funds could apply for a specific license with OFAC

felt that donors were engaging in brinkmanship until the famine declaration, as one UN official said, then credit must be given to those same donors for their rapid turnaround once famine was declared.

It was not only the volume of funding but also the terms on which it was disbursed that changed dramatically with the famine declaration. In some quarters the pressure was no longer on avoiding aid diversion or taxation payments to Al-Shabaab, but on delivery to beneficiaries in famine areas. By many accounts, there was a shift in priorities. Many humanitarian actors interviewed described a shift from a cautious environment to one where aid was delivered at all cost. One NGO increased its budget by a factor of 15 within a few months. It was asked by its donor to deliver plane loads of unidentified goods it had never ordered and whose contents it could only check when the plane landed in Mogadishu.[248] Given prior counter-terrorism concerns, this example highlights that the debate had certainly shifted.

Between the beginning and the end of 2011, the context in which aid could be delivered had not significantly changed and neither had counter-terrorism legislation and policies been modified. Rather, the urgency of the situation, and perhaps the public scrutiny in particular, prompted donors to be more flexible and humanitarian actors less risk-averse (no such flexibility had been evident in response to FSNAU's and FEWSNET repeated warnings since 2010). There appears to have been a shared understanding in the later part of 2011 between humanitarian actors and donors that a "zero tolerance" interpretation of counter-terrorism restrictions would present an unacceptable obstacle to the humanitarian imperative to save lives in a crisis of this magnitude.

For donors, greater oversight pre-famine was both in the interest of accountability and adherence to counter-terrorism legislation. This view is shared by some implementing agencies: the head of a large NGO commented that "accountability went up because of the political environment derived from the sanctions regime."[249] However, given similar levels of aid diversion in Transitional Federal Government controlled areas, and the perceived lack of donor concern about this phenomenon, the majority of humanitarian actors understood donor scrutiny as a response to a counter-terrorism agenda, not one to improve accountability. In addition, for many humanitarian actors, the suspension of projects and the level of scrutiny demanded went too far towards risk avoidance at the expense of responding to needs.

This debate between humanitarian needs vs. risks made its way to Washington. Although the US responded fast when famine was declared, it had cut funding at a period when the FSNAU and FEWSNET reports were foreshadowing the issue. This prompted prominent members of the US Congress to make public declarations on the need to improve US internal processes to distribute humanitarian assistance without compromising the country's counter-terrorism objectives. The

[248] Interview, Nairobi, March 2012
[249] Interview, Nairobi, 27 March 2012

Fiscal Year 2013 Senate Appropriations Bill included two provisions "requiring the Department of Treasury's Office of Foreign Assets Control (OFAC) and the United States Agency for International Development (USAID) to submit reports to Congress addressing specific problems relating to delays in their response to the 2011 famine in Somalia."[250]

Internal

Alongside traditional donors such as the EU, the UK and the US, some of the largest contributors to Somalia during the famine crisis included Saudi Arabia and Turkey. The OIC, through its Humanitarian Coordination Office in Mogadishu, played an important coordination role for many Member States and Islamic NGOs, particularly after the expulsion of many other UN agencies and NGOs in late 2011.[251] As the OIC did not operate within the same restrictions as donor funded NGOs, they have been able to negotiate continued access with all local parties.[252] However, a reported internal impact felt particularly by Islamic NGOs was trouble receiving project funds, even from the UN, due to international banking restrictions imposed as part of counter-terrorism efforts. These led to delays in project implementation.[253] Some NGOs reported exchanging money from US dollars to Euros or another currency to expedite international transfers and then re-exchanging once it had reached the field (often losing out on foreign exchange rates). [254] For some Islamic NGOs cash distributions were stopped a together in favour of in-kind donations for fear of the ramifications of any aid divergence, often following legal advice.[255] Interviewees pointed out that significantly more funding could have been provided from Gulf states. While substantial amounts were donated by royal families, private individual donations were obstructed by financial procedures introduced to counter-terrorism which hit Muslim donors and recipients particularly hard (see Box 3 on Impact on Financial Transactions).

c) Case Study 2: occupied Palestinian territory

Context

While aid to the oPt has been affected by concerns about diversion to terrorist groups for some time, the situation intensified with the coming to power of Hamas in the Gaza Strip in June 2007.[256] By late 2003, Hamas was already listed as a terrorist organisation and subject to sanctions by a number of Member States who are also significant humanitarian donors such as Australia, Canada, EU, Japan and the US. In January 2006, after Hamas won the majority of seats in the Palestinian Parliamentary elections the Quartet on the Middle East – made up of the UN, the US, the EU and

[250] http://www.charityandsecurity.org/news/Appropriations_Report_Tres_Address_Barriers_Disaster_Response
[251] *Ibid*
[252] Interviews, Somalia and Nairobi (October 2012)
[253] *Ibid*
[254] *Ibid*
[255] Interviews, Nairobi and Somalia, October 2012
[256] The examples in this case study come predominantly from the Gaza Strip because the impact of counter-terrorism measures on humanitarian action are more apparent than in the West Bank. For a more complete picture, see forthcoming *'SDC study on counter-terror legislation and aid delivery in oPt'*

Russia – called on them to commit to the principles of non-violence, recognition of Israel and acceptance of previous agreements and obligations. In the absence of such a commitment, the bulk of aid to Gaza – from Quartet members, as well as other traditional Western donors – circumvents the *de facto* authorities. Humanitarian actors must reconcile counter-terrorism restrictions with the requirements of effective humanitarian action, which would call for coordination with local authorities under normal circumstances.

After the 2006 election, a power struggle between Hamas and Fatah ensued and by June 2007, Hamas became the *de facto* authority in the Gaza Strip. Israel then imposed a land, sea and air blockade that restricted the movement of people in and out of Gaza, the import and export of goods as well as access to agricultural land and fishing waters. The humanitarian situation in Gaza is a consequence of this blockade, which continues today. Out of a population of 1.6 million, approximately 44 per cent are food insecure and 80 per cent are aid recipients.[257]

Timeline of selected events related to counter-terrorism concerns

1995	January	US lists Hamas as a terrorist organisation
2001		UK lists military wing of Hamas as a terrorist organisation
2002	October	US Congress imposes vetting obligations on USAID-funded West Bank and Gaza programmes in Appropriations Act
	November	Canada lists Hamas as a terrorist organisation
2003	May	Australia lists Hamas as a terrorist organisation
	June	EU lists Hamas as a terrorist organisation (applicable in Member States)
	October	Japan lists Hamas as a terrorist organisation
2006	January	Hamas wins majority of seats in Palestinian Parliamentary elections
	March	Canada announces no-contact and no-aid policy to Hamas
	May	US passes Palestinian Anti-Terrorist Act restricting funding and contact
2007	June	Hamas becomes the *de facto* authority in the Gaza Strip Quartet promotes no-contact policy
2008	December	"Operation Cast Lead" – a three-week armed conflict with severe

[257] UN OCHA. *Five Years of Blockade. The Humanitarian Situation in the Gaza Strip*. June 2012. http://domino.un.org/UNISPAL.nsf/22f431edb91c6f548525678a0051be1d/d8fec28d9b541e8d85257a1d004e5bb0?OpenDocument

		humanitarian consequences
2009	Summer	Hamas requests NGOs operating in Gaza to pay registration fees
2011	May	Hamas requests audits of NGOs operating in Gaza
	October	Hamas requires foreigners to obtain visas to enter Gaza
2013	March	Hamas announces exit permit requirements for Palestinian staff of international organisations

Specific legal framework

Hamas is not subject to any UN terrorism-related sanctions. However, it is one of a number of Palestinian entities designated as a terrorist organisation by selected states. Israel designated Hamas as an unlawful organization in 1989.[258] In 1995, acting under the IEEPA, US President Clinton issued Executive Order 12947, "Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process." Determining the existence of a national emergency due to acts committed by foreign terrorists, Executive Order 12947 prohibited transactions with and blocked the assets of a list of groups and persons including Hamas.[259] The humanitarian exception built into the IEEPA for "donations … of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering" was overridden on the grounds that it would seriously impair the President's ability to deal with the national emergency. [260]

The EU designated the armed wing of Hamas as a terrorist organisation in its first list annexed to the 2001 Council Common Position on Combatting Terrorism. In 2003 it added Hamas in its entirety.[261] Hamas is therefore treated as a terrorist organization by all EU Member States, who must ensure*, inter alia*, that "funds, financial assets or economic resources or financial or other related services will not be made available, directly or indirectly, for the benefit of" Hamas. In addition, post September 2001, Hamas and/or its military wing has been designated by such non-EU states as Canada, Australia, Japan and Jordan.

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[258] Defence (Emergency) Regulations (State of Emergency) 1945

[259] The other members of the list were: Abu Nidal Organization (ANO), Democratic Front for the Liberation of Palestine (DFLP), Hezbollah, Islamic Gama'at (IG), Jihad, Kach, Kahane Chai, Palestinian Islamic Jihad-Shiqaqi faction (PIJ), Palestine Liberation Front-Abu Abbas faction (PLF-Abu Abbas), Popular Front for the Liberation of Palestine (PFLP), Popular Front for the Liberation of Palestine-General Command (PFLP–GC). The US State Department also designated Hamas as a foreign terrorist organisation in October 1997 and as a Specially Designated Global Terrorist group under Executive Order 13224 in October 2001

[260] OFAC has issued a number of General Licences for oPt since April 2006: General Licences have been issued for transactions with and in-kind medical donations to the Palestinian Authority under certain circumstances [General Licences numbers 1-7]. OFAC has also issued a general license for payment for legal services to listed entities, though this license is not specific to Hamas

[261] 2003/482/CFSP 27 June 2003

Financial or other support given to Hamas will violate sanctions in these countries and often also criminal prohibitions on supporting terrorism, depending on how the relevant offence has been crafted in the different jurisdictions. Sanctions are generally binding on a state's own nationals and organisations otherwise subject to the laws of that state, and have extra-territorial application. All states examined in this report claim extra-territorial criminal law jurisdiction over the acts of their own nationals, and some go considerably further.

In March 2006, following the January Parliamentary Elections, Canada became the first Western state to announce that it was suspending aid and instituting a "no-contact" policy with members of the Hamas-led Cabinet.

The Palestinian Anti-Terrorist Act also introduced a "no-contact" policy: that no officer or employee of the US Government should negotiate or have substantive contacts with members of Palestinian terrorist organisations. In April 2006, USAID had already issued a Mission Notice regulating contact between the Palestinian Authority and USAID contractors and grantees (and their subcontractors and sub-grantees) in their execution of US-funded activities.[262] The main thrust of the policy is to avoid contact with Hamas officials, as well as with individuals affiliated with other organisations designated as terrorist by the US. Contact is allowed with non-Hamas affiliated officials, and exceptions are allowed for administrative contact where necessary to implement US Government-approved programme activities, following the principle of contact at the lowest level possible.

Since 2009 the UK has, on a case-by-case basis, also instructed its humanitarian partners that contact with Hamas should only happen at a technical and lowest possible level. Other Quartet states maintain no-contact policies at political level but do not pass this instruction on to organisations in receipt of their donor funding. Others, such as Switzerland and Norway, determinedly keep channels of communication open with the Hamas authorities and can act as interlocutors for other nations.[263]

The UN, while cautious at a political level to avoid legitimising an authority which has not been accepted by the international community, reportedly maintains a pragmatic approach on the humanitarian level and has instructed its staff to continue existing technical contacts in order not to interfere with humanitarian operations. However, the exact terms and nature of the level of contact allowed is not clear amongst operational UN agencies in the oPt.

Contact with Hamas or any other listed organisation is not prohibited by any of the criminal law or economic sanctions examined in this paper. The UK and US contact policies are similar to contractual agreements, violation of which would likely result in termination of the funding agreement and possible repayment on the part of the grantee.

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[262] Notice 2006-WBG-17
[263] See Norway legal analysis in Section II

Donor policies

The following section lays out donor policies and conditions in funding agreements which have been specifically developed for the oPt and thus operate in parallel or in addition to broader counter-terrorism donor policies and conditions outlined in Section III.

Canada

While Canada does not have counter-terrorism clauses specific to the West Bank and Gaza in its grant agreements with humanitarian actors – and relies on general counter-terrorism clauses outlined in Section III – Canada does require "enhanced due diligence" from partners including checks against Canada's terrorist lists. Canada informs its UN and NGO partners of their responsibility to ensure that due diligence checks are conducted. Partners are required to provide CIDA with the names of all sub-contracted organisations as well as inform CIDA of any changes to the list of them. Most Canadian funding in the West Bank and Gaza goes through UN agencies and Canada-based NGOs as a result of a programming decision based on the fact that, historically, UN organizations have the capacity and mechanisms in place to effectively manage large grants and mitigate risks associated with operating in a conflict zone.

As mentioned earlier, the no-contact policy is binding on Canadian government officials but CIDA's grantees do maintain technical relations with Hamas where necessary for implementation.

The United Kingdom

In a letter in the summer of 2009, DIFD informed some partners working in the oPt that it might, at its discretion, insert a clause related to contact with Hamas and counter-terrorism legislation in funding agreements. Current DFID draft guidance suggests the use of a standard text but does not require the DFID office in Jerusalem to do so. The clause reads as follows:

> (…)
> *that if contact with Hamas is necessary for the delivery of humanitarian assistance, this should happen at a technical and lowest possible level. The independent, neutral, impartial nature of humanitarian assistance must be maintained.*
>
> *that [Organization] will assure itself that any activities it carries out in Gaza or elsewhere do not provide direct or indirect financial benefit to Hamas, or otherwise contravene the provisions of European Council Regulation EC/2580/2001 and/or the Terrorism (United Nations Measures) Order 2006 of the United Kingdom.*

The United States

The issue of US funding of Palestinian aid has been on the radar for some time. For example, the US Foreign Assistance Act of 1961, as amended, states the following in relation specifically to

funding of the United Nations Relief and Works Agency for Palestine Refugees in the Near East (UNRWA)[264]:

> *No contribution by the United States shall be made to the United Nations Relief and Works Agency for Palestinian Refugees in the Near East except on the condition that the United Nations Relief and Works Agency takes all possible measures to assure that no part of the United States contribution shall be used to furnish assistance to any refugee who is receiving military training as a member of the so-called Palestinian Liberation Army or any other guerrilla type organization or who has engaged in any act of terrorism* (Section 301(c))

Following the attacks of September 2001 and the issuing of Executive Order 13224, the US Congress increased its measures of control over aid to the West Bank and Gaza. Since 2003, the annual Foreign Operations Appropriations Act (FOAA) requires vetting of all recipients of USAID assistance in the West Bank and Gaza. As noted in Section III, some of the vetting procedures that led to the creation of the Partner Vetting System (PVS) currently being piloted by the US were first introduced by USAID in the West Bank and Gaza. Since 2002 (financial year 2003), vetting has been mandated by the annual FOAA. The provision for financial year 2012 reads as follows (in part):

> *(b) Vetting- Prior to the obligation of funds appropriated by this Act under the heading 'Economic Support Fund' for assistance for the West Bank and Gaza, the Secretary of State shall take all appropriate steps to ensure that such assistance is not provided to or through any individual, private or government entity, or educational institution that the Secretary knows or has reason to believe advocates, plans, sponsors, engages in, or has engaged in, terrorist activity nor, with respect to private entities or educational institutions, those that have as a principal officer of the entity's governing board or governing board of trustees any individual that has been determined to be involved in, or advocating terrorist activity or determined to be a member of a designated foreign terrorist organization: Provided, That the Secretary of State shall, as appropriate, establish procedures specifying the steps to be taken in carrying out this subsection and shall terminate assistance to any individual, entity, or educational institution which the Secretary has determined to be involved in or advocating terrorist activity.*[265]

In practice, this provision has translated into a thorough vetting procedure that goes beyond the scope of the PVS as currently rolled out (as detailed in the Donor Conditions section, above). For instance, the vetting applies to certain contractors, sub-contractors, grantees and sub-grantees but

[264] UNRWA is a subsidiary organ of the UNGA and provides assistance, protection and advocacy for some five million registered Palestine refugees in Jordan, Lebanon, Syria and the oPt
[265] Section 7039

also to beneficiaries over a certain threshold (for instance a dollar value). The data is reviewed by a Vetting Center in Washington, DC and in some cases by the Consulate General in Jerusalem.

Since 2005, the Act prohibits the use of USAID money "for the purpose of recognizing or otherwise honouring individuals who commit, or have committed, acts of terrorism." [266] In practice, this has translated into a restriction on facility names:

> *The use of "shuhada" or "shaheed" ("martyr" or "martyrs") in a facility's name may be approved by the Mission Director if he determines (i) that assistance to the facility does not have the purpose of honoring or recognizing any individual who has advocated, sponsored or committed acts of terrorism and (ii) that it is unlikely that a reasonable person aware of the relevant facts and circumstances would perceive the assistance as having the effect of honoring or recognizing such an individual. When making this determination, the Mission Director may consult with the U.S. Ambassador or the U.S. Consul General, as appropriate.*

In May 2006, the US passed the Palestinian Anti-Terrorist Act (May 2006), which blocks assistance to the Hamas-controlled Palestinian Authority unless the President certifies that no senior member of the authority is a member of a Foreign Terrorist Organization, that the authority has committed to the Quartet principles (see above), and that the delivery of the aid is important to US national security requirements. Since the assumption of power in Gaza by Hamas in June 2007, this restriction is of primary relevance there.

USAID has summarised these and the other multi-layered legal prohibitions on support to Hamas and other listed Palestinian groups in its Mission Order 21, a 21 page document, last updated in October 2007.[267] The US State Department's funding for the oPt through PRM is not subject to Mission Order 21. The Mission Order details three counter-terrorism measures relevant to humanitarian action: vetting procedures, ATC and restriction clauses in funding agreements.

The standard ATC requires all US-funded non-governmental organizations to certify that they do not provide material support or resources for terrorism. The ATC is in addition to mandatory clauses in funding agreements that remind NGOs and UN agencies of the applicable legislation and sanctions pertaining to counter-terrorism. Those clauses have been modified in the oPt to meet the statutory requirements relating specifically to the West Bank and Gaza programme. It is the legal responsibility of grantees to ensure compliance.

Australia, Canada, the EU, Denmark, Netherlands and Norway do not have counter-terrorism conditions specific to the oPt. Qatar, Saudi Arabia, and Turkey also do not have specific conditions

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[266] Section 599 FY06 FOAA. See also Palestinian Anti-Terrorism Act, 2006
[267] Notice 2007-WBG-26 http://transition.usaid.gov/wbg/misc/2007-WBG-26.pdf

related to the oPt (often related to the centrality of the Israeli-Palestinian conflict for many of their respective governments).

Examples of impact

As in Somalia, the extent to which the counter-terrorism laws and measures have impacted the affected populations themselves is difficult to quantify, especially as the determining factor in the humanitarian situation is the Israeli blockade. In the words of a UN official: "Without Israel's blockade, there would be no humanitarian situation."[268] Nevertheless, counter-terrorism measures remain the primary obstacle to humanitarian action *within* Gaza.

Structural

The structural impact of counter-terrorism measures is particularly evident in the Gaza Strip. Their application skews much of the aid framework away from that of traditional humanitarian impartiality. Three elements in particular combine to create this distortion: first, the fact that the designated terrorist entity for many states is the de facto local authority[269]; second, the policy, or the perception of a policy, of no or limited contact with that authority; and third, the high awareness among international aid workers of potential individual criminal liability for supporting terrorism.[270] Together, this contributes to a system in which programmes are designed to circumvent the local authorities, resulting not only in inefficiencies but also in gaps in provision in cases where aid can only be delivered through or in collaboration with the authorities.

Humanitarian actors are, for the most part, not free to design programmes based solely on need, and in some cases must exclude whole groups of people on the basis of such criteria as their geographic location.[271] For instance, USAID-funded NGOs stated that they have geographic limitations, and are only allowed to work with a small number of municipalities in the Gaza Strip that are deemed not to be under the authority of Hamas. Projects to benefit populations in other areas are not even proposed. Government-run schools are also avoided, as they are assumed to be under Hamas control. One child-focused NGO that used to work in government-run schools now restricts its assistance to UNRWA schools, in line with the policy of its donor.[272] A significant percentage of children of school-age go to government schools (as UNRWA does not provide secondary education).[273] This means that roughly one half of children in Gaza cannot benefit from assistance from several important donors for their education. This includes school construction, school

[268] Interview, Jerusalem, April 2012
[269] Hamas is a designated entity but employees of the Palestinian administration working in Gaza are not necessarily members or supporters of Hamas
[270] These structural impacts are not only relevant for humanitarian action funded by traditional donors. In early 2012, Turkey was reportedly quick to deny that it was providing "cash aid" to Hamas but rather providing funds for humanitarian assistance in Gaza including the construction of a hospital: International Crisis Group Report, *Light at the end of their tunnels? Hamas & the Arab uprisings* Middle East Report No. 129, 14 August 2012. "Light at the end of their tunnels? Hamas & the Arab uprisings"
[271] Interview, Tel Aviv, 26 April 2012
[272] Interview, Gaza, 29 April 2012
[273] The number varied between 25 to 50 per cent according to different interlocutors

rehabilitation and latrine construction, school materials, teacher training and programme management. UN agencies and NGOs involved in education seek alternative funding to try to make up for this disparity and ensure all children in need receive the necessary aid.

In the case of Hamas, at least when it first took power, legal sanctions operated alongside political efforts to avoid recognition of Hamas as a legitimate authority until and unless it recognised the Quartet principles. Notable amongst these were the more-or-less formal "no contact" policies discussed above, most of which apply at a political level to state representatives. Humanitarian actors believe that engagement with the de facto authority is necessary to operate in Gaza, in part as evidence of their neutrality. However, the application and status of any policy on contact with Hamas is not clear within the humanitarian community. The UK and the US are the only states which also formally apply these policies to their humanitarian partners, yet many aid workers whose organisations are not in receipt of UK or US funding also believe that they are prohibited from meeting with Hamas officials, especially senior ones, as a result of lack of clarity in donor policies and verbal directions of no or limited contact policy. While UN agencies reportedly maintain a pragmatic approach to contact with the authorities to ensure the continued delivery of humanitarian aid, UN agencies have interpreted the level of "existing technical contacts" needed to continue with humanitarian assistance differently. Importantly, the wider humanitarian community including NGOs are taking the lead from UN agencies in terms of contact with authorities. There is also a (mis-) perception across the board that contact may violate national criminal counter-terrorism law in all cases. These fears multiply the effect of counter-terrorism laws, encourage over-caution and self-censorship on the part of humanitarian actors and displace the primary concern of responding according to need (see Box 2).

The impact of these structural shifts is acknowledged by donors themselves. One noted that "it's impossible to improve certain issues if you can't talk to the authorities."[274] Another stated that "this policy is problematic as a lot of projects can't be done".[275]

As well as limiting consultation and co-operation with the local authorities, donor measures introduced pursuant to counter-terrorist laws have had the effect of diminishing the crucial role of Palestinian NGOs in the humanitarian system in Gaza. Palestinian NGOs objected from the start to the introduction of the US ATC in funding agreements (see donor policies section), due to sensitivities over the use of the term "terrorism" to characterise what many perceive as Palestinian resistance. The Palestinian Non-Governmental Organization Network (PNGO), the largest umbrella group of Palestinian NGOs, stated that its members would not sign funding agreements that included the ATC: this is now a condition for membership under PNGO byelaws. Several Palestinian

[274] Interview, Gaza, 29 April 2012
[275] Interview, 26 April 2012

NGOs have refused grants from CIDA and from a UN agency on similar grounds.[276] This has had an impact on the ability of donors to find qualified partners, as well as for prominent Palestinian NGOs to access a significant source of funding. A report by the Ma'an Development Center notes that US contributions to Palestinian NGOs dropped by more than half between 1999 and 2008.[277] This damaged relationships between major donors and some of the most competent civil society actors and impacted the quality and appropriateness of programmes.

One other structural impact of counter-terrorism measures, which lies somewhat outside the focus of this paper, is the near impossibility of transitioning from humanitarian to development assistance in Gaza. Since coordination with the *de facto* authority is prohibited by some of the largest donors, the range of activities that can be implemented, and the ability to hand over projects to relevant government departments, is severely limited. Capacity building and training of technical staff in ministries, livelihood programmes and higher education programmes are excluded by certain donors or difficult to design and implement. To give one example, funding for education in the Gaza Strip from OECD donors generally goes through UNRWA in order to avoid funding government schools. However, apart from the fact that UNRWA schools only cater for a portion of the population, UNRWA's programmes are also limited to primary education, and do not include secondary or tertiary institutions. Both the population of Gaza and humanitarian actors lament that the occupants of Gaza are kept in a state of humanitarian dependency rather than being enabled to move towards self-sufficiency. This impact deserves mention as it affects the humanitarian sector's ability to comply with important principles of good donorship, such as providing humanitarian assistance "in ways" – according to Good Humanitarian Donorship principle nine – "that are supportive of recovery and long-term development, striving to ensure support, where appropriate, to the maintenance and return of sustainable livelihoods and transitions from humanitarian relief to recovery and development activities."

Operational

On an operational level, the most visible impact of counter-terrorism measures on humanitarian action in the Gaza Strip came with the suspension of EU, US and Canadian assistance to the Palestinian Authority (PA) when Hamas won the 2006 elections. This affected direct funding for programmes in areas such as education and health that used to go through ministries, though at least in the case of Canada it led to an increase in humanitarian funding. ECHO partners had to re-negotiate contracts with the municipal authorities and find suitable contractors.[278] Subsequently, ECHO informed its partners that they were allowed to contact Hamas at a "low, technical level." Following the July 2007 conflict in Gaza between Fatah and Hamas and the subsequent formation

[276] Interviews, Gaza and Jerusalem, May 2012. Sources also indicated that not all members of PNGO comply with this principled stance

[277] The report states: "According to a study surveying external funding to PNGOs between 1999 and 2008, US aid to PNGOs has dropped from contributing to 12% of the total external funds in 1999 to 5% in 2008." Ma'an Development Center: *Matrix of Control: The Impact of Conditional Funding on Palestinian NGOs*, August 2011 http://www.maan-ctr.org/pdfs/FSReport/PositionPaper.pdf

[278] IASC survey on the humanitarian impact of counter-terrorism measures, Synthesis Report, October 2011

of a new government by Prime Minister Salam Fayad, some donors returned to direct funding of the PA. This included through the PEGASE Direct Financial Support mechanism set up by the EU in 2008. However, the role of the PA outside the West Bank is limited and Hamas has not recognised the new government.

Different donors interpret the prohibition on support to Hamas in different ways. This disparity can lead to operational difficulties for implementing agencies. For instance, WFP needs to maintain two separate pipelines for its food distributions. The first one, funded by ECHO, Japan, France and other donors, channels food through the Palestinian Ministry of Social Affairs (the Minister is affiliated with a US designated terrorist organisation) to reach beneficiaries. The second pipeline is funded by the US and Canada and must be distributed exclusively through international NGOs. This two pipeline system creates a number of problems for WFP. First, the larger volume of US and Canadian food aid makes the two pipelines unbalanced, creating friction with the Ministry of Social Affairs which sees its role diminished. Second, it is more costly and time consuming for WFP to have to juggle between pipelines and implementing partners. Third, and perhaps most importantly, it affects populations directly. WFP needs to match beneficiaries to pipelines to maintain distribution levels but the Ministry of Social Affairs has in the past been reluctant to accede to WFP's request to transfer some of its beneficiaries onto the US and Canada pipeline.

The lack of co-ordination with the authorities also affects the quality and design of programmes. One organisation reported that removing the ban on contact, as the organisation understood its application, would make a major difference to its operations, enabling it to better target the population and design programmes. Programme design, it was reported, currently suffers from a lack of statistics and data which is only available from the ministry. Although several Gaza ministerial staff attend cluster meetings to share information and assist in coordinating humanitarian assistance with NGOs and UN agencies, not all information is available through the cluster system.

The concern to avoid support to Hamas, and the broad understanding of what that might mean, also has prevented some humanitarian programmes from going ahead at all. One US-based NGO could not carry out a planned distribution of food and non-food items to 2,000 families because its donor did not authorise it to share the list of beneficiaries with the Ministry of Social Affairs.[279] Another could not progress with a planned school psychosocial project because the headmaster was perceived as too senior a figure in the administration, so co-operation with him was not allowed.[280]

Waivers and licences are available, although they can fail to solve practical difficulties. In one case, the US funded a water project which required a waiver from the US Secretary of State to enable USAID's implementing partner to interact with certain officials. The waiver was eventually obtained after a lengthy procedure which required the implementing partner to certify that the water authority

[279] Interview, Gaza, 30 April 2012
[280] Interview, Gaza, 30 April 2012

was not linked to Hamas or any listed group. However, contact with officials with the municipality benefiting from the project was still proscribed, which considerably complicated project implementation.

Obtaining a licence can also not be relied upon and criteria for granting them are not always clear. One NGO had to scale down a project because its US affiliate could not renew its OFAC license in the second year of a three-year project. The project, which had been audited internally, consisted of orphan sponsorship, school lunches for pre-schoolers, as well as medical supplies to hospitals. The cuts were implemented within a month and affected 2,000 families, or about 14,000 people, including 1,800 children in the sponsorship scheme. In addition to the primary impact on these 14,000 people in need, the NGO was concerned that it may have difficulty operating in the future, as its reputation had suffered with both the population and the authorities because of the sudden scale-down.[281]

As Hamas has developed administrative mechanisms and gradually asserted more control over Gaza, it is also seeking to regulate the aid sector. This is objected to by many donors on political as well as legal grounds. Over the past few years Hamas has introduced or attempted to introduce a number of administrative procedures that concern NGOs. These included payment of registration fees, value-added tax (VAT) and income tax, all of which are separate from NGOs' dues and obligations to the PA in Ramallah. NGOs in particular have been caught between the requirements of various ministries in Gaza with regard to paying fees and taxes and counter terrorism measures which prohibit fulfilling these requirements, either from the perspective of no-contact policies and/or material support provisions. The UN is exempt from payment of tax under the Conventions on Privileges and Immunities.[282] Organisations manage these pressures in different ways, in line with their own risk mitigation strategies. For instance, they can avoid paying VAT by obtaining all their supplies from Israel through the Kareem Shalom border crossing.[283] This is also required by the Israeli authorities (the alternative would usually involve purchasing goods brought into Gaza through the tunnels from Egypt). However, obtaining humanitarian supplies from Israel presents a significant obstacle to speedy project implementation, as they are expensive, restricted by security concerns and take a long time to reach their intended destination.

NGOs have also been under pressure to register with ministries, obtain visas for foreigners and submit to annual audits. Many humanitarian actors interviewed, considered that it was reasonable for Hamas to register foreigners and potentially useful from a security perspective for the authorities to be aware who was in the territory. However, there was concern among humanitarian actors that compliance might breach counter-terrorism regulations. Similarly, audits of humanitarian actors are

[281] Interview, Gaza, 29 April 2012
[282] *Convention on the Privileges and Immunities of the United Nations*, 1946; *Convention on the Privileges and Immunities of the Specialised Agencies*, 1947
[283] It also seems possible to obtain VAT waivers from Hamas according to some INGOs

not uncommon in many countries, but several donors explicitly required their partners not to comply with on-site audit requests from the Gazan authorities (although no fees are payable during the auditing process). As a result, one USAID partner was shut down in August 2011 by the Ministry of the Interior after declining to be audited. USAID suspended all its humanitarian aid to Gaza, and the issue was resolved after 51 hours of negotiations. The US has stated that it will halt all aid if Hamas enforces an on-site audit of a US-funded NGO. One Canadian-funded NGO stated that the delay in getting instructions from CIDA put it in the odd position of having to negotiate a delay on auditing with an authority with whom they were not supposed to have contact.[284]

Box 2: Lack of clarity of counter-terrorism requirements results in self-censorship and regulation on the part of humanitarian actors

In the oPt, the lack of clarity of donor measures, combined with concern about the potential ramifications of counter-terrorism legislation, has led humanitarian organisations to self-regulate and self-censor, often going beyond what is required by the original donor conditions. Numerous examples of this were found particularly in the Gaza Strip. One NGO excluded two kindergartens from its school feeding programmes because of the schools' potential ties with Hamas. This was a preventative measure and not at the request of a donor. Another European donor found evidence that a UN agency and a prominent NGO were using due diligence procedures to check not only partners and suppliers, but beneficiaries themselves. The donor asked for this practice to stop since those procedures exceeded what they felt was required under relevant laws and policies. As was the case in Somalia, humanitarian actors interviewed explained that certain projects were not even proposed as they posed too great a risk of running afoul of relevant legislation. Self-censorship can also be caused by the fear of loss of funding in another country. One European NGO that refused US funding for projects in Gaza Strip because of the ATC was concerned that their activities in Gaza could jeopardise their US funding elsewhere.

Many humanitarian workers also referred to the lack of clarity about the potential ramifications of counter-terrorism legislation on their personal and professional lives as a source of constant concern. (UN staff feel somewhat protected by their "diplomatic" immunity although this does not cover national staff outside of work hours.) Interviewees did not fully understand the legislation and policies, with several believing that merely speaking to ministerial departments violated criminal law provisions in the US and possibly elsewhere. There were reports of legal advice which explicitly stated that any level of contact could violate national legislation. There was a high awareness of the existence if not the detail of the Humanitarian Law Project case from the US Supreme Court, as well as the extra-territorial jurisdiction claimed by the US.

[284] According to CIDA, correspondence regarding clarification were over a six week period and partners were not asked for an audit

In response to those concerns, the humanitarian community has at times sought clarification from donors as to what activities and behaviour fall within their policy guidelines and legal requirements. While some states, notably the US, provide written guidance, there have been several instances of donors refusing to put down on paper a recommendation made verbally. Some donors based in the oPt have had difficulty themselves getting legal guidance from their capitals and fear a clear answer may be one that makes humanitarian operations impossible. In the words of one large donor: "asking for clarification from HQ is not helpful. We get no answers or a very conservative one".[285] At least one donor distributed a non-paper providing general guidance on the issue, but stating that this did not represent official policy. Another donor agreed verbally to have a humanitarian partner share a beneficiary list with Gaza ministry officials, but wouldn't put the authorisation in writing.[286]

Many donors interviewed acknowledged that such lack of clarity shifts the risk on to implementing partners. Several large donors limit their partnerships to a few larger organisations who can absorb large donations and are seen as having the capacity to mitigate the risk, excluding other smaller partners and programmes which they might otherwise have funded.

While clarifying the situation might have disadvantages, the current uncertainty hampers the smooth running of operations, forcing NGOs to make *ad hoc* operational and administrative decisions based on their own legal interpretation and risk assessment. These decisions, large and small, need to be made frequently according to operational requirements: they include such matters as avoiding attendance at a cluster meeting where ministerial officials may be present; rehabilitation of broken windows in government schools or not hosting an event in a locale owned by a municipality. OCHA has stated that the uncertainty over what is permitted has resulted in less robust planning, hence effectiveness, of humanitarian operations. This is compounded by Hamas' indication that it will introduce further administrative controls, audits and income tax, moves which could lead donors to suspend funding completely.

Internal

If uncertainty is an impediment to robust planning, the administrative effort required to understand and implement the various legal and policy requirements also slows operations. The administrative burden is significant for both donors and humanitarian actors, employing additional staff (for example, USAID has two legal advisers for the oPt alone while usually one adviser covers a whole region), reporting requirements and auditing. One European donor stated that counter-terrorism measures made humanitarian operations more expensive and created delays: in the end, "there is logically less food and medicine."[287] Others, on the contrary, consider that the measures add to transparency, accountability and, ultimately, effectiveness. What is clear is that humanitarian actors

[285] Interview, Jerusalem, 27 April 2012
[286] Interview, Jerusalem, 1 May 2012
[287] Interview, Jerusalem, 27 April 2012

on the ground must now try to reconcile counter-terrorism restrictions with the requirements of effective humanitarian aid.

Waivers and licences are sometimes available, although they can fail to solve practical difficulties. In one case, the US funded a water project which required a waiver from the US Consulate to enable USAID's implementing partner to interact with the Coastal Municipalities Water Utility (CMWU). An administrative exception to the contact policy was required because a majority of CMWU's board members were appointed by Hamas-controlled municipalities. However, contact with officials with the municipality benefiting from the project was still proscribed, which considerably complicated the implementation of the project. One NGO stated that it had to scale down its project because its US affiliate could not renew its OFAC license and decided to suspend all partnership with them in Gaza. Among the projects impacted were an orphan/child sponsorship programme (where beneficiaries were internally screened based on legal advice received by the NGO), provision of school lunches for pre-schoolers and medical supplies to hospitals. The cuts were implemented within a month and affected 2,800 children or about 14,000 people in total. In addition to the primary impact on beneficiaries, the NGO was concerned that it may have difficulty operating in the future, as its reputation had suffered with both the population and the authorities because of the sudden scale-down.[288]

Some administrative counter-terrorism measures not only consume resources but lead to real or perceived violations of humanitarian principles. The practice of partner vetting, in some of its manifestations, is one of these. The practice is a cause for concern where it is used to exclude beneficiaries in need on non-humanitarian grounds, or where it undermines the neutral image of humanitarian actors. However, the level of vetting is different across organisations. UNRWA has its own processes and mechanisms irrespective of donors. This includes, but is not limited, to biannual checks of staff names, suppliers, registered Palestine refugees and micro-finance recipients against the UNSCR 1267 lists (although UNRWA does not vet against national lists in accordance with UN policy). It also checks suppliers against UN Suspect Vendor reports, and strict internal reporting mechanisms. Some NGOs also self-impose vetting at different levels. One NGO has one dedicated employee in Gaza to screen staff, contractors, local NGO partners and beneficiaries against a database.

US-funded NGOs are required to implement vetting (see details in donor section), which was described as a cumbersome procedure. For instance, US NGOs are required to vet all participants in training sessions they run which last for more than five consecutive days. This has led to organisations restructuring their training courses or limiting the number of training days to avoid both the administrative burden and the intrusive questioning of participants. In one case, an NGO had to delay a project because of the necessity to obtain the passport information of each of the 45

[288] Interview, Gaza, 29 April 2012

individuals on the board of a school, many of whom were resident in different countries. One NGO has calculated that it took six minutes to vet one individual. Since vetting can be at the level of beneficiaries, a project benefiting 1,000 people could require ten person/hours for vetting alone.

Although partner vetting schemes are not as formal in other states, a Qatar-based NGO reported that it had to stop using an active local partner in the Gaza Strip after its bank accounts were frozen. The Qatari NGO was required to divert its funding through the Palestinian Red Crescent Society (PRCS), leading to delays in implementation (especially as PRCS has its main offices in the West Bank which required a subsequent internal transfer of funds to the Gaza sub-office).[289] Islamic NGOs have spoken generally about their inability to transfer funds in the oPt, particularly Gaza, even where the organisation is not marked by OFAC. Some interviewees reported these difficulties are felt to be more restrictive for Islamic NGOs.[290]

Further, as is also the case in Somalia, the impact of donor driven counter-terrorism measures on humanitarian actors differs depending on the type of organisation. While at least four of the UN agencies operating in the oPt now include standard counter-terrorism clauses in their funding agreements with implementing partners there are also examples of UN agencies (sometimes collectively) effectively negotiating with major donors around the content and requirements of the counter-terrorism clauses in funding agreements. This ability to try to mitigate the negative impacts of donor-imposed counter-terrorism conditions is not always available to other humanitarian actors, including some international and national NGOs.

d) General Discussion of Impact

As set out at the start of this section, the impact of counter-terrorism law and measures on humanitarian action can be viewed at the structural, operational and internal levels.

Structural impacts

In Somalia, the restrictions placed upon humanitarian actors through sanctions and counter-terrorism measures are considered by many in the humanitarian community to have compounded the already difficult operating environment in Al-Shabaab controlled areas. In the Gaza Strip, the structural impact is more profound. The parameters of humanitarian action have for the most part been shifted so that programmes are designed firstly to avoid contact with or support to the designated group (Hamas) and only secondly to respond to humanitarian needs. This is due both to the formal policies of Western and traditional donor states and to the less formal strategies of some Gulf donors in their partner and project selection. This distortion of the core humanitarian principle of impartiality is one of the key fears of those concerned about the impact of counter-terrorism measures on humanitarian action.

[289] Interview, Doha, 12 September 2012
[290] Interviews, September - December 2012

Operational impacts

Significant examples of impact at an operational level were found in both case studies. Most dramatic in Somalia was the halt in funding from some key donors after the designation of Al-Shabaab as a terrorist group. While it is impossible to determine the extent to which the abrupt decrease in aid (or indeed other consequences of counter-terrorism measures) contributed to the famine that followed in mid-2011, some relationship cannot be discounted. Certainly the severity of the food crisis, and the publicity around it, prompted a reversal of donor policy.

In the Gaza Strip, impacts at operational level include not only funding cuts but also blocking of projects, suspension of programmes, as well as planning and programme design based more on constraints than on needs. These impacts are in addition to the exclusion of beneficiaries in areas and structures under Hamas control by a significant number of humanitarian actors. The overall amount of aid to Gaza, while hard to disaggregate from the total amounts spent in the oPt, does not seem to have significantly decreased. However, it seems fair to assume from the problems reported that the money spent is not being used in the most effective manner and is not necessarily reaching those most in need.

Internal impacts

At an internal level, the impact of counter-terrorism measures on the functioning of organisations is among the key issues raised by humanitarian actors. The additional time and resources spent on compliance with counter-terrorism law and the lack of clarity over what-is-and-what-is-not permitted is certainly a constraining factor. The procedures to obtain licences and waivers, when available, can be lengthy and burdensome, hampering a timely response even when finally granted. More generally, NGOs have reported increased bureaucracy trying to import supplies, including from pharmaceutical companies, into countries where national counter-terrorism sanctions operate. Companies are increasingly asking for proof and questioning the scope of humanitarian actors' licences, requiring agencies to engage lawyers and delaying, or at times stopping, imports of drugs.[291]

The potential criminalisation of humanitarian action may also impact staffing and recruitment. For example, one European-based NGO saw its offer of employment declined by a US Green Card holder in the aftermath of the Humanitarian Law Project case as she feared for her immigration status.[292] In another case, a Canadian staff member resigned from an NGO for fear of criminal prosecution relating to her organisation's engagement with entities listed by Canada.[293] Interviews conducted for the two case studies revealed a reduction in the ability of Islamic charities to hire qualified expatriate staff for Somalia and the oPt for fear that mere presence could lead to staff

[291] Follow up correspondence to Interview, November 2012
[292] Interview, 21 May 2012
[293] Interview, 1 May 2012

being labelled a 'terrorist'.[294] Further, at least one US based NGO has reported problems obtaining insurance coverage for US staff in countries subject to counter-terrorism sanctions.[295]

In addition, the uncertainty and concern over legal liability leads to a reluctance to share information between organisations, undermining collaboration in the humanitarian sector. While this is another impact that is difficult to measure, some interviewees reported that sectoral transparency had deteriorated as organisations fear divulging information on projects which might violate a counter-terrorism provision in one or other jurisdiction. If true, this bucks the trend desired by donors who have responded to counter-terrorism objectives by expecting greater accountability and transparency from their humanitarian partners.

Finally, counter-terrorism measures imposed by humanitarian donors have led to increased tensions between international and local NGOs. This was most evident in the oPt. Palestinian NGOs report feeling marginalised as more aid is channelled through international NGOs due to the perception among some donors that they implement more robust counter-terrorism risk management strategies. In addition, international actors are resented for passing on counter-terrorism obligations to sub-grantees, at the request of donors, and including counter-terrorism provisions in agreements with local organisations. USAID, for example, has specifically included "no-contact" policies at the level of sub-contractors and sub-grantees as well as in the use of the controversial PVS since 2002. In some cases, local NGOs took the formal position that they would not sign funding agreements that included a counter-terrorism clause.

Beyond examples at the different levels of impact, there are two areas which need particular mention. One is the impact of counter-terrorism measures on the banking sector and its effect on humanitarian operations, the second the disproportionate impact of this effect on Islamic charities (See Boxes 3 and 4).

Box 3: Impact of Counter-Terrorism Measures on Financial Transactions of Humanitarian Organisations

Financial institutions are the lifeline of humanitarian actors, which depend on the international banking sector to receive funding from governments and private donors as well as distribute those funds to their affiliates in the various countries where they operate.

Increasingly strict measures to scrutinise and control financial transactions have been imposed on the international banking sector since 2001 in the context of international legal and policy efforts to prevent the financing of terrorism. One key driver behind this is the FATF, which was established to combat money laundering but expanded to address terrorist financing after the September 2001

[294] Interviews, September – December 2012
[295] Follow up correspondence to an interview, November 2012

attacks (see Section II). One of the focus areas of FATF regulation is the non-profit sector which has been identified as particularly vulnerable to exploitation. FATF Recommendation 8 encourages countries to review the adequacy of laws and regulations governing non-profit organizations (NPOs), to ensure that they cannot be misused. The interpretive note to Recommendation 8 acknowledges the "vital role" played by NPOs, but observes that "terrorists and terrorist organizations exploit the NPO sector to raise and move funds, provide logistical support, encourage terrorist recruitment, or otherwise support terrorist organizations and operations". The interpretative note contains a detailed list of measures recommended to be taken to ensure adequate regulation of NPOs.

How countries have interpreted and implemented Recommendation 8 has varied. Only five out of 159 countries and territories have been assessed as "Compliant" by FATF.[296] One of them, Egypt, has promoted a NGO law which bars NGOs from accepting foreign or domestic funding without explicit authorisation from the Ministry of Social Solidarity. A FATF report notes that "such strict controls while achieving their purpose of ensuring that NGO's are not used for terrorist financing purposes, have the potential of disrupting or discouraging legitimate charitable activities."[297] Another example is the Saudi Arabian Monetary Agency which automatically designates all non-profit agencies as high risk entities. As discussed in Section II, this has curtailed significantly the ability of NGOs to both fundraise and transfer funds abroad.

Among mechanisms used to ensure compliance with national and international legislation and policy, international financial institutions use software to check whether recipients of financial transaction have links to terrorism. While the use of software that scans lists and databases may provide some measure of reassurance, these databases are compiled in part from media reports and unconfirmed information from the internet. They also include lists of so-called "Politically Exposed Persons" not necessarily related to counter-terrorism law. If an organisation is mentioned on a blog alongside the name of a listed individual, or if an organisation attends a conference along with a listed group, this software may flag the link as "adverse publicity". For institutions such as banks, with little appetite for risk or knowledge of the humanitarian system, such red flags may mean that they will not process financial transactions. In fact, some private banks have said, confidentially, that they simply will not transfer funds to Muslim international NGOs to avoid associated risks, even in cases where the transfers are not related to countries subject to sanctions. Importantly, financial institutions cannot be held accountable for these decisions, which are also not subject to any right of review by those excluded. Some NGOs have also reported that when private

[296] Belgium, Egypt, Italy,Tunisia and the US. From *Counter-terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society*, Transnational Institute / Statewatch, 2012 http://www.icnl.org/research/journal/vol14iss1/feature.html

[297] MutualEvaluation Report on Egypt by the Middle East and North Africa Financial Action Task Force. May 2009. http://www.menafatf.org/images/UploadFiles/MER_Egypt_ForPublication.pdf

banks have blocked transfers they have chosen not to draw attention to this publicly for fear of further reputational damage.[298]

Measures imposed have led to criticism from the non-profit sector. As the director of the Humanitarian Forum and former head of the Charity Commissions' International Programme argues: "The risk of overregulation may be limited in the liberal democracies that make up most of the FATF membership and that have internal checks and balances in place to limit abuse of power, but the rules are intended to be implemented around the globe. Countries in all regions have recently used laws to restrict charities."[299] This point is reinforced by a World Bank working paper that discusses Recommendation 8 and suggests that "policy makers need to be specific and not paint the whole sector with the same brush."[300] In taking action against the genuine threat of terrorism exploiting the non-profit sector, including humanitarian NGOs, the international community may not have considered the full implications of potential over-regulation.

One consequence has been a disruption in funding of humanitarian organisations in the decade after September 2001. This has been particularly evident in funding from Muslim countries and to Islamic NGOs. Another consequence is that such regulations may hamper humanitarian organisations which rely on raising money quickly in the aftermath of humanitarian crises and transfer donations often to remote locations or conflict zones. The humanitarian community has expressed its concern that FATF Recommendation 8, as implemented in certain countries, would negatively affect their financial health or obstruct day-to-day operations by requesting a large amount of information that would be both unrealistic and onerous to gather.[301]

Differential impact of counter-terrorism measures

The nature of the humanitarian organisation in question will affect how it is impacted by counter-terrorism measures. The UN and other intergovernmental organizations benefit from privileges and immunities set out in various conventions and agreements, including the UN Charter, the 1946 Convention on the Privileges and Immunities of the United Nations and the 1947 Convention on Privileges and Immunities of the Specialized Agencies. These shield UN staff from individual criminal responsibility for acts carried out in the course of their work, and also exempt the

[298] Interviews, June 2012. See also James Shaw-Hamilton, *Recognizing the Umma in Humanitarianism: International Regulation of Islamic Charities*, in Jon Alterman and Karin Von Hippel, Understanding Islamic Charities, CSIS, 2007

[299] James Shaw-Hamilton, *Recognizing the Umma in Humanitarianism: International Regulation of Islamic Charities*, in Jon Alterman and Karin Von Hippel, Understanding Islamic Charities, CSIS, 2007

[300] Emile van der Does de Willebois, *Nonprofit Organizations and the Combatting of Terrorism Financing*, World Bank Working Paper No. 208, https://publications.worldbank.org/index.php?main_page=product_info&products_id=23909

[301] See, for example, Hayes, Ben. *Counter-terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance Regulating Civil Society,* Transnational Institute / Statewatch, 2012. 2012 http://www.statewatch.org/news/2012/mar/tni-sw-fafp-exec-summary.pdf

organization from tax and customs duties. The ICRC often obtains similar privileges in headquarter agreements with different states.

Multilateral organisations and the ICRC also hold some leverage to negotiate bilaterally with governmental donors so as to minimise any possible impact of counter-terrorism restrictions in funding agreements. For example, the UN takes the position that it will only vet partners against sanctions lists established by the UN Security Council. In a 2006 letter to the US Ambassador to the UN, the UN Under-Secretary-General for Legal Affairs explained that "it would not be appropriate for the United Nations to establish a verification regime that includes a list of possible contractors developed by one Member State" as "it would not be in a position to justify and defend its decision in respect to any individual or entity that is included in such lists."[302] Following this position, UN actors should only vet against the UNSCR 1267 lists. However, there has not been harmonisation of practices across the UN system and it would seem that UN agencies have responded differently to donor requests in different contexts.

In some cases, UN agencies have included broad donor-driven counter-terrorism clauses in agreements with implementing partners. In the case of the oPt, at least four UN agencies have included standard, donor determined counter-terrorism clauses level in their subsidiary funding agreements, which have caused tensions with local implementing partners. However, there have also been cases of good practice where operational UN agencies have collectively negotiated more appropriate clauses with major donors in specific contexts.

Within the humanitarian NGO community, the degree to which organisations are affected by counter-terrorism measures varies significantly:

(1) NGOs are more or less affected according to the nationalities of their staff and the state in which they are registered, due to the variation in national counter-terrorism law. This is often not straightforward, as many large international NGOs have offices, sections and affiliated partners in different countries, often raising funds from a combination of individuals, foundations and government sources. As a number of these international NGOs undergo processes to integrate different national sections,[303] procedures to meet the requirements of the most exigent host state are being introduced as standard across the organisation

(2) The type of activity of the NGO is also a determining factor. Humanitarian action encompasses a wide range of activity, from delivery of relief items to provision of services, including training and legal advice. However, while it might earlier have been thought that programmes involving transfer of resources, such as large scale food delivery or cash transfers, were more vulnerable to legal risk, the US Supreme Court judgement in the Humanitarian Law Project case has

[302] Letter dated 31 January 2006 from Nicolas Michel, United Nations Under-Secretary-General for Legal Affairs, The Legal Counsel, to His Excellency Mr. John R. Bolton, Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the United States to the United Nations
[303] e.g. Save the Children

shown that training and legal advice are equally hazardous activities, at least in that jurisdiction. A second-level impact of this decision has been a reluctance on the part of US law firms to give advice to humanitarian actors on counter-terrorism liability, for fear of being accused themselves of material support, as was the case for one of the organisations interviewed

(3) How NGOs are perceived by governments, and to a certain extent by the general public, will also shape how they are impacted. Islamic NGOs appear to have faced greater scrutiny from certain governments in the West and also in the Gulf and North Africa than secular or other faith-based organisations. This has contributed to a public suspicion of Islamic charities which, when combined with the financial impediments discussed above, has had a serious impact on these organisations' abilities to operate

More generally, research carried out for this study has demonstrated that the application of counter-terrorism laws is not always uniform across different contexts, leading to criticism about the blurring of political, security and humanitarian concerns and undermining the perception of the independence of the humanitarian sector as a whole. For example, a report on the 2005 Pakistan earthquake response noted that "interviewees did not report any major negative humanitarian impacts of anti-terrorist legislation" and also that UN agencies and NGOs were actively collaborating with charities affiliated with entities on the OFAC list. The report suggests that it was not only a humanitarian but also a political imperative to assist a key ally in the "war on terror", which eventually led to the relaxation of counter-terrorism measures.[304] Scrutiny on the oPt from many Western states, on the other hand, is far greater than on other areas where designated terrorist groups operate. One Western donor in the oPt confided that he fielded several questions every week from parliamentarians on how aid was disbursed, resulting in considerably more pressure on implementing partners than in less politically charged contexts.

Box 4: Impact of Counter-Terrorism Measures on Islamic Charities

The importance of charitable giving in the Muslim world stems in part from *zakat,* a religious duty to provide a fixed portion of one's wealth as charity. Perhaps less well-known has been the significant humanitarian contributions of Muslim countries over the past few years. Saudi Arabia and the UAE are now among the 20 largest government donors of humanitarian funding, provided more than $1 billion of aid over the past four years.

However Islamic charities, including humanitarian NGOs, have been impacted more strongly by counter-terrorism measures. Over the past ten years, the US government has shut down at least eight US-based charities on terrorism grounds, six of which had Muslim affiliations. Only one has

[304] Wilder, Andrew. *Perception of the Pakistan Earthquake Response*, Humanitarian Agenda 2015: Pakistan Country Study, Feinstein International Centre, February 2008 https://sites.tufts.edu/feinstein/2008/humanitarian-agenda-2015-perceptions-of-the-pakistan-earthquake-response

been convicted of material support to terrorism.[305] Others have had their assets blocked when they were designated terrorist under Executive Orders. A recent study showed that three of the 23 largest transnational Islamic NGOs have ceased to exist or are under investigation for terrorism-related charges.[306] Certain Islamic NGOs – or individuals in those NGOs – have been found to have links to terrorism. The best known cases include the International Islamic Relief Organization (IIRO), which was closed by national authorities in the Philippines and Indonesia, designated terrorist by the US and appears on the UNSCR 1267 list.[307] Equally prominent is the Holy Land Foundation for Relief and Development (HLF) which was the organisation prosecuted in the US.[308] However, these cases concern a very small proportion of the Islamic NGO community.

High profile public investigations, for example in the UK and US, even when charges are later dropped, have created a general climate of suspicion towards Islamic charities. Statements such as "in the public mind, Islamic charity organizations have become little more than funding fronts for terrorism and jihad"[309] may be hyperbolic, but there is certainly a trust deficit that has made donors, both institutional and individuals, more wary.

Islamic charities in the US report receiving in-kind donations rather than financial contributions because their donors are afraid to be listed on government databases.[310] Other organisations have reported a divergence in aid from Arab donors to more recognised NGOs such as national Red Crescent Societies impacting other NGOs ability to fundraise.[311]

As a result of such scrutiny, large Islamic NGOs can regulate themselves to a higher degree than non-Islamic NGOs. For example, one UK-based Islamic NGO has dedicated employees to ensure compliance with US, UK and World Bank due diligence requirements. It has signed up to a global database run by a private company to screen all contractors and partners against 179 lists which link organizations and individuals to terrorism suspects. Ironically, in another case, another UK based Islamic NGO funded by the UK government, the European Commission and the UN, had trouble

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[305] Charity and Security Network. *US Muslim charities and the war on terror: a decade in review*, January 2012 http://www.charityandsecurity.org/system/files/USMuslimCharitiesAndTheWarOnTerror.pdf

[306] Including one in Saudi Arabia and two in the US. Marie Juul Petersen, *For humanity or for the umma? Ideologies of aid in four transnational Muslim NGOs, University of Copenhagen, 2011*

[307] "In 2006, the Philippines and Indonesia branches of IIROSA were closed by national authorities and designated by the US – and later the UN – on the grounds that they were "facilitating fundraising for al Qaida and affiliated terrorist groups." And in 2009, the office in Bangladesh was closed, although no relations with local terrorist groups had been detected. Petersen, Marie Juul. *For humanity or for the umma? Ideologies of aid in four transnational Muslim NGOs,* University of Copenhagen, 2011 http://www.diis.dk/graphics/_staff/mape/marie%20juul%20petersen%20%20for%20humanity%20or%20for%20the%20umma%20.pdf

[308] The indictment process in the HLF case was criticized by several civil society groups. See for example The Fifth Circuit's Holy Land Foundation Decision on the Charity and Security Network. http://www.charityandsecurity.org/background/Summary_Fifth_Circuit_HLF_Decision

[309] Kroessin, Mohammed. *Islamic Charities and the "War on Terror: Dispelling the Myths*, Overseas Development Institute, Humanitarian Practice Network, Humanitarian Exchange, Issue 38, June 2007. http://www.odihpn.org/humanitarian-exchange-magazine/issue-38/islamic-charities-and-the-war-on-terror-dispelling-the-myths

[310] http://www.washingtonpost.com/wp-dyn/content/article/2006/08/08/AR2006080801246.html

[311] Interviews, September - December 2012

buying vetting software from two different suppliers who did not proceed with the sale because of the organisation's "subversive activities".[312]

As described in Box 3, the use of software by financial institutions can wrongly discredit an NGO by flagging a loose association with a listed group on the basis of unverified Internet searches. It may happen that financial transactions are then denied or delayed for fear of legal or reputational risk within the international banking sector. For example, a registered UK-based Islamic NGO working internationally received a commitment from a donor for a significant grant. Instructions to transfer the funds were sent by the donor to a financial institution in Switzerland whose internal World Check report revealed several unsubstantiated allegations against the overseas Muslim trustees. The compliance officer in the financial institution refused to transfer the money to protect his professional reputation in case an intermediary bank questioned him. He explained: "I would feel embarrassed. You have to understand, it is a small community." The Islamic NGO was able to demonstrate that several international organizations had given it small grants for work related to NGO accountability. The compliance officer told the charity that "in these circumstances" he was persuaded to make the transfer. This occurred three months after the original instruction from the donor impacting the delivery of timely humanitarian assistance.[313]

In direct response to increased counter-terrorism measures and the disproportionate impact on Islamic NGOs post September 2001, the Swiss Federal Department of Foreign Affairs launched the Montreux Initiative, a project to recognise the financial and governance standards of accredited Islamic NPOs and improve perceptions and encourage support for them.[314] Islamic NPOs were reportedly initially happy to sign up to the more stringent requirements contained in the Montreux Conclusions drawn up in 2000. However, this reportedly has not been matched by some recognition on the part of governments and the process has not been taken forward.[315]

The Humanitarian Forum carried out research in June 2011 on measuring the medium- and long-term impact of counter-terrorism measures on international Islamic non-profit organisations in the UK, Germany, Kuwait, the Netherlands, Qatar and Saudi Arabia. Respondents felt governments were indifferent or antagonistic towards Islamic NGOs and that there was a sense that regulation has been delegated to banks and that these are too risk averse and in some cases dismissive.[316]

The impact on Islamic charities has also come in the form of formal regulations and policies on financial transactions, particularly from the Middle East and the Gulf States. One reputable UK-based NGO has seen its funding discontinued from private donors in Saudi Arabia, the UAE and

[312] IASC survey on the humanitarian impact of counter-terrorism measures, August 2012
[313] *Ibid*
[314] See http://www.eda.admin.ch/eda/en/home/topics/peasec/peac/confre/conrel.html
[315] European Center for Not-for-Profit Law, *Study on Recent Public and Self-Regulatory Initiatives Improving Transparency and Accountability of Non-Profit Organisations in the European Union,* (April 2009)
[316] IASC survey on the humanitarian impact of counter-terrorism measures, August 2012

North African countries because of government regulations. This affects Islamic NGOs based in Western countries as well as those based in Muslim countries. For example, the Saudi NGO World Assembly of Muslim Youth (WAMY) has seen a 40 per cent drop in its fundraising income since September 2001 due to "fear of Muslims falling foul of strict US efforts to monitor terror funding".[317]

As one commentator noted: "ironically, attempts to close down or control formal charities may have had precisely the opposite effect by forcing charitable giving into less regulated channels."[318] This concern was echoed by government officials and civil society during interviews in Saudi Arabia.[319] These interviewees noted the reports and arrest of individuals with large amounts of cash at Saudi airports and the increasing concern of charitable funds being moved through cash and outside of *bona fide* humanitarian actors to circumvent government regulation.[320]

It is difficult to quantify the effect of private donors being prevented from funding, but one Islamic NGO estimated that it was losing (or rather, not receiving) up to $15m a year based on comparative funding levels to Western NGOs from the Gulf.[321]

The umbrella role of the OIC was noted by a number of NGOs as important in the context of counter-terrorism, at least in Somalia.[322] The OIC now has 57 members and some NGOs interviewed reported that they will feel more comfortable working in contexts such as Somalia and the oPt under OIC coordination.[323]

V Conclusions and Recommendations

This study has presented evidence that counter-terrorism measures have had and continue to have a negative impact on humanitarian action. The situation should not be construed as a simple opposition of humanitarianism to counter-terrorism, or of operational agencies to governmental donors.

Negative impacts reported, range from halts and decreases in funding to blocking of projects, suspension of programmes, planning and programme design not according to needs, as well as the slowing of project implementation. In Gaza, beneficiaries in areas and structures under the control of the designated terrorist group are systematically excluded by some donors. Funding through Muslim charities, particularly from the growing donor base in the Gulf, has been significantly obstructed. The

[317] *Ibid*
[318] *Ibid*
[319] Interviews, Riyadh and Jeddah, 23 – 25 February 2013
[320] *Ibid*
[321] Interview, September 2012
[322] Interviews, Somali and Nairobi, 3 – 12 October 2012
[323] *Ibid*

implementation of counter-terrorism laws as examined in this study undermines the neutrality, both real and perceived, of humanitarian actors, and the impartiality of their operations. These are serious problems. However, in examining how best to solve these problems and to mitigate negative effects, it should be remembered that the objectives of humanitarian action and counter-terrorism have significant points of convergence.

Most fundamentally, both humanitarian action and counter-terrorism seek the protection of civilian populations from harm. In addition, the principle of neutrality is incompatible with funding or assisting any terrorist or belligerent groups. Neutrality is critically important to humanitarian actors as it underpins their operational independence and enables access to areas where humanitarian needs are greatest. Similarly, the impartiality of humanitarian action is incompatible with any humanitarian goods or services being diverted away from beneficiaries in the greatest need. It is in the interest of humanitarian actors to have robust risk mitigation procedures to prevent this or any inadvertent contribution to armed groups, including those designated as terrorist, an objective shared with all governmental donors. In addition, these counter-terrorism regulations affect the non-profit sector more generally, whose contribution to fostering an environment where terrorism is less likely to thrive should not be undervalued.

Donor agencies are bound to observe national and international counter-terrorism laws, as well as international laws and principles governing humanitarian action. Ideally, there should be no conflict between these two legal frameworks: both should reconcile security objectives with the humanitarian imperative. Indeed, humanitarian exceptions in national and international sanctions and other counter-terrorism laws are concrete examples of accommodation between the two. While the negative impacts detailed in this paper indicate that the overall balance has not been correctly struck, the fundamental idea of an interplay between the two does appear to be accepted. Indeed, donors have adjusted their application of counter-terrorism measures in the case of extreme humanitarian need.

During the 2011 famine in Somalia, donors which had hitherto prioritised counter-terrorism objectives recalibrated their positions to facilitate humanitarian action that had previously been hindered or blocked. The persistent advocacy of NGOs generated bipartisan concern in the US Congress over the legal impediments to humanitarian assistance in Somalia following the famine. Similar concern has translated, in some cases at least, into humanitarian programmes that a more conservative risk analysis may not have endorsed. In the second half of 2011 several donors funded cash transfer programmes, essentially distributing several tens of millions of dollars in southern Somalia because it was felt to be the best way to alleviate the effects of the famine.

Operational humanitarian actors are of course also bound by counter-terrorism laws at the same time as they have committed to the fundamental principles of humanitarian action. While smaller international and national NGOs may find it hard to “negotiate” with states over counter-terrorism

measures, the sector as a whole can contribute to a better balance between security and humanitarian objectives. While the law is the law, the relationship between government donors and humanitarian partners is a voluntary one. Any restrictions on humanitarian action which may result from clauses in funding agreements should be seen as part of such agreement. Humanitarian actors have a responsibility to uphold their guiding principles and mitigate any negative impact on affected populations. This responsibility has not been assumed in all cases.

For example, the acquiescence of a large number of NGOs to the implementation of the US vetting system in the West Bank and Gaza, which extends to the vetting of beneficiaries, is seen as having undermined legitimate opposition to this practice by more principled humanitarian actors. It has been nearly a decade since the first vetting scheme was introduced. As vetting is now an integral part of US funding in the oPt it is significantly harder to argue against on principled grounds in other contexts. Likewise, while all humanitarian actors are, by definition, committed to the protection of the civilian population, accepting language such as being "firmly committed to the international fight against terrorism", as in the funding agreement of one UN agency, may be going too far. In the light of well-known criticisms both of the political and partial nature of terrorist designations and of the way in which the international fight against terrorism has been carried out, this kind of language could be seen as damaging to the perceived independence of (at least) the agency concerned.

More positively, the research team found several examples of creative reconciliation of counter-terrorist and humanitarian demands, without compromising the core objectives of each. In the oPt, UNRWA has devoted considerable thought to translating counter-terrorist objectives into its own self-imposed requirement to maintain neutrality. The resulting UNRWA risk mitigation procedures, while designed to ensure that UNRWA remains neutral, also protect against diversion of UNRWA resources to terrorist groups. This is just one example of good practice on which efforts to reduce the adverse impact of counter-terrorism measures can draw.

It is important to recognise that such efforts emerge not only from the application of existing legal principles, but also from exchanges between the counter-terrorism, donor and humanitarian communities. Opportunities for the humanitarian and counter-terrorism communities to share or publish their views should be encouraged and promoted. Many humanitarian actors and donors interviewed for this study decried the absence of a humanitarian view point during international and national counter-terrorism policy discussions. One effect of the failure to include humanitarian perspectives in counter-terrorism discussions is the lack of knowledge and familiarity of the counter-terrorism community with humanitarian action. Conversely, humanitarian actors lack familiarity with the legislation and policies underpinning counter-terrorism at national and international level. This study has encountered several instances of aid workers who were misinformed about counter-terrorism measures, as well as government officials whose seem to believe that humanitarian action is akin to dumping relief items in terrorist-controlled areas.

Beyond this, risk management and mitigation in the sector in general can be and is being improved to allay donors' concerns. (The impetus has also come from within organisations, and in response to interrogations of aid effectiveness). In June 2010, the Humanitarian Coordinator for Somalia wrote a letter to the Canadian Minister for International Cooperation asking Canada to resume its humanitarian funding (then reportedly adversely affected). He pointed out that the UN had begun to implement procedures to address funds being misused, including the nomination of a Risk Management Officer.[324] Hosted by UNDP, the Risk Management Unit aims to create a due diligence process for all UN agencies there, going beyond standard UN vetting against the UNSCR 1267 lists and determining which documents – such as financial statements and bank account details –contractors and partners should be expected to provide. Other initiatives include the UN's Joint Operating Principles for Somalia, drafted in 2008, or the Somalia NGO Consortium's "Red Lines". Both were attempts to set minimum standards that would, in part, reduce the misuse of aid and secondarily minimise exposure to liability under counter-terrorism legislation.

At the global level, UNICEF is moving towards the application of the standard UN security management framework to non-security risks including running afoul of counter-terrorism laws. The central idea is to balance risk, in this case of inadvertent support to terrorist groups, with programme criticality, in other words to place the interplay of counter-terrorism and humanitarian objectives at the centre of decision-making for programme managers. By taking the initiative to respond to counter-terrorism obligations and donor concerns on their own terms, operational actors can both help reconcile humanitarian and security goals and inject a dose of operational reality.

The development of more robust procedures across the humanitarian sector could also help level out the different levels of scrutiny required by donors according to context. We have seen how there was flexibility during the response to the 2005 Pakistan earthquake but Western states closely scrutinise the oPt. One Western donor in the oPt confided that he fielded several questions every week from parliamentarians on how aid was disbursed, resulting in considerably more pressure on implementing partners than in less politically charged contexts.

Recommendations

The existing literature on counter-terrorism and humanitarian action in its broadest sense contains a number of recommendations, usually centering on particular aspects, such as improving the speed and ease of financial transactions for the funding of humanitarian response to crises or promoting a collaborative approach on regulating civil society, or on the policies of particular donor states.

[324] Interview, Nairobi, March 2012. Also, according to the 2012 Somalia Monitoring Group report: "RMU's plans include establishing minimum standards of due diligence that all agencies should adhere to before entering into a contract with any entity, and identification of problematic or risky implementing partners and contractors (…) only 8 out of 24 UN agencies working in Somalia are now participating in the system." http://www.un.org/sc/committees/751/mongroup.shtml - 13 July 2012

The following recommendations are phrased in general terms. They seek to build on the good practice and underlying principles identified in the study. They seek to reduce the adverse impact of counter-terrorism measures on humanitarian action, and they should also help overcome the obstacles to transparency and dialogue mentioned above, offering both increased security to humanitarian actors and more accountable operations to donor governments. Donors, the Emergency Relief Coordinator and the IASC are strongly encouraged to follow-up on the recommendations and monitor their implementation.

RECOMMENDATION 1

- **The humanitarian community and donor States should engage in sustained and open policy dialogue on how to better reconcile counter-terrorism measures and humanitarian action. This should take place across all relevant sectors within government (security, justice, financial and humanitarian), as well as between States and the humanitarian community at both headquarters and field level.**

A key conclusion of the study is that there is a need for better and sustained cross-sectoral policy dialogue, both to raise awareness of counter-terrorism policy and humanitarian principles in the respective "other" sectors, and to discuss the impact of counter-terrorism on principled humanitarian action.

There are existing fora in which exchange does take place and where it can be increased. These include academia; the work of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism; the Counter-Terrorism Implementation Task Force (CTITF) of which thirty UN-associated entities are members; the Counter-Terrorism Committee Executive Directorate's (CTED) and its regional workshops, as well as initiatives at national level to foster a dialogue between civil society and government which frequently involve umbrella organizations and various branches of governments. Indeed this study aims to contribute to the growing body of research and to stimulate increased dialogue.

The IASC should consider how these and other fora might be utilised or what additional modalities for dialogue might be considered at national, regional and international levels. Dialogue can be structured, if appropriate, around language acceptable to a wide range of humanitarian stakeholders, including local NGOs, which could be incorporated into donor grant agreements. The clauses could outline due diligence good practice to address counter-terrorism concerns while preserving the ability of organisations to act in accordance with humanitarian principles, and minimising any negative impact on the delivery of aid to beneficiaries. Such model clauses could be developed by the IASC and subsequently adjusted for each context.

At the field-level, dialogue between donors and humanitarian organizations needs to be more structured and inclusive to ensure that all humanitarian actors (UN agencies, international and local

NGOs) have the opportunity to discuss the challenges and voice concerns. An example of good practice is a Swiss Agency for Development and Cooperation (SDC)-funded project in the oPt, under which a number of consultations with different stakeholders including donors, UN agencies, international and national NGOs and other local actors have been held to discuss counter-terrorism policies and identify areas of concern.[325]

RECOMMENDATION 2

- **Donors should be more responsive to requests from humanitarian organizations for guidance on the content, scope and application of counter-terrorism measures in specific contexts.**

As part of this dialogue, donors need to be more responsive to requests from humanitarian organizations for clarity on how counter-terrorism measures apply to them in specific contexts. This is particularly the case in relation to the existence and scope of any policies on contact, which is widely misunderstood to be a potential criminal offence. This study found very few examples of formal good practice and many examples where the lack of information results in misinformation, self-regulation and self-censorship on the part of humanitarian actors often going beyond the original donor requirements. Without this information, humanitarian organizations are not able to advise their staff on relevant donors' counter-terrorism laws and policies and to discuss the implications for programming and funding choices.

RECOMMENDATION 3

- **Donors and inter-governmental bodies should take steps to ensure that counter-terrorism measures do not undermine the valuable role played by national and local humanitarian actors.**

The study found that donor-imposed counter-terrorism measures have had a differential impact on humanitarian actors. Whether through formal policies to channel funding to fewer and more 'trusted' international NGOs or the implementation of partner vetting schemes, the crucial role of local organisations risks being further diminished. Donors should continue to support their critically important work and engage in dialogue about how their risk management and administrative systems respond to counter-terrorism due diligence requirements. Where appropriate, donors should support these actors in building their risk-management capabilities, including compliance with counter-terrorism conditions. Coordination bodies for local humanitarian actors could also be utilised to discuss counter-terrorism implications, due diligence requirements and how these measures can be managed effectively against programme criticality.

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[325] SDC 'Project Description: The impact of donor counter-terrorism laws and related contractual requirements on the rights of Palestinians to received assistance'

UN agencies and international NGOs also have a role to play in supporting the work of their local implementing partners. This includes ensuring that their own contractual agreements (the terms of which may be dictated by donors or their own headquarters) do not negatively impact their partners' assistance and protection activities. Sharing the risk, rather than passing it along to local partners to reduce one's own vulnerability, is vital.

Inter-governmental bodies such as FATF and its associated regional organisations should also review recommendations regarding regulation of the non-profit sector in the context of terrorist financing. FATF has recognised that, on occasion, existing Recommendation 8 has been utilised to significantly restrict national non-profit sectors, potentially undermining legitimate charitable activities. FATF should engage with representatives of humanitarian actors, such as the IASC, in this review process.

RECOMMENDATION 4

- **Counter-terrorism laws and measures adopted by States and inter-governmental organisations should include exceptions for humanitarian action which is undertaken at a level intended to meet the humanitarian needs of the person concerned.**

As indicated earlier, the basic principle that humanitarian action must be undertaken solely on the basis of need, without discrimination on political or other grounds, requires the fact of terrorist designation or other links to be ignored when dealing directly with individual beneficiaries. When an individual is in need, assistance which aims at preserving life, preventing and alleviating human suffering and maintaining human dignity cannot be denied. Any potential security disadvantage from such an act, for example where it is seen as helping the enemy, is considered to be outweighed by the humanitarian imperative in this situation. In addition to its basis in IHL, the principle is a cornerstone of the Good Humanitarian Donorship initiative and reflected in the European Consensus on Humanitarian Aid.

While this principle is not perfectly upheld in the practices examined by this research, it is reflected in some of the counter-terrorism laws examined for this report. This is notable in the US, for example, where there is a standard exemption for "donations … of articles, such as food, clothing and medicine, intended to be used to relieve human suffering" in the International Emergency Economic Powers Act (IEEPA), the asset freezing provision on which much US counter-terrorism law is based, as well as an exemption for medicine and religious materials in the material support statute. The IEEPA exemption has, however, been consistently overridden in terrorist cases (in accordance with the provisions of the Act) and jurisprudence has confirmed that the exemption in the material support statute only covers provision of medicine and religious materials, likely not

other humanitarian aid.[326] New Zealand criminal law incorporates the full principle, making a specific exemption from the crime of material support for the provision of material such as food, clothing or medicine "in an act that does no more than satisfy essential human needs" of designated individuals or their dependants. A similar approach can be found in the jurisprudence of the European Court of Justice, which held that the provision of social security benefits to the spouses of listed persons did not violate the sanctions regime in a judgement which rejected the notion of fungibility of resources where those resources were at a level "intended to meet only the strictly vital needs of the persons concerned". [327] While not examined in detail in this report, sanctions generally tend to include provisions for their measures to be relaxed to meet the humanitarian needs of designated individuals.

The principle is rarely violated in practice. One obvious example is the beneficiary vetting applied by the US in the oPt, insofar as it is used to exclude individuals from humanitarian aid. As the rollout of vetting has highlighted, organisations applying the basic principle are unlikely to be aware of the affiliations of the individuals they provide with humanitarian assistance, and so the issue may not arise. Making this explicit in laws at national, regional or international level would not only be an important statement of principle but would help clarify the legal position for humanitarian actors and reduce some of the negative impact of the "chilling effect" discussed above. This could be done via the introduction of standard humanitarian exemptions in counter-terrorist sanctions regimes and national criminal laws. On the policy level, the practice of beneficiary vetting (and the rejection of anyone linked with a designated terrorist entity as a beneficiary of humanitarian assistance) should be avoided.

RECOMMENDATION 5

- **Counter-terrorism laws and related measures adopted by governments and relevant inter-governmental bodies should exclude ancillary transactions and other arrangements necessary for humanitarian access recognising that humanitarian actors operate in areas under control of groups designated as terrorist.**

Humanitarian actors in certain contexts must be able to engage with armed groups designated as terrorist for safe and sustained access to civilian populations under their control. This is particularly acute in areas where designated groups are also *de facto* authorities and may impose requirements such as registration, auditing and taxation on humanitarian organisations. The issue of how to manage necessary ancillary transactions with armed groups designated as terrorist is complex and there are no easy solutions. It should be proactively managed in a way that reconciles the real risk of unintended or incidental contributions to designated groups against the scale and intensity of the humanitarian need.

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[326] See Humanitarian Law Project case, discussed in Section II
[327] M (FC) & Others v HM Treasury, Case C-340/08, para 61

As has been seen, this is often the way both states and humanitarian organisations manage the risk in practice. Faced with both increasing operational difficulties and the deteriorating humanitarian situation in southern Somalia in 2010, the UN Security Council created an exception to the sanctions regime for "the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia".[328] In July of the following year the UN declared famine in parts of southern Somalia, and nine day later, the US, who had not yet incorporated the exception into its national law, did so, issuing a licence to the State Department and USAID in terms similar to the Security Council Resolution. In the UK, which had incorporated the exception, the Charity Commission issued guidance on how to balance the two imperatives which both reminded humanitarian actors of their legal obligations and sought to ensure that they would not be paralysed by fear of liability: charities must not, they advised, "base their decisions on an automatic acceptance that all organisations and those they work with, have an association with a terrorist group".[329]

However, as the study has suggested, this recalibration may have come too late. In the words of one seasoned humanitarian actor, "the donor community had to wait until a famine had been formally declared in Somalia before the political space was created for concessions to be made – we shouldn't wait until people are suffering to that extent before agreeing what the revised rules should be." On this basis, states should consider standard exemptions to counter-terrorist sanctions and criminal law in terms similar to the Somalia resolution. These could be under certain conditions such as the good faith of the provider or with a commonly agreed oversight mechanism attached.

RECOMMENDATION 6

- **Humanitarian organisations should work together to more effectively demonstrate and strengthen the implementation of the different policies, procedures and systems used to minimize aid diversion to armed actors, including those designated as terrorist, and better communicate how they weigh such efforts against programme criticality and humanitarian need.**

Humanitarian organisations should collaborate more closely to both demonstrate and strengthen implementation of the different policies, procedures and systems used to minimise aid diversion to armed actors. This would also apply to those designated as terrorist, and more effectively communicate how they weigh such efforts against programme criticality and humanitarian need.

Humanitarian action is never intended to benefit the parties to an armed conflict and humanitarian organisations have put in place standards and procedures that seek to prevent aid diversion and

[328] UNSCR 1916
[329] Charity Commission advice for Charities raising funds for and/or carrying out humanitarian operations in response to the crisis in Somalia and East Africa, July 2011

ensure the impartial delivery of aid. Risk management and mitigation in the humanitarian sector in general can be and is being further improved to allay donors' concerns. The impetus has also come from within organisations as they improve their overall risk management frameworks in response to legitimate concerns regarding aid effectiveness. Examples of good sector practice in reconciling counter-terrorism risks with established risk management frameworks were highlighted in this study. By taking the initiative to respond to counter-terrorism obligations and donor concerns on their own terms, operational actors can both improve the humanitarianism-security equilibrium and inject a dose of operational reality.

The IASC as the primary mechanism for inter-agency coordination of humanitarian action has a critical role to play in establishing sector standards such as best practice guidelines in risk management in the context of counter-terrorism.

RECOMMENDATION 7

- **Donor States and inter-governmental bodies should avoid promulgating on-the-ground policies that inhibit engagement and negotiation with armed groups, including those designated as terrorist, that control territory or access to the civilian population.**

Contact or dialogue with individuals or groups designated as terrorist is not prohibited and should not be. As has been remarked by many observers, effective humanitarian action depends on dialogue with those in control of territory.[330] In situations of armed conflict, IHL provides for impartial humanitarian bodies to engage with the parties to an armed conflict in order to negotiate access, or, in the language of the Four Geneva Conventions of 1949, to offer their services to them. Anticipating protests about such engagement legitimising non-state actors, the Conventions add that such humanitarian engagement "shall not affect the status of the parties to the conflict".[331] In the one national jurisdiction examined which does prohibit associating with a terrorist organisation, a specific exception is made when this is for the purpose of providing humanitarian aid.[332]

However, as was discussed in relation to the oPt, there may be formal or informal policies limiting contact with groups listed as terrorist, often to avoid appearing to accept the authority of such

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[330] "A headline finding of this study is that the greater an organisation's demonstrated capacity to communicate and negotiate with all relevant actors, the better access and security is achieved for humanitarian operations." United Nations Office for the Coordination of Humanitarian Affairs. *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, Policy and Studies Series, 2011 https://docs.unocha.org/sites/dms/Documents/Stay_and_Deliver.pdf. "While engagement [with non-state armed groups] will not always result in improved protection, its absence will almost certainly mean more civilian casualties in current conflicts." Report of the Secretary-General on the Protection of civilians in armed conflict, S/2012/376, para 45. http://reliefweb.int/report/world/report-secretary-general-protection-civilians-armed-conflict-s2012376

[331] Common Article 3 to the Geneva Conventions of 1949

[332] Article 102.8, Australian Criminal Code

groups or offer them political support. In addition, the widely publicised US Supreme Court decision in the Humanitarian Law Project case has led many humanitarian actors to fear interacting with designated groups, despite the clear statement in that judgment that US criminal law "does not penalize mere association, but prohibits the act of giving foreign terrorist groups material support".[333] The negative effects of this confusion are most clearly seen in the case of the oPt. Donors and inter-governmental bodies should avoid promulgating on-the-ground policies that inhibit engagement and negotiation with armed groups, including those designated as terrorist, that control territory or access to the civilian population.

[333] Humanitarian Law Project case, Syllabus page 6

VI SUMMARY OF RECOMMENDATIONS

(1) The humanitarian community and donor States should engage in sustained and open policy dialogue on how to better reconcile counter-terrorism measures and humanitarian action. This should take place across all relevant sectors within government (security, justice, financial and humanitarian) as well as between States and the humanitarian community at both headquarters and field level.

(2) Donors should be more responsive to requests from humanitarian organizations for guidance on the content, scope and application of counter-terrorism measures in specific contexts.

(3) Donors and inter-governmental bodies should take steps to ensure that counter-terrorism measures do not undermine the valuable role played by national and local humanitarian actors.

(4) Counter-terrorism laws and measures adopted by States and inter-governmental organizations should include exceptions for humanitarian action which is undertaken at a level intended to meet the humanitarian needs of the person concerned.

(5) Counter-terrorism laws and related measures adopted by governments and relevant inter-governmental bodies should exclude ancillary transactions and other arrangements necessary for humanitarian access, recognizing that humanitarian actors operate in areas under control of groups designated as terrorist.

(6) Humanitarian organizations should work together to more effectively demonstrate and strengthen the implementation of the different policies, procedures and systems used to minimize aid diversion to armed actors, including those designated as terrorist, and better communicate how they weigh such efforts against programme criticality and humanitarian need.

(7) Donor States and inter-governmental bodies should avoid promulgating on-the-ground policies that inhibit engagement and negotiation with armed groups, including those designated as terrorist, that control territory or access to the civilian population.

Selected Bibliography

American Civil Liberties Union, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the "War on Terrorism Financing"*, June 2009 http://www.aclu.org/pdfs/humanrights/blockingfaith.pdf

Atallah, Haroun. *Preventing Abuse of the NPO Sector from Terrorist Financing*, Organization for Security and Co-operation in Europe, CTN Electronic Journal "Preventing the Abuse of Non-Profit Organizations for Terrorist Financing", June 2011 http://www.humanitarianforum.org/news.php/en/234/ctn-electronic-journalpreventing-the-abuse-of-non-profit-organizations-for-terrorist-financing-june-

Aziz, Sahar. *Countering Religion or Terrorism: Selective Enforcement of Material Support Laws Against Muslim Charities*, Institute for Social Policy and Understanding, Policy Brief #47, September 2011 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2022748

Benthall, Jonathan. *An Unholy Tangle: Boim versus the Holy Land Foundation*, Journal of Islamic and Near Eastern Law, Volume 10, No. 1

Bradbury, Mark. *State-building, Counterterrorism, and Licensing Humanitarianism in Somalia*, Feinstein International Center Briefing Paper, September 2010 http://sites.tufts.edu/feinstein/2010/state-building-counterterrorism-and-licensing-humanitarianism-in-somalia

Cerone, John. *Caveat Doctor: International Law And The Criminalization Of Teaching It*, Suffolk Transnational Law Review, Volume 34, Book 3, 2011 http://www.law.suffolk.edu/highlights/stuorgs/transnat/upload/Cerone_article_book3.pdf

Charity And Security Network. *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism measures in the United States*, (Washington, June 2012) http://www.charityandsecurity.org/system/files/Safeguarding%20Humanitarianism%20Final.pdf

Charity and Security Network. Submissions to US Department of State (December 2011, February 2012) and USAID (January 2012) on the Partner Vetting System

Charity and Security Network. *US Muslim charities and the war on terror: a decade in review*, January 2012 http://www.charityandsecurity.org/system/files/USMuslimCharitiesAndTheWarOnTerror.pdf

Chowdhury Fink, Naureen. *Meeting the Challenge: A Guide to United Nations Counterterrorism Activities*, International Peace Institute, 2012 http://www.isn.ethz.ch/Digital-Library/Publications/Detail/?lng=en&id=146680

Cockayne, James *et. al*. *Reshaping United Nations counter-terrorism efforts: Blue-sky thinking for global Counterterrorism Cooperation 10 Years after 9/11*, Center on Global Counterterrorism Cooperation, January 2012 http://www.globalct.org/publications/reshaping-united-nations-counterterrorism-efforts/

Collinson, Sarah and Elhawary, Samir. *Humanitarian Space: trends and issues*, HPG Policy Brief, April 2012 http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7644.pdf

Council of Europe - Committee Of Experts On Terrorism (Codexter). *Country Profiles On Counter-Terrorist Capacity,* http://www.coe.int/t/dlapil/codexter/country_profiles_en.asp

DARA. *IASC Evaluation of the Humanitarian Response in South Central Somalia 2005-2010,* December 2011 http://reliefweb.int/report/somalia/iasc-evaluation-humanitarian-response-south-central-somalia-2005-2010

DARA. *Focus on Somalia: a predictable crisis*, Humanitarian Response Index 2011 http://daraint.org/humanitarian-response-index/humanitarian-response-index-2011/response-to-crises/somalia/

Development Initiatives. *Global Humanitarian Assistance Report 2011* http://www.globalhumanitarianassistance.org/report/gha-report-2011

Development Initiatives. *Global Humanitarian Assistance Report 2012* http://www.globalhumanitarianassistance.org/report/gha-report-2012

Donohue, Laura K. *Constitutional And Legal Challenges To The Anti-Terrorist Finance Regime*, Wake Forest Law Review, Volume 43 https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=43+Wake+Forest+L.+Rev.+643&srctype=smi&srcid=3B15&key=37fa8183fe1492dff0cb2bf19f044fdf

Egeland, Jan *et. al*. *To Stay and Deliver: Good practice for humanitarians in complex security environments*, OCHA Policy and Studies Series, (OCHA, 2011) http://reliefweb.int/report/world/stay-and-deliver-good-practice-humanitarians-complex-security-environments-enar

European Center for Not-for-Profit Law, *Study on Recent Public Initiatives Improving Transparency and Accountability of Non-Profit Organizations in the European Union*, (April 2009) c.europa.eu/home-affairs/doc_centre/terrorism/docs/initiatives_improving_transparency_accountability_npos_avr09.pdf

European Consensus on Humanitarian Aid. http://ec.europa.eu/echo/policies/consensus_en.htm

Fast, Larissa. *Aid in a Pressure Cooker: Humanitarian Action in the Occupied Palestinian Territory,* Humanitarian Agenda 2015: Case Study No. 7, Feinstein International Center, November 2006 http://dl.tufts.edu/catalog/tufts:UA197.001.DO.00006.00002

Financial Action Task Force*. International Standards On Combating Money Laundering And The Financing Of Terrorism & Proliferation*, - *the FATF Recommendations* http://www.fatf-gafi.org/topics/fatfrecommendations/documents/internationalstandardsoncombatingmoneylaunderingandthefinancingofterrorismproliferation-thefatfrecommendations.html
February 2012

Financial Action Task Force. *Anti-Money Laundering and Combating the Financing of Terrorism: State of Kuwait*, June 2011 http://www.fatf-gafi.org/documents/documents/mutualevaluationofthestateofkuwait.html

Financial Action Task Force. *Third Mutual Evaluation Report Anti-Money Laundering And Combating The Financing Of Terrorism: Turkey*, February 2007 http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20Turkey%20full.pdf

Fraterman, Justin A. *Criminalizing Humanitarian Relief Are US Material Support for Terrorism Laws Compatible with International Humanitarian Law?*, Georgetown University Law Center, Working paper, January 2011 http://www.allianceforpeacebuilding.org/news/67198/Criminalizing-Humanitarian-Relief.htm

Grantmakers without Borders and OMB Watch, *Collateral Damage: How the War on Terror Hurts Charities, Foundations, and the People They Serve*, July 2008 http://www.charityandsecurity.org/studies/Collateral_Damage

Hammond, Laura and Hanna Vaughan-Lee. *Humanitarian Space in Somalia: A Scarce Commodity*, HPG Working Paper, April 2012 http://www.odi.org.uk/publications/6430-humanitarian-space-somalia-aid-workers-principles

Harvard University. *Humanitarian Action Under Scrutiny: Criminalizing Humanitarian Engagement*, Program on Humanitarian Policy and Conflict Research, HPCR Working Paper, February 2011 http://www.hpcrresearch.org/research/criminalizing-humanitarian-engagement

Hayes, Ben. *Counter-terrorism, 'Policy Laundering' and the FATF: Legalising Surveillance, Regulating Civil Society*, Transnational Institute / Statewatch, 2012 http://www.statewatch.org/news/2012/mar/tni-sw-fafp-exec-summary.pdf

Husabø, Erling Johannes and Bruce Ingvild (ass.). *Fighting Terrorism through Multilevel Criminal Legislation: Security Council Resolution 1373, the EU Framework Decision on Combating Terrorism and their Implementation in Nordic, Dutch and German Criminal Law*, Martinus Nijhoff 2009 http://www.brill.com/fighting-terrorism-through-multilevel-criminal-legislation

Inter-Agency Standing Committee. *Real-Time Evaluation of the Humanitarian Response to the Horn Of Africa Drought Crisis: Somalia 2011-2012. May 2012* https://docs.unocha.org/sites/dms/Documents/IASC-RTE%20Somalia%202012.pdf

International Center for Not-For-Profit Law. *NGO Law Monitor: Saudi Arabia*, July 2012 http://www.icnl.org/research/monitor/saudiarabia.html

International Committee of the Red Cross, *Report on IHL and the Challenges of Contemporary Armed Conflicts* (see Chapter 5 on "The Conflation of IHL and the Legal Framework Governing Terrorism"). http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm

International Monetary Fund. *Qatar: Detailed Assessment Report on Anti-Money Laundering and Combating the Financing of Terrorism*, IMF Country Report No. 08/322, October 2008 http://www.imf.org/external/pubs/ft/scr/2008/cr08322.pdf

Kroessin, Mohammed. *Islamic Charities and the "War on Terror: Dispelling the Myths*, Overseas Development Institute, Humanitarian Practice Network, Humanitarian Exchange, Issue 38, June 2007. http://www.odihpn.org/humanitarian-exchange-magazine/issue-38/islamic-charities-and-the-war-on-terror-dispelling-the-myths

Ma'an Development Center. *Matrix of Control: The Impact of Conditional Funding on Palestinian NGOs*, August 2011 http://www.maan-ctr.org/pdfs/FSReport/PositionPaper.pdf

Mackintosh, Kate. *Holder V. Humanitarian Law Project: Implications for Humanitarian Action: A View from Médecins Sans Frontières*, Suffolk Transnational Law Review, Volume 34, Book 3 http://www.law.suffolk.edu/highlights/stuorgs/transnat/upload/Mackintosh_article_book3.pdf

Magone, Claire, Neuman, Michaël and Weissman, Fabrice (eds.). *Humanitarian Negotiations Revealed: The MSF Experience*, (London: Hurst & Co., 2011) http://www.ghd-si.utoronto.ca/wp-content/uploads/2013/01/Humanitarian-Negotiations-Revealed-ver4.pdf

Margon, Sarah. *Unintended Roadblocks: How U.S. Terrorism Restrictions Make it Harder to Save Lives*, Centre for American Progress, November 2011 http://www.americanprogress.org/issues/regulation/report/2011/11/16/10642/unintended-roadblocks/

Margulies, Peter. *Accountable Altruism: The Impact Of The Federal Material Support Statute On Humanitarian Aid*, Suffolk Transnational Law Review, Volume 34, Book 3 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1800124

Middle East and North Africa Financial Action Task Force. *Mutual Evaluation Report: Anti-Money Laundering and Combating the Financing of Terrorism (Egypt)*, 19 May 2009 http://www.menafatf.org/images/UploadFiles/MER_Egypt_ForPublication.pdf

Ministry of Foreign Affairs of Denmark, *Evaluation of the Danish Engagement in and Around Somalia 2006-10*, September 2011 http://www.oecd.org/countries/somalia/49649335.pdf

Oxfam. *A Shift in Focus: Putting the interests of Somali People First*, Briefing Note, February 2012 http://www.oxfam.org/en/policy/shift-focus-somalia

Pantuliano, Sara, Mackintosh, Kate and Elhawary, Samir. *Counter-terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, HPG Policy Brief 43, October 2011 http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/7347.pdf

Petersen, Marie Juul. *For humanity or for the umma? Ideologies of aid in four transnational Muslim NGOs,* University of Copenhagen, 2011 http://www.diis.dk/graphics/staff/mape/marie%20juul%20petersen%20%20for%20humanity%20or%20for%20the%20umma%20.pdf

Roach, Kent. *The 9/11 Effect: Comparative Counter-Terrorism*, University of Toronto, August 2011 http://www.lawfareblog.com/2012/07/lawfare-podcast-episode-16-kent-roach-on-the-911-effect/

Sentas, Victoria. *Terrorist Organisation Offences and the LTTE: R v Vinayagamoorthy*, Current Issues in Criminal Justice, Volume 22, No. 1 http://search.informit.com.au/documentSummary;dn=473203919687268;res=IELHSS

Scheinin, Martin. *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, (A/65/258), http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N10/478/27/PDF/N1047827.pdf?OpenElement

Shaw-Hamilton, James. *Recognizing the Umma in Humanitarianism: International Regulation of Islamic Charities*, in Jon Alterman and Karin Von Hippel, Understanding Islamic Charities, CSIS, (Washington, 2007)

Shaw-Hamilton, James. *Thinking outside the (tick)box: a wider look at Non-Profit Organizations and Counter-Terrorism*, Organization for Security and Co-operation in Europe CTN Electronic Journal "Preventing the Abuse of Non-Profit Organisations for Terrorist Financing", June 2011 http://www.humanitarianforum.org/data/files/osce.pdf

(UK) House of Commons – International Development Committee. *Development Assistance and the Occupied Palestinian Territories*, Fourth Report of Session 2006–07, volume I http://www.publications.parliament.uk/pa/cm200607/cmselect/cmintdev/114/114i.pdf

United Nations Office for the Coordination of Humanitarian Affairs. Occupied Palestinian Territory Humanitarian Reports http://www.ochaopt.org/

United Nations Office for the Coordination of Humanitarian Affairs. Somalia Situation Reports. http://unocha.org/somalia/

United Nations Office for the Coordination of Humanitarian Affairs. *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, Policy and Studies Series, 2011 https://docs.unocha.org/sites/dms/Documents/Stay_and_Deliver.pdf

United Nations, Security Council. Report Submitted by the State of Turkey to Security Council Committee Established Pursuant to Resolution 1267, (2003), S/AC.37/2003/(1455)/6 http://www.un.org/ga/search/view_doc.asp?symbol=S/AC.37/2003/%281455%29/6

United Nations, Security Council. Report Submitted by the State of Qatar to Security Council Committee Established Pursuant to Resolution 1267, (2003), S/AC.37/2003/(1455)/66 http://www.un.org/ga/search/view_doc.asp?symbol=S/AC.37/2003/%281455%29/66

United Nations, Security Council. Reports of the Panel of Experts and the Monitoring Group on Somalia submitted in accordance with Resolution 1853 (2008), S/2010/91 https://www.un.org/ga/search/view_doc.asp?symbol=S/2008/274

United Nations, Security Council. Reports of the Panel of Experts and the Monitoring Group on Somalia and Eritrea submitted in accordance with Resolution 1916 (2010), S/2011/433 https://www.un.org/ga/search/view_doc.asp?symbol=S/2011/433

United Nations, Security Council. Reports of the Panel of Experts and the Monitoring Group on Somalia and Eritrea submitted in accordance with Resolution 2002 (2011), S/2012/544 http://www.un.org/sc/committees/751/mongroup.shtml

(US) Congressional Research Service. *The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, October 2003 http://www.fas.org/irp/crs/RL32120.pdf

(US) Congressional Research Service. *U.S. Foreign Aid to the Palestinians*, August 2010 http://fpc.state.gov/documents/organization/147286.pdf

(US) Government Accountability Office. "*Measures to Prevent Inadvertent Payments to Terrorists under Palestinian Aid Programs Have Been Strengthened, but Some Weaknesses Remain*, May 2009 http://www.gao.gov/products/GAO-09-622

(US) Senate Committee on Foreign Relations. Testimonies from the Panelists, Responding to Drought and Famine in the Horn of Africa, http://www.foreign.senate.gov/hearings/hearing/?id=afcb5daf-5056-a032-5283-63f9fda3cc5d

Van der Does de Willebois, Emile. *Nonprofit Organizations and the Combatting of Terrorism Financing*, World Bank Working Paper No. 208 https://publications.worldbank.org/index.php?main_page=product_info&products_id=23909

Wilder, Andrew. *Perception of the Pakistan Earthquake Response*, Humanitarian Agenda 2015: Pakistan Country Study, Feinstein International Centre, February 2008 https://sites.tufts.edu/feinstein/2008/humanitarian-agenda-2015-perceptions-of-the-pakistan-earthquake-response

Annex I: Table of comparison - National and regional counter-terrorism law and sanctions[334]

	Crimes of financial and other material support to terrorism				Counter-terrorism sanctions		
Jurisdiction	**Scope of material support offences[335]**	**Level of intent**	**Humanitarian exemptions**	**Jurisdiction**	**Scope of sanction regimes**	**Application**	**Waiver/licence available**
Australia	Provision of support or resources to a terrorist organisation that would help the organisation engage in terrorist activity	Support or resources must be intentionally provided. Different penalties are applied depending on whether the provider knows the organisation is terrorist organisation or is merely reckless as to whether the organisation is listed Unclear the level of intent required for an unlisted terrorist organisation as determined by an Australian court	No	Australia claims extra-territorial jurisdiction over these crimes and can prosecute non-citizens with the consent of the Attorney-General	UNSC Res. 1267 lists and pursuant to UNSC Res 1373. National list maintained by Foreign Minister	Any person in Australia; any Australian anywhere in the world; companies incorporated overseas that are owned or controlled by Australians or persons in Australia; any person using an Australian flag vessel or aircraft to transport goods or transact services subject to UN sanctions	Licences can be obtained from the Foreign Minister to deal with proscribed entities
	Provision of funds to, from, or for a terrorist organisation						
	Association with a terrorist organisation	The person must intentionally associate with another person who is a member of, or a person who promotes or directs the activities of, a terrorist organisation	Exemption where association is only for the purpose of providing aid of a humanitarian nature				

[334] This table provides an approximate guide. For a more accurate account please see the relevant section of the full report
[335] The most restrictive offence is listed here, i.e. the one most likely, or least unlikely, to apply to humanitarian operations. Please see the full report for a more comprehensive discussion

Canada	Providing or making available property or financial or other related services, directly or indirectly	Must either intend or know that the resources will be used for terrorist activity or know that they will be used by or for the benefit a terrorist group or of a person carrying out a terrorist activity	No	Extra-territorial jurisdiction over own citizens or residents	One regulation implements UNSC Res. 1267 prohibitions and lists. A second regulation pursuant to UN Res. 1373 maintains a national list established by the Governor General in Council.	Applicable to Canadian citizens (resident and non-resident) and to any person in Canada, which includes both individuals and entities	
EU (Regional Organisation)	EU Member States are required to criminalise a range of acts including participation in the activities of a terrorist group appearing on the EU list Participation includes supplying information or material resources or funding activities in anyway of a terrorist group	Requires knowledge that the resources provided will contribute to criminal activities of the terrorist group	No	N/A (at national member state level)	EU list established by Regulation (EC) 2580 /2001. UNSC Res. 1267 lists implemented by Regulation (EC) 881/2002 (although successful due process challenges to inclusion on the UNSC Res. 1267 lists has led the EU to revise its implementation of UNSC lists). Both Regulations are directly applicable in all EU Member States	Applicable not only within territory of the EU but to any EU national and to any legal person or entity incorporated or constituted under the law of an EU country or doing business within the EU	Exemptions are available under specific conditions and procedures (e.g. funds necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment ECJ interpreted UNSC Res 1267 sanctions as requiring a real risk that resources provided might be used for terrorist ends: *M (FC) & Others v HM Treasury,* 2008. This judgment is binding on all EU member states
Denmark	Provision of financial support or funds or the making of money, other financial assets or financial or other similar services available directly or indirectly to a person, group of persons or association that commits or intends to commit terrorist acts Otherwise furthering the activity of a person, group of persons or association that commits or intends to commit a terrorist act	It is not necessary to intend to further or contribute to a terrorist act if the provider knows that the individual or group is involved in terrorism	No	Extra-territorial jurisdiction over own citizens or residents	Implements EU list. No national list	See EU section	See EU section

France	Financing of terrorist organisations, defined as providing, collecting or managing funds, securities or any property or giving advice to this end	Must either intend or know that the resources provided will be used to commit an act of terrorism	No – level of intent required would make provisions unlikely to apply to humanitarian action	Extra-territorial jurisdiction no matter what the nationality of the offender for these crimes (as specified by the Terrorism Financing Convention) if the offender is found on French territory	Implements EU list. National list may be created by French Foreign Minister	See EU section	See EU section
Germany	Supporting a terrorist organisation (not defined further although commentaries indicate that this includes logistical or financial support)	The supporter must share the goals of the organisation, and be at least reckless as to whether the aims of the group and specific terrorist acts will occur	No – level of intent/nature of offence would make provisions unlikely to apply humanitarian action	Extra-territorial jurisdiction over offences against German / internationally protected legal interests. The crime of supporting a terrorist organisation can also be prosecuted in Germany if committed within the EU or, with the consent of the Federal Ministry of Justice where the perpetrator / victims are German nationals or find themselves on German territory	Implements EU list. No national list	See EU section	See EU section
	Financing of terrorism, defined as provision or collection of funds that will be used to commit a terrorist act	Knowledge that the money will be used to commit a terrorist offence is required	Applicable only to certain types of entities i.e. financial and commercial and not humanitarian actors				
Japan	Provision or collection of funds for the purposes of committing or facilitating public intimidation (no specific references to terrorism in Japanese law)	Requires intention of public intimidation	No – level of intent/nature of offence makes provisions unlikely to apply to humanitarian action	Extra-territorial jurisdiction no matter what the nationality of the offender	UNSC Res. 1267 lists implemented. Also designates on a national level	Individuals and legal bodies in the jurisdiction of Japan	
Kuwait	No specific provisions which criminalises terrorism, financing of terrorism or support to terrorist acts or groups General criminal law applicable only	Only intentional or knowing participation in the criminal group or act constitutes an offence	No – level of intent/nature of offence makes provisions unlikely to apply to humanitarian action	Extra-territorial jurisdiction if crime occurs partially outside of Kuwait	UNSC Res. 1267 lists implemented under general law enforcement powers. No national list	N/A	N/A

Netherlands	Participation in a terrorist organisation, including by supplying assistance in money or any other form	According to the Criminal Code, only knowledge of the terrorist objective of the organisation is required However, the Dutch Supreme Court has ruled that participation requires a person to belong to or be a member of the terrorist organisation and contributes or supports act that further or are related to the realisation of the criminal objective: *NJ 1998/255*	No	Extra-territorial jurisdiction over own citizens; over foreigners if crimes committed with objective of causing fear in part of the Dutch population, or of coercing or seriously damaging Dutch or EU institutions or structures	Applies EU lists. Individuals and entities can also be sanctioned by agreement between the Ministers of Foreign Affairs, Security and Justice, and Finance	See EU section. National list applies to individuals and legal bodies in the jurisdiction of the Netherlands	See EU section
New Zealand	Financing of terrorism	Knowledge or intention that support will be used to carry out terrorist act is required	No – level of intent/nature of offence makes provision unlikely to apply to humanitarian action	Extra-territorial jurisdiction over own citizens. For financing of terrorism, wider jurisdiction in line with Terrorism Financing Convention	UNSC Res. 1267 lists and national list maintained by Prime Minister	All persons and entities in New Zealand, and in many cases New Zealand citizens and companies overseas	Yes - can obtain authorisation from the Prime Minister for activities that might otherwise be prohibited
	Making available property or financial or other service to a designated terrorist entity	Knowledge that the group is a designated entity is required	Excludes humanitarian assistance (for example, food, clothing, or medicine) to designated terrorist individual or dependent in need that does no more than satisfy an essential human need				
Norway	Obtaining or collecting funds or other assets with the intention that they be used to finance terrorist acts and making funds and other assets available to persons or enterprises involved in terrorism "Other assets" are not defined in the law	The level of intent required is not defined though preparatory work for the amendment indicates that it was intended to criminalise wilful (intentional) violations (although it appears sufficient that the person making funds or other assets available thought it likely that the recipient group commits or intends to commit a terrorist act)	No	Extra-territorial jurisdiction over own citizens. Additional jurisdiction over foreign nationals where the act is also a crime in the jurisdiction where it was committed or took effect	UNSC Res 1267 lists. Ceased following EU list in 2006. No national list		

Qatar	Providing material or financial support, information, equipment or supplies, or raising money for a group formed to commit a terrorist crime	Must know the group's terrorist purpose	No – penalties for both offences are doubled if committed through abuse of member of non-profit sector	First crime listed appears to apply only on Qatari territory. Extra-territorial jurisdiction over own nationals for "international crimes"	UNSC Res. 1267 lists implemented under general law enforcement powers. No national list	N/A	N/A
	Terrorist financing, defined as directly or indirectly providing, collecting or attempting to collect funds for the execution of a terrorist act or by a terrorist or terrorist organisation	Intention to use funds or knowing that these funds will be used in whole or in part for the execution of a terrorist act or by a terrorist or terrorist group is required					
Saudi Arabia	Financing terrorism, terrorist acts and organization (within the definition of money laundering)	Knowledge that terrorism or terrorist acts or a terrorist organisation is being financed, which can be inferred from the objective and factual conditions and circumstances, is required	No – increased penalties if the crime is committed through a charitable institution		UNSC Res. 1267 lists and pursuant to UNSR Res. 1373. National list maintained		No provision for humanitarian exemption in applicable law and implementing regulations
Turkey	Provision or collecting funds for a terrorist or terrorist organization	Knowledge and "willingness" that the funds are to be used in a terrorist crime is required	No – level of intent/nature of offence makes provision unlikely to apply to humanitarian action		UNSC Res. 1267 lists and recent 2013 terror financing law provides for national list		MASAK [Financial Crimes Investigation Board] is also authorized to take steps to ensure "the subsistence of the person about whom a decision on freezing of asset has been made and of the relatives of who he/she is obliged to take care of"
United Kingdom	Provision of money or other property for the purposes of terrorism	Knowledge or reasonable cause to suspect that the money or other property will be used for the purposes of terrorism or for the benefit of a listed group is required	No	Extra-territorial jurisdiction over own nationals	EU list and national list maintained of designated persons (not groups) by Minister of Interior	Includes acts outside of UK territory for UK nationals and companies	Licenses to deal with listed entities or individuals can be granted by Treasury
	Entering into or becoming concerned in an arrangement as a result of which money or other property is made available to anotherfor the purposes of terrorism						

United States	Provision of material support to terrorist crimes i.e. "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 …"	Knowledge or intention that support will be used in preparation for or in carrying out a terrorist act is required.	Yes – medicine and religious materials only (not medical treatment)	Extra-territorial jurisdiction over nationals and residents, and over all other perpetrators who enter US territory at any time after the commission of the crime	UNSC Res 1267 lists. National list of FTOs maintained by Secretary of State and individuals and organisations subject to two specific Executive Order sanctions regimes	All US citizens, permanent residents, entities organized under the laws of the US (including foreign branches), or any person in the US are covered by US sanctions	Yes – automatic exemption for "donations … of articles, such as food, clothing and medicine, intended to relieve human suffering" Exemption in US law can be overridden by President where: (1) such donations "would seriously impair his ability to deal with any national emergency"; (2) where they "are in response to coercion against the proposed recipient or donor"; and (3) "endanger the Armed Forces of the US which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by circumstances". Exemption has been overridden under Executive Orders No. 12947 (1995) and No. 13224 (September 2011) OFAC can issue licenses in exceptional cases to deal with designated individuals/entities on list
	Provision of material support (see above for definition) to designated Foreign Terrorist Organisations	Knowledge either that the organisation is a designated terrorist organisation or that it has engaged or engages in terrorist activity is required.					