


Counter-terrorism laws and regulations

What aid agencies need to know



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Cover photo: Three female Hamas supporters during a rally celebrating the group's victory in the Palestinian Legislative Elections.

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Chapter 1

Introduction

Over the past two decades, states and inter-governmental bodies have adopted increasingly robust counter-terrorism laws and policies. At the same time, humanitarian crises in countries like Somalia, Mali, and Syria have reaffirmed the continued importance of principled humanitarian action. Counter-terrorism laws and humanitarian action share several goals, including the prevention of attacks against civilians and of diversion of aid to armed actors. Yet tensions between these two areas of law and policy have emerged in recent years, resulting in challenges for governments and humanitarian actors. These include obstacles to open and frank discussions about the practical and legal consequences of counter-terrorism laws for humanitarian action, especially in territories where listed armed actors control territory or access to populations in need; donors' increasing risk aversion, which can complicate or thwart efforts by humanitarian organisations to operate in high-risk environments; recommendations by inter-governmental bodies that seek to regulate humanitarian organisations because they are perceived as likely conduits for terrorist activity; a lack of exemptions in counter-terrorism law for principled humanitarian action; the criminalisation of activity deemed essential to humanitarian action (e.g. the provision of medical assistance to wounded enemy fighters); and the increasing use of unconventional tactics, such as calling for congressional inquiries or the use of 'naming and shaming' campaigns to link civil society organisations with harmful activity.

Researchers and members of the humanitarian community have written about the tensions between counter-terrorism laws and humanitarian action,¹ and a recent study commis-

sioned by the Norwegian Refugee Council and the UN Office for the Coordination of Humanitarian Affairs (OCHA) has contributed significantly to discussions regarding the practical impact of donors' counter-terrorism measures on humanitarian action.² While those discussions have provided in-depth and nuanced analysis of current legal frameworks and the dilemmas facing humanitarian actors, this paper aims to provide a brief primer on the subject and an overview of some of the most salient questions that humanitarian actors are grappling with in planning effective, principled, and lawful operations in high-risk environments. The report is aimed at a generalist humanitarian audience; it does not explore legal concepts in great depth or detail, but rather provides readers with a survey of some of the pressing challenges facing humanitarian actors as they navigate counter-terrorism laws and policies in their work in conflicts where listed non-state armed groups control territory or access to civilians. The paper begins by outlining the legal bases for both counter-terrorism law and humanitarian action, and then discusses the challenges and possible consequences of legislation for humanitarian actors. Chapter 3 outlines some of the key challenges anti-terrorism laws and regulations pose to humanitarian action, and Chapter 4 provides some questions and approaches humanitarian actors may wish to consider when facing these challenges.

1 For an excellent discussion of these issues, see Sara Pantuliano et al., *Counter-terrorism and Humanitarian Action*, HPG Policy Brief 43, October 2011. See also Counterterrorism and Humanitarian Engagement Project, 'Counterterrorism and Humanitarian Engagement in Somalia and Mali', Background Briefing, March 2013.

2 Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, OCHA and the NRC, July 2013.

Chapter 2

Humanitarian principles and counter-terrorism law

What are humanitarian principles and why do they matter?

Under international law, a state bears the primary responsibility for meeting the basic needs of its population. Certain events, such as armed conflicts, may result in a state not being able to meet those needs. In these instances, humanitarian actors may offer assistance in accordance with international humanitarian law (IHL) – the international legal framework regulating armed conflict – which provides rules and principles for states, non-state actors, and impartial and independent humanitarian organisations.

Whether an armed conflict is international or non-international in character determines in part the applicable portions of international humanitarian law establishing the rights and responsibilities of the parties, civilians, and other actors. In international armed conflicts, humanitarian actors generally negotiate humanitarian access with states; in non-international armed conflicts, humanitarian actors may need to negotiate and coordinate not only with the state but also with non-state actors, such as armed groups and rebel organisations, while still being subject to state consent for their presence and activities. Under IHL, the act of negotiation between humanitarian actors, states, and non-state actors does not confer recognition or legitimacy on any party; rather, negotiation serves as a means to gain access and deliver aid.

The principles of humanity, impartiality, neutrality, and independence underlie humanitarian action. Adherence to these principles helps enable humanitarian groups to provide effective assistance that reaches the civilian population and those no longer participating in hostilities. In addition to facilitating access and providing a framework for assistance, these principles also serve – in theory, if not always in practice – to protect aid workers in the field. Despite adherence to these principles, however, certain conditions may affect the ability of humanitarian organisations to successfully negotiate access to, and help protect, the civilian population. Humanitarian organisations may be perceived as politically motivated or representing foreign interests, which may cause states or non-state actors to deny access.

What is counter-terrorism law?

Broadly speaking, counter-terrorism law encompasses the body of laws adopted by inter-governmental bodies and states to deter and punish terrorist acts, and to prevent terrorist groups from accessing resources that support their terrorist acts. While counter-terrorism laws existed in many countries prior to 2001, the attacks of 9/11 and the immediate response by the international community served as a catalyst for states to develop new measures and strengthen existing laws. Subsequent attacks and attempted attacks – including in Africa, Asia, Europe, and the US – reinforced states' urgency not only to prevent

non-state actors from conducting attacks on their soil, but also to prevent people from undertaking so-called preparatory acts of terrorism, such as attending terrorist training camps, raising or laundering funds for terrorist activities, and inciting terrorist attacks.

As discussed below, the listing of particular individuals and groups as terrorists is a significant component of counter-terrorism law. Many countries and international bodies, including the United Nations, have developed terrorist lists that publicly identify and sanction particular individuals and groups.

What counter-terrorism measures has the United Nations adopted?

The United Nations has adopted several counter-terrorism measures to punish individuals and groups engaging in terrorism. UN Security Council Resolution 1267 and subsequent related resolutions require UN member states to freeze funds and other financial resources of the Taliban, al-Qaeda and affiliated individuals and groups, and designate specific individuals and groups as sanctioned.³ Additionally, Resolution 1373 and subsequent related resolutions require states to implement laws and measures to improve their ability to prevent terrorist acts. These measures include criminalising the financing of terrorism; freezing the funds of individuals involved in acts of terrorism; denying financial support to terrorist groups; cooperating with other governments to share information; and investigating, detecting, arresting, and prosecuting individuals and entities involved in terrorist acts.

The Security Council has also established committees that oversee the implementation of these sets of resolutions. The 1267 Committee places individuals and entities associated with al-Qaeda on a public list. Inclusion on the list subjects designated individuals and groups to sanctions, including an asset freeze, travel ban, and arms embargo, which all UN member states must impose. The 1373 Committee, also referred to as the Counter-Terrorism Committee or CTC, assesses the counter-terrorism capabilities of each member state and provides technical assistance to countries to help them develop and implement counter-terrorism laws. The CTC produces reports that describe the counter-terrorism laws and policies of each state and assess that state's progress towards meeting the requirements of UN counter-terrorism resolutions.⁴

³ Initially, the United Nations placed individuals or groups associated with the Taliban or al-Qaeda on one consolidated list, but subsequently separated the list into two separate groups. Currently, the 1988 Committee oversees the listing of individuals and entities associated with the Taliban.

⁴ See Country Reports Pursuant to Resolution 1373 (2001) and Resolution 1624 (2005), <http://www.un.org/en/sc/ctc/resources/countryreports.html>.

What counter-terrorism laws have states adopted?

Security Council resolutions establish a baseline of counter-terrorism measures that UN member states must implement, while allowing states to enact additional or stronger measures if desired. Many states, including most major humanitarian donor states, have adopted at least some form of counter-terrorism measures, although the precise scope of these laws may vary widely from state to state. While there is variation among states, certain trends have emerged.

Among certain leading humanitarian donor states, counter-terrorism laws not only strongly condemn and penalise terrorist acts but also criminalise acts preparatory to or in support of terrorism. In the United States, for example, an act deemed in ‘material support’ of terrorism is punishable by 15 years’ imprisonment. The law applies irrespective of the nationality of the accused. The definition of ‘material support or resources’ encompasses a broad range of activities, including the provision of lodging, training, expert advice or assistance, communications equipment, facilities, personnel, and transportation.⁵ An individual does not need to intend to further an organisation’s terrorist activities to be found guilty under the material support statute, and only the provision of ‘medicine and religious materials’ is permitted under the law. The law contains no general exemption for humanitarian action. In a case challenging the material support statute, the US Supreme Court explained that a wide range of seemingly peaceful activities, such as training listed groups on the use of international law to resolve disputes, are prohibited under the law because any assistance offered to terrorists ‘frees up’ resources for nefarious activities.⁶

In addition to or as part of their implementation of the UN terrorist lists, many states, including the United States, the United Kingdom, Canada, and Australia, have developed their own lists of terrorist individuals and groups. Some countries maintain multiple terrorist lists, with individuals and groups on each list subject to different sanctions. Because states define terrorism differently, and because the listing of individuals or groups may be responsive to a specific or regional threat facing a country or a foreign policy effort to isolate and put pressure on a particular group, the various terrorist lists vary greatly in terms of which groups or persons are listed. As the decision on whether to list an individual or group rests with the government of each state, the listing process is an inherently political one, subject to many different considerations and different definitions of what constitutes a ‘terrorist’.

Other sources of counter-terrorism policy

In addition to international and domestic sources of counter-terrorism law, inter-governmental bodies may also promulgate counter-terrorism policy, including by drafting

⁵ 18 U.S.C. § 2339A and 2339B. On this legislation, see Charles Doyle, *Terrorist Material Support: An Overview of 18 U.S.C. 2339A and 2339B*, Congressional Research Service, 19 July 2010.

⁶ Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2725 (2010).

Box 1

Examples of counter-terrorism-related contract clauses⁷

In a contract between the US Agency for International Development (USAID) and a humanitarian organisation, USAID required the organisation to conduct ‘enhanced due diligence’, whereby the organisation agreed that it and any implementing partners would ‘take all reasonable steps to minimise 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’, to include fees at roadblocks and other transit points, ‘purchases or procurement of goods or services, and payments to al-Shabaab’. If such a transaction occurred, the grantee agreed that it would notify USAID promptly and in writing, and include a description of any ‘safeguards and procedures, including management and oversight systems, that were in place to help avoid the occurrence of such event’.

In another contract between two organisations, the grantee required the sub-grantee to certify that it and its implementing partners ‘have not made and will not (a) make any payments or conveyance of any other benefits to any person or organisation on the [Specially Designated Nationals] List or similar lists kept by the UK Treasury Department or any person or organisation that is directed or indirectly owned 50% or more by any person or organisation on such lists ... or (b) export into Syria any items controlled by the US or the EU pursuant to the Sanctions Laws’. If prohibited payments or exports occur, the sub-grantee would ‘immediately notify’ the grantee, in writing, of the transaction. As with the USAID contract, the description of the prohibited transaction should include any ‘safeguards and procedures (including management and oversight systems) in place to help avoid the re-occurrence of such event’.

‘model’ counter-terrorism laws. The Financial Action Task Force (FATF) and the Global Counter-Terrorism Forum (GCTF) have the membership, funding, and backing to significantly influence the development of domestic, regional, and international counter-terrorism laws. The mandates of these groups range from broad counter-terrorism issues to more specific areas of concern, such as terrorist financing.

The recommendations of these international bodies can affect a broad range of actors, including humanitarian organisations. For instance, the FATF has developed recommendations on terrorist financing which include a recommendation regarding civil society organisations. Because the FATF maintains that an ‘ongoing international

⁷ Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts*, Research and Policy Paper, May 2014.

Box 2**The impact of counter-terrorism law on humanitarian assistance: a hypothetical scenario**

Imagine you work for a large international NGO that provides life-saving assistance to children. You are overseeing the delivery of food and medical supplies to a community in Somalia located in an area under the control of al-Shabaab, an armed group that many countries have placed on their terrorist lists because of its affiliation with al-Qaeda. While al-Shabaab is in a conflict with the internationally recognised government of Somalia, the central government is in many important respects weak. al-Shabaab effectively governs those parts of south and central Somalia that it controls. The central government has little or no influence, control, or reach in these areas. Al-Shabaab has placed checkpoints on roads leading to the area where the community lives, and a member of al-Shabaab stops your convoy at one of these checkpoints. You are told that you must pay a \$200 fee to pass the checkpoint. In addition, several of your colleagues who are already working in other parts of al-Shabaab-controlled territory have informed you that the organisation's 'NGO Liaison Office' is requesting a monthly 'tax' from all international organisations seeking access to the area.

Your organisation has published the core humanitarian principles on its website, as well as its commitment to the IFRC/ICRC Code of Conduct. In your initial training, you were reminded that any payments or fees to non-state armed actors in exchange for access would constitute a violation of the principle of neutrality and also, possibly, the principle of independence. You also recognise that, in many other conflicts, organisations that provide such fees to armed groups often face heightened security risks as non-state armed actors seek to extort greater and greater concessions from foreign organisations.

The counter-terrorism law of your home country prohibits the provision of material support and resources (which would include any direct monetary payments to representatives of al-Shabaab) to al-Shabaab or any other listed terrorist group, and individuals who violate the material support law of your country could face serious criminal and civil penalties. In addition, your organisation's contract for a grant from your home country's government humanitarian aid body explicitly states that your organisation must not provide resources or support, directly or indirectly, to the listed organisations or those individuals or groups affiliated with them. Such support would constitute a material breach of the contract. You are faced with two options, both of which raise concerns for you and your NGO: either pay the \$200 fee and violate your country's counter-terrorism

laws, as well as the terms of your grant contract, or decline to pay the fee and not be allowed to continue to provide much-needed assistance, or take the significant risk that al-Shabaab will expel your organisation from areas under its control.

As illustrated by this example, counter-terrorism laws and policies may present serious dilemmas for humanitarian actors. On the one hand, humanitarian actors could violate numerous laws through certain prohibited interactions with listed armed groups and jeopardise funding (from the same country whose laws pose restrictions) to provide life-saving assistance to those in need. These transactions may also violate humanitarian principles, though on purely humanitarian terms this would have to be weighed against the life-saving nature of the assistance and the severity of need among the civilian population. On the other hand, compliance with counter-terrorism law could result in moral and ethical challenges to principled humanitarian action, as provisions like the material support law cited here could constrain and even prevent the delivery of aid.

Organisations faced with these kinds of difficult choices, in Somalia and in other areas where listed armed groups act as the de facto government in situations of armed conflict, have taken a variety of decisions. Some organisations have sought to obtain licences from their home jurisdiction, effectively obtaining authorisation to engage in transactions that would otherwise violate the law. These licences rarely exempt individuals from criminal liability, but may provide some clarity as to which activities are understood as necessary in the circumstances. Some organisations have attempted to engage in a frank dialogue with their donors, informing them of the requests of listed armed groups and seeking guidance as to how they should manage these demands while seeking to provide life-saving assistance. Governments have hesitated to provide specific guidance to grantees, but such an approach may provide a better understanding of the legal environment. Other organisations have attempted to fully understand the risk profile presented by various counter-terrorism laws, balanced these against humanitarian needs, and decided to proceed with their operations despite some degree of exposure to possible legal liability. Yet other organisations have assessed their operational profile, attempted to practically assess their risk of legal liability, and determined that they must cease some or all of their activities in high-risk areas.

campaign against terrorist financing has unfortunately demonstrated ... that terrorists and terrorist organisations exploit the [non-profit] sector', FATF Recommendation No. 8 advises countries to 'review the adequacy of laws and regulations that relate to entities that can be abused for the financing of terrorism'.⁸ According to the FATF, countries should also adopt laws and regulations to prevent the misuse of civil society organisations because those groups are 'particularly vulnerable' to misuse by terrorists.

Organisational policies and procedures, as well as contracts between humanitarian actors and donors or UN entities, may also affect the daily activities of humanitarian actors. In contracts with donors and partners, a humanitarian organisation may be required to ensure that funds do not support terrorism, or a humanitarian organisation may receive funds contingent on a requirement that it vet local partners, vendors, and suppliers against numerous terrorist lists.⁹ Many contracts stipulate that these obligations also apply to an agency's implementing partners, contractors, or sub-grantees.¹⁰

Many organisations have also adopted risk management procedures and internal policies, framed in terms of principled humanitarian action, that address counter-terrorism issues or express an organisation's commitment to preventing its resources from supporting terrorism.¹¹

How do counter-terrorism laws affect humanitarian assistance?

While there are points of convergence between principled humanitarian action and counter-terrorism laws, particularly in terms of seeking to avoid diversion to non-state armed groups, tensions in key areas produce challenges for humanitarian actors. Humanitarian organisations may face

⁸ *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation: The FATF Recommendations*, Financial Action Task Force, February 2012.

⁹ See Counterterrorism and Humanitarian Engagement Project, *Partner Vetting in Humanitarian Assistance: An Overview of Pilot USAID and State Department Programs*, Research and Policy Paper, November 2013.

¹⁰ Mackintosh and Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, p. 69.

¹¹ For more detail on this, see Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations*, Research and Policy Paper, May 2014.

heightened scrutiny due to concerns that humanitarian aid could be exploited or abused by terrorists. The prohibition on material support in the United States and other jurisdictions, along with the FATF recommendation on the regulation of civil society, also appear to reflect a growing concern that humanitarian assistance can be manipulated or abused by, or diverted to, terrorist groups. There is also a growing sense that counter-terrorism laws and policies should apply to a broad range of activities far beyond those traditionally identified as supporting violent acts (such as financing for terrorist acts and the provision of military training). Consequently, existing counter-terrorism laws may be interpreted (largely through regulations and contracts) to apply to the types of unintentional or incidental diversion that may occur where aid agencies operate in areas controlled by listed groups. The FATF recommendation and other measures aimed at civil society suggest that states should undertake concerted efforts to prevent the misuse of humanitarian aid.¹²

Counter-terrorism laws also affect and even restrict the ability of humanitarian actors to operate in certain high-risk environments, potentially posing complex new legal and operational challenges to humanitarian organisations and their donors. Non-state groups may be designated as terrorists and placed on UN or domestic terrorist lists. Placement on these lists triggers many prohibitions, some of which can affect the ability of humanitarian actors to operate in areas where a designated non-state group controls territory.

Humanitarian groups may object to other requirements of counter-terrorism law, such as USAID's pilot Partner Vetting System (PVS), which once in effect will require humanitarian organisations in five countries to provide detailed personal information about local partners and sub-grantees to US government officials for additional vetting through classified intelligence databases. Programmes like PVS may appear to compromise the neutrality and independence of a humanitarian organisation by requiring that the organisation gather information for governments.

¹² Examples of these efforts include a recent raid on the offices of the Humanitarian Relief Foundation (IHH) by Turkish counter-terrorism police because of the organisation's suspected link to al-Qaeda. 'Turkish Anti-Terrorist Police Raid Aid Agency Near Syrian Border', Reuters, 14 January 2014.

Chapter 3

Challenges

Difficulties in discussing practical consequences of counter-terrorism law

As states develop counter-terrorism laws and policies, dialogue between government officials and civil society has become especially important in understanding how the counter-terrorism sanctions framework may reshape donor agreements and frameworks, as well as the question of criminal liability for humanitarian actors under counter-terrorism laws. While some actors, including those within government and civil society, have been reluctant to engage in open and frank discussion about these issues, recently there has been more engagement between states and humanitarian actors. This may stem in part from increased awareness of counter-terrorism laws and their impact on the part of humanitarian organisations; from a sense that their activities are being more directly affected by counter-terrorism regulations; or from a concern on the part of donor governments – particularly in the wake of the 2011 Somalia famine – that some counter-terrorism regulations may impede their efforts to fund and facilitate emergency aid.

In instances where states and humanitarian actors have engaged in conversations about these issues, however, states have been guarded about elaborating the full scope of their counter-terrorism laws and the obligations those laws place on humanitarian organisations, even when those organisations receive funding from the government. Government officials may find it difficult to explain requirements to grantees, may want to avoid giving complete and clear guidelines to humanitarian actors because of the operational implications of those guidelines, or may not realise the full implications of certain provisions of counter-terrorism law. Governments may face competing impulses to provide large sums of aid and goods to those in need while implementing restrictive laws and regulations that seek to prohibit the provision of resources to listed armed groups. Furthermore, government officials may encounter tensions between various counter-terrorism laws: for instance, some states demand that grantees undertake ‘all reasonable measures’ to prevent the provision of aid to listed persons and groups, while other provisions impose liability regardless of any ‘reasonable’ measures that an organisation takes to prevent aid diversion to listed groups. Without an accurate and complete understanding of the laws and the manner in which governments interpret and intend to enforce them, humanitarian actors may find it difficult to develop appropriate risk management procedures.

This lack of clarity may contribute to other undesirable consequences for humanitarian actors. In environments where humanitarian organisations come into contact with individuals or groups designated as terrorists, humanitarian actors may seek to obscure or diminish their ties with

Box 3

A chilling effect on humanitarian assistance: Somalia

In 2011, as the famine in Somalia reached its peak, the UN Security Council, pursuant to Resolution 1844, implemented sanctions against certain listed individuals and groups in Somalia, including al-Shabaab. The group’s placement on the UN sanctions list and subsequent listing by UN member states, as well as the prohibitions imposed by counter-terrorism law against providing support to terrorist groups, meant that humanitarian organisations faced tremendous challenges in providing aid to the Somali population. These challenges arose because al-Shabaab controlled territory throughout Somalia, and as humanitarian groups worked to negotiate access to the civilian population under its control, al-Shabaab often mandated that it oversee, coordinate, or distribute aid, or directly taxed humanitarian groups.¹³ Under counter-terrorism law, the diversion of aid to al-Shabaab, or the payment of ‘taxes’ to the group, would be prohibited and could result in criminal liability for aid workers. Even as government officials in the United States and other donor countries provided assurances that individuals acting ‘in good faith’ would not be prosecuted under counter-terrorism laws prohibiting the provision of ‘material support’ and resources to designated terrorists,¹⁴ many humanitarian groups remained unsure or wary of prosecution under counter-terrorism laws. This tension, engendered by states’ calls for increased humanitarian assistance while condemning the terrorist acts of al-Shabaab, contributed to the delayed response to the famine among donor states and humanitarian actors.¹⁵

As discussed below, after the crisis in Somalia states did not make any changes to existing counter-terrorism laws and regulations to provide an exemption for humanitarian action. This means that humanitarian actors may face similar problems in future humanitarian crises. This tension between counter-terrorism law and humanitarian action has surfaced again in Mali and Syria, where humanitarian actors come into contact with groups or persons affiliated with al-Qaeda, a designated terrorist group.

13 Ashley Jackson and Abdi Aynte, *al-Shabaab Engagement with Aid Agencies*, HPG Policy Brief 53, December 2013.

14 Office of Foreign Assets Control (OFAC), US Department of Treasury, *Frequently Asked Questions*, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#131> (explaining that the ‘unintentional’ provision of humanitarian assistance to al-Shabaab is ‘not a focus for OFAC sanctions enforcement’).

15 Laura Hammond and Hannah Vaughan-Lee, *Humanitarian Space in Somalia: A Scare Commodity*, HPG Working Paper, April 2012.

those individuals or groups.¹⁶ Humanitarian actors may either knowingly or unknowingly engage in activity that exposes them to liability under counter-terrorism laws or, conversely, humanitarian actors could become wary of certain acts that they believe will expose them to criminal liability and limit their operations accordingly, even if no law prohibits those actions (a key example here is speaking with listed organisations and entities). As a result, the real or perceived threat of criminal liability under counter-terrorism laws could potentially serve to ‘chill’ or curtail otherwise lawful and desirable humanitarian action. While the precise extent of this chilling effect cannot be easily measured, anecdotal evidence from recent humanitarian crises demonstrates that counter-terrorism laws and policies have had a considerable impact on otherwise lawful humanitarian action.¹⁷

In general, governments have not prosecuted humanitarian actors for violations of counter-terrorism law. Daniel Fried, an official at the US State Department charged with coordinating US sanctions policy, recently stated that he ‘can’t think of cases where the [US] Department of Justice has actually gone after legitimate NGOs’ as evidence that the prosecution of humanitarian actors is not an enforcement priority under US counter-terrorism law.¹⁸ Despite this and other statements from government officials, the fact remains that it is undesirable to have individuals or groups engaging in possible violations of criminal law. Other forms of assurances, such as general or specific licences issued by the US Office of Foreign Assets Control (OFAC), do not protect humanitarian actors from criminal liability under counter-terrorism law.¹⁹ Criminal law is intended to instruct members of society not to engage in particular acts, regardless of whether those people anticipate being prosecuted. The current approach engenders uncertainty and confusion and presents very serious dilemmas for any responsible organisation seeking to ensure that its activities comport with the law.

The effect of sanctions regimes on the financial sector

Counter-terrorism laws also affect the financial sector, as banks interpret and implement measures in response to sanctions regimes. Many governments have become increasingly concerned about the misuse of financial systems for terrorist financing, and inter-governmental bodies like the FATF have promulgated policy recommen-

¹⁶ Naz K. Modirzadeh et al., ‘Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape’, *International Review of the Red Cross*, vol. 93, no. 883, September 2011.

¹⁷ See Mackintosh and Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*.

¹⁸ Daniel Fried, ‘Remarks at the Center for Strategic and International Studies (CSIS): Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action’, 28 October 2013, available at <http://www.youtube.com/watch?v=qieaGYue1qM> (at 58:57).

¹⁹ For further discussion of OFAC licences, see Counterterrorism and Humanitarian Engagement Project, OFAC Licensing, Background Briefing, March 2013. See also OFAC, *Frequently Asked Questions*.

Box 4

Sanctions and the financial sector: Barclays

In May 2013, Barclays, a British bank, announced that it would no longer provide remittance services to Somalia due to the risk of money-laundering and terrorist financing. Many banks provide remittance services to their customers, enabling those customers to send funds to individuals abroad, often family members. In countries like Somalia, remittances comprise a significant portion of the country’s economy and enable the recipients to purchase food and other necessities. Remittances, therefore, can help mitigate the effects of humanitarian crises by allowing much-needed assistance to reach individuals and families in need.

Barclays’ decision to end its remittance services came in the wake of a record settlement between the US government and HSBC, another British bank, regarding allegations that the bank was used to launder money and violate sanctions programmes.²⁰ In November 2013, a British court awarded a temporary injunction to allow Dahabshiil, a remittance company, to keep its account at Barclays.²¹ While this decision represents an important development, risk aversion by banks and other financial institutions may continue to have a sizable impact on humanitarian crises in countries like Somalia.²²

dations to help countries standardise their approaches to financial regulation. These recommendations aim to eliminate loopholes and prevent terrorist groups from exploiting weaknesses in a particular country’s financial system. Many countries have increased their oversight of financial institutions in recent years, especially as more countries have imposed sanctions against individuals, groups, and countries for terrorism-related offences. Some countries, including the United States, hold a bank liable if a third party uses its services in the assistance of international terrorism.²³

As governments have developed laws and policies to prevent the financing of terrorism, banks have implemented rules, policies, and risk management procedures that may go beyond the requirements of their jurisdiction’s counter-terrorism laws. Some banks have implemented anti-fraud, anti-money-laundering, and other risk-based protocols that effectively prohibit certain transactions.

²⁰ Aruna Viswanatha and Brett Wolf, ‘HSBC To Pay \$1.9 Billion US Fine in Money-Laundering Case’, Reuters, 11 December 2012.

²¹ Edwin Lane, ‘Somali Remittances Granted Reprieve’, BBC News, 5 November 2013.

²² Armin Rosen, ‘Banking on Somalia’, *The American Interest*, 19 December 2013.

²³ See The Currency and Foreign Transactions Reporting Act of 1970 (as amended by Title III of the USA PATRIOT Act of 2001).

Sanctions regimes, and the ensuing financial, legal, and reputational harm facing financial institutions that violate those sanctions, have consequences that reach far beyond remittances. Juan Zarate, a former Assistant Secretary for terrorist financing and financial crimes at the US Department of the Treasury, explains the impact of counter-terrorism laws on the private sector:

In [the US Treasury Department], we realized that private-sector actors – most importantly, the banks – could drive the isolation of rogue entities more effectively than governments – based principally on their own interests and desires to avoid unnecessary business and reputational risk ... This [post-9/11 approach] worked by focusing squarely on the behavior of financial institutions rather than on the classic sanctions framework of the past. In this new approach, the policy decisions of governments are not nearly as persuasive as the risk-based compliance calculus of financial institutions. For banks, wire services, and insurance companies, there are no benefits to facilitating illicit transactions that could bring high regulatory and reputational costs if uncovered. The risk is simply too high ...

As primary gatekeepers to all international commerce and capital, banks, even without express governmental mandates or requirements, have motivated private-sector actors to steer clear of problematic or suspect business relationships. The actions of legitimate international financial community participants are based on their own business interests, and when governments appear to be isolating rogue financial actors, the banks will fall into line. Reputation and perceived institutional integrity became prized commodities in the private sector's calculus after 9/11. Our campaigns leveraged this kind of reputational risk.²⁴

This heightened scrutiny of financial transactions means that many banks no longer process transactions involving 'high-risk' environments or 'high-risk' actors, including transactions involving individuals, groups, or countries targeted by counter-terrorism sanctions. In some cases the avoidance of certain high-risk transactions is mandated by law; in other instances, it may be the product of risk-based protocols that banks have adopted in response to counter-terrorism measures.

As banks implement and interpret existing sanctions, their policies may affect the operations of humanitarian actors. For instance, humanitarian actors may not be able to operate in or transfer funds to sanctioned countries, or they may take very high risks in order to do so (such as carrying large sums of cash in order to pay staff, rental, and other operating costs). Without legal changes or lawsuits like the one involving Barclays and Dahabshiil (see Box 4), banks are likely to continue to develop risk-based protocols that in some instances may go beyond the requirements of their country's counter-terrorism, anti-fraud, and anti-money-laundering laws in order to avoid legal or reputational harm.

²⁴ Juan Zarate, *Treasury's War: The Unleashing of a New Era of Financial Warfare* (New York: Public Affairs, 2013).

Impact of terrorist financing policies developed by inter-governmental bodies

Inter-governmental bodies' policies may also have a significant impact on humanitarian actors. In some cases, the impact on humanitarian actors may be unintended, but in others inter-governmental bodies seek to directly affect the operations of humanitarian organisations. Most notably, the FATF, charged with developing 'model' laws and policies on money-laundering and terrorist financing, identified civil society organisations as possible conduits for terrorist financing. In accordance with that assessment, the FATF recommended that states develop laws and policies to 'combat the abuse of nonprofit organisations'.²⁵ Although the recommendations of the FATF are not binding, it reports on member states' compliance with its recommendations. This trend towards increased regulation of civil society could continue with other inter-governmental groups that formulate model counter-terrorism laws and policies for their member states, such as the newly established Global Counter-Terrorism Forum.

The development of policy relating to humanitarian actors under the framework of counter-terrorism law may pose operational and ethical challenges if the regulations constrain principled humanitarian action, do not adequately account for the operational challenges humanitarian actors face, or do not fully understand or account for pre-existing risk management systems used by humanitarian organisations. Because counter-terrorism laws and policies are informing the regulation of humanitarian actors and generally fail to exempt principled humanitarian action, humanitarian organisations may need to adjust their activities, which could result in the cessation of operations in certain areas or the shifting of resources in line with risk-management policies and procedures. Humanitarian actors may also face an increasingly hostile environment, and may be viewed with suspicion and distrust. For example, in Saudi Arabia civil society organisations automatically receive a designation as 'high risk entities'.²⁶

Lack of exemptions for humanitarian action in existing laws

Another challenge facing humanitarian actors involves the general lack of automatic and comprehensive exemptions for humanitarian action in nearly all of the major donors' existing counter-terrorism laws and policies.²⁷ For example,

²⁵ FATF, *International Standards on Combating Money Laundering*.

²⁶ Mackintosh and Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, p. 105.

²⁷ Notable exceptions include humanitarian exemptions in New Zealand and Australian counter-terrorism law. Australian criminal law prohibits association with terrorist organisations, with certain exceptions, including association for the purpose of providing humanitarian aid. Mackintosh and Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*. UN Security Council Resolution 1916 exempted the provision of humanitarian assistance by certain humanitarian actors from the sanctions imposed by Resolution 1844. Mackintosh and Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*. In the United States, the International Emergency Economic Powers Act (IEEPA) also contains an exemption for some humanitarian assistance. *Ibid*.

Box 5**Humanitarian exemptions: New Zealand and US approaches**

Very few countries have adopted exemptions for humanitarian action in their criminal codes, the compilation of laws where states typically enumerate their terrorist-related offenses. New Zealand law, however, contains such an exemption: its Terrorism Suppression Act criminalises the provision of ‘property, or financial or related services’ to designated persons and groups, with the exception of items like food, clothing, or medicine that are given to meet the ‘essential human needs’ of designated individuals and their dependants.²⁸ The Prime Minister may also authorise the provision of property or services to designated persons and groups.

In the United States, some lawmakers have indicated their support for a ‘legislative fix’ to the lack of exemptions in existing counter-terrorism laws in the form of amendments to existing law. The US Congress is considering the Humanitarian Assistance Facilitation Act (HAFA), which, as currently drafted, would allow individuals subject to the jurisdiction of the United States to ‘enter into transactions with certain sanctioned foreign persons that are customary, necessary, and incidental to the donation or provision of goods or services to prevent or alleviate the suffering of civilian populations’.²⁹ US officials also appear to recognise the need to incorporate humanitarian exemptions into sanctions policy.³⁰ If successful, this move towards ‘legislative fixes’ may continue in other states, along with efforts to build exemptions for humanitarian action into new counter-terrorism laws and sanctions regimes.

US counter-terrorism laws and sanctions do not contain exemptions for humanitarian action, or contain very limited exemptions (such as the material support law’s exemption for ‘medicine and religious materials’). OFAC, the entity charged with implementing and enforcing US sanctions against countries and individuals, often provides exemptions for humanitarian action in the form of general or specific licences, which OFAC issues after a sanctions programme has already been in place, but these licences do not provide immunity against the criminal prohibition

28 Terrorist Suppression Act of 2002, Section 10, <http://www.legislation.govt.nz/act/public/2002/0034/latest/DLM152716.html>.

29 Humanitarian Assistance Facilitation Act, H.R. 3526, 113th Cong. (2013). See also ‘Statement of 66 Organizations in Support of the Humanitarian Assistance Facilitation Act of 2013’, Interaction, 19 November 2013, <http://www.interaction.org>.

30 ‘Obama Administration Looks To Address Humanitarian Impact of Sanctions’, National Iranian American Council, 11 July 2013, <http://www.niacouncil.org/site/News2?page=NewsArticle&id=9497> (quoting Daniel Fried, the US State Department’s coordinator for sanctions policy, as saying ‘[A] proper and sustainable sanctions regime has to have a humanitarian aspect’).

on providing material support or resources to terrorists.³¹ The fact that even these limited humanitarian exemptions are not automatically built into sanctions programmes can cause delays in humanitarian assistance reaching a particular area.³²

Criminalisation of activity at the core of international humanitarian law

Some counter-terrorism laws criminalise actions that are at the core of international humanitarian law. One notable example involves the provision of medical assistance to protected persons and civilians: under IHL, humanitarian actors are guided by the principle to provide assistance to fighters *hors de combat* and civilians on the basis of need alone. Under US counter-terrorism law, however, this kind of medical assistance, if offered to a member of a listed terrorist group (such as al-Qaeda), would likely be prohibited because the material support law permits only the provision of medicine, not other types of medical assistance or care, thereby prohibiting ‘many acts that are essential to perform humanitarian activities’.³³

This tension is not abstract; it has emerged in several settings, including Somalia, Mali, and Syria, where non-state actors have been linked to or are affiliated with al-Qaeda. Medical personnel operating in these environments face increased risks to their safety, often because of perceptions that doctors are providing assistance to ‘enemy’ fighters who will then be able to return to the battlefield. In Syria, for instance, the authorities have arrested hundreds of doctors and nurses for treating people in need of medical assistance in an opposition area.³⁴

In addition to risks to their safety and freedom, doctors and others who provide medical assistance during hostilities and in areas where fighters from listed groups are active face a challenging set of questions: whether to work at all in areas where they may be exposed to criminal liability for providing assistance to members of terrorist groups; if they choose to work in areas where they will come into contact with listed groups or individuals, whether to deny medical assistance to those wounded fighters no longer

31 See Counterterrorism and Humanitarian Engagement Project, *OFAC Licensing*.

32 *A License To Aid? How Politics Delays Aid to Civilians in Conflict Zones*, Charity and Security Network, 24 July 2013. See also Pantuliano et al., Counter-terrorism and Humanitarian Action.

33 Sophie Delaunay, Andres Romero and Mary Vonckx, *Condemned To Resist*, Professionals in Humanitarian Assistance and Protection, 10 February 2014, <http://phap.org/articles/condemned-to-resist>. But see *Boim v. Holy Land Foundation for Relief and Development*, 549 F.3d 685 (7th Cir. 2008), p. 699 (explaining that the provision of ‘innocent’ medical assistance to designated persons by organisations such as the Red Cross and MSF would not violate the material support laws because it would be ‘helping not a terrorist group but individual patients and, consistent with the Hippocratic Oath, with no questions asked about the patient’s moral virtue. It would be like a doctor who treats a person with a gunshot wound whom he knows to be a criminal’).

34 See e.g. ‘Syria Two Years On: The Failure of International Aid’, Médecins Sans Frontières, 6 March 2013, <http://www.doctorswith-outborders.org/article/syria-two-years-failure-international-aid>.

taking part in hostilities, thereby violating medical ethical guidelines and humanitarian principles; and whether to provide medical treatment to all those *hors de combat* and civilians, consistent with medical ethics and humanitarian principles but despite the possibility of criminal liability under counter-terrorism laws. If vetting or other screening methods are applied to this specific and narrow area of humanitarian assistance, managers and administrators could be put in the position of demanding that doctors and healthcare professionals vet people before they treat them, or doctors are somehow held accountable for who they treat or for denying that they knew of an individual's affiliation with terrorist groups.

These legal provisions result in tremendous operational, legal, and ethical challenges for medical practitioners working in conflict areas, and subjects individuals who provide life-saving assistance to possible criminal liability. Existing counter-terrorism law places medical professionals in the untenable position of having to choose between complying with the criminal law, relevant contractual requirements, and their obligations under their medical licences and professional standards. Generally, while states have not made the prosecution of doctors an enforcement priority, the possibility of criminal liability remains under existing counter-terrorism laws. In the United States, doctors providing medical support to members of al-Qaeda have been convicted under the material support laws; however, a significant factor in these cases appears to involve the doctors' ideological affinity with al-Qaeda, and their intent (as expressed to an undercover Federal Bureau of Investigation (FBI) agent) to act under the 'direction and control' of the group.³⁵ Even so, while doctors operating independently of designated terrorist groups have not been prosecuted by the US government for violations of counter-terrorism laws, the tension between humanitarian principles and counter-terrorism law remains a salient issue for many operating in conflict zones, and poses a challenge to one of the core features of IHL: to effectively allow for the medical care of fighters *hors de combat* and civilians.

Reputational harm

As the international community continues to focus on counter-terrorism efforts, states, government officials, and journalists have paid close attention to compliance with counter-terrorism laws and policies. One possible

³⁵ See *U.S. v. Shah*, 474 F. Supp. 2d 492, 499 (S.D.N.Y. 2007).

way that humanitarian actors could experience the effects of this heightened awareness of counter-terrorism issues involves scrutiny of an organisation's actions, particularly actions undertaken in certain 'high-risk' environments where listed armed groups operate. Investigative efforts by those in the public sector, such as governments, elected officials, and journalists, help to ensure the accountability and transparency of the non-profit sector. Others may use these same public platforms, however, to invoke broad and extraterritorially applicable counter-terrorism laws (like the US material support statute) in order to make unproven and uninvestigated accusations that could damage an organisation's reputation and funding without the organisation ever being formally accused of wrongdoing, investigated for any problematic acts, or accused by their donors of breaching contract requirements.

Making these kinds of accusations has become very easy, and a variety of tactics may be available to interest groups or others wishing to 'name and shame' individuals or organisations. For instance, in the United States interest groups and elected officials may call for congressional inquiries to investigate possible wrongdoing or use non-legal, public relations-based tactics (e.g. issuing press releases as part of a 'naming and shaming' campaign, linking others with harmful activity).³⁶ One recent example involves the Israel Law Center (Shurat HaDin), which alleged in 2012 that an Australian NGO funded proscribed terrorist groups in the Gaza Strip.³⁷ Although the Australian government found no evidence of wrongdoing and the NGO concerned denied the accusation, the allegations have affected its work in the region. Once these kinds of harmful allegations emerge in the public sphere, some reputational harm to humanitarian actors seems inevitable, regardless of whether the allegations are true. The risk posed to humanitarian actors requires them to think about how they would address a public relations campaign accusing them of violations of counter-terrorism law, such as providing support to terrorists with taxpayer funds. Reputational harm may result in reduced donor confidence and loss of funding, as donors may be reticent to fund groups that may be engaged in allegedly negligent or criminal activity.

³⁶ See Counterterrorism and Humanitarian Engagement Project, *Congressional Inquiries*, Research and Policy Paper, March 2013.

³⁷ 'Shurat HaDin Warns Charity Over Alleged Terror Ties', *Jerusalem Post*, 14 October 2012.

Chapter 4

Questions to consider

The tension between principled humanitarian action and counter-terrorism laws and policies has resulted in significant challenges for humanitarian organisations. As a result of this tension, humanitarian actors may face greater scrutiny of their actions than ever before. The following recommendations seek to provide humanitarian actors with some possible courses of action as they face these challenges.

Consider the desirability and feasibility of documenting evidence of adverse or positive impacts of counter-terrorism measures on programmes

Humanitarian actors may wish to consider documenting the adverse or positive impacts of counter-terrorism laws and policies. This documentation could provide a basis for raising awareness and promoting discussion of these challenges within and beyond the humanitarian community, especially involving issues like partner vetting systems (PVS) and other regulatory mechanisms.

In 2011, InterAction, a coalition of over 180 US humanitarian and international development organisations, wrote to the US government about the possible adverse effects of USAID's pilot Partner Vetting System. According to InterAction, PVS would compromise the perception of an organisation's independence and neutrality, would place staff and local partners at greater risk, and would discourage international and local partners from working with US-based and US-funded organisations.³⁸ This letter served to document possible adverse impacts of proposed counter-terrorism regulations and provides one example of the ways that humanitarian groups may wish to consider the possible effects of counter-terrorism laws and policies on their operations.

Identify whether operational areas are subject to sanctions

If a humanitarian organisation operates in an area targeted by sanctions, that organisation may wish to consider whether it has an internal mechanism to monitor and adhere to sanctions regimes. Additionally, humanitarian actors may wish to ensure that their organisations develop processes to ensure the regular monitoring of new sanctions and designations. Many large humanitarian organisations have at least one staff member working full-time to ensure the organisation's compliance with anti-diversion policies. For many organisations, staff resources allocated to anti-diversion efforts may be higher. For instance, one international NGO recently reported that it has six staff members working full-time on ensuring compliance with anti-diversion policies; of those six, two spend the majority of their time screening potential and current partners against counter-terrorism and other lists.³⁹

³⁸ Letter from Samuel A. Worthington, InterAction, to Edward H. Vazquez, US Department of State, 19 December 2011, <http://www.charityandsecurity.org>.

Identify whether programmes are subject to financial sanctions

Humanitarian organisations may wish to identify whether any of their programmatic activities are subject to financial regulations or sanctions. For instance, UN entities must comply with UN Security Council sanctions, while individual donors may impose other financial prohibitions on their grantees. Because of the broad potential operational impacts of financial sanctions and regulations, it is crucial that humanitarian organisations understand whether and how financial sanctions could and do affect their work.

Assess whether programmes may qualify for humanitarian exemptions

Humanitarian organisations may wish to consider identifying whether any of their organisation's activities may qualify for an exemption regime under relevant laws and policies. The scope of exemptions (if any) varies significantly among jurisdictions. Identifying potential exemptions would provide staff with a more detailed understanding of which activities are allowed that would otherwise be prohibited.

Consider contributing to discussions that attempt to identify ways forward

Humanitarian actors can contribute to discussions within their organisations and the broader humanitarian

Box 6

Civil society recommendations to the FATF

In 2014, the Charity and Security Network (CSN) and the Human Security Collective developed recommendations for the FATF. In its earlier guidance for states, the FATF described non-profit organisations as 'particularly vulnerable' to abuse for terrorist financing, and it called upon states to review their laws to address these perceived vulnerabilities. CSN and the Human Security Collective called upon the FATF to, among other things, differentiate between 'potential risk and actual abuse' of non-profit organisations, and to recognise the need for tailored strategies to mitigate potential abuse.⁴⁰ The input of CSN and the Human Security Collective represents one substantial effort by humanitarian organisations to contribute to ongoing discussions about the challenges presented by counter-terrorism laws and policies.

³⁹ See Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations*, Research and Policy Paper, May 2014.

⁴⁰ See Transnational NPO Working Group on FATF, *Recommendations: Financial Action Task Force Typology Review*, <http://www.charityandsecurity.org>.

community – including at the level of the Inter-Agency Standing Committee – in order to help identify whether there may be ways forward regarding dialogue and engagement with donors with respect to licencing, exemptions, and other areas of concern. This dialogue could serve to engage and educate donors about the need for exemptions and to inform them about the challenges posed to principled humanitarian action by counter-terrorism law and policies.

Assess and respond to potential risks

Humanitarian actors may wish to consider developing

a risk profile for their organisations’ programmatic activities and the environments where they operate. This risk profile could also address potential reputational harm and seek to cover other relevant issues involving beneficiary communities, donors, and other stakeholders. Humanitarian organisations may also wish to consider drafting an internal summary of their policies and procedures regarding risk management, which could serve as a readily available resource in case an organisation is called upon to explain its risk management policies and procedures.

Box 7

Recommendations of an independent study commissioned by OCHA and the Norwegian Refugee Council

An independent study of the impact of donors’ counter-terrorism measures on humanitarian action, commissioned by OCHA and the Norwegian Refugee Council and published in July 2013, made several recommendations to address the challenges facing humanitarian community from counter-terrorism laws and policies:

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 organisations for guidance on the content, scope, and application of counter-terrorism measures in specific contexts.
3. Donors and intergovernmental 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 intergovernmental organisations 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 intergovernmental 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.
6. Humanitarian organisations should work together to more effectively demonstrate and strengthen the implementation of the different policies, procedures, and systems used to minimise aid diversion to armed actors, including those designated as terrorist, and better communicate how they weigh such efforts against program criticality and humanitarian need.
7. Donor States and intergovernmental 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.⁴¹

⁴¹ Mackintosh and Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, pp. 114–21.

Chapter 5

Conclusion

The tensions between counter-terrorism laws and humanitarian action span a broad range of issues and have affected or have the capacity to affect humanitarian action in many contexts. States and members of the humanitarian community have increasingly engaged in dialogue on these issues, and efforts to address the many challenges posed by counter-terrorism law are under way. Despite this progress, and despite the significant need for humanitarian assistance among the civilian populations concerned, the threat of harm or criminal liability has caused many humanitarian actors to curb or halt some of their work in certain regions. Some of these challenges may become more complicated as crises become more pressing. Already, there is evidence of this complexity in the Gaza Strip, Somalia, Mali, and Syria. These conflicts raise considerable challenges for humanitarian actors, especially those seeking to operate in areas controlled by listed armed groups. Humanitarian actors should be aware of the challenges that may arise when counter-terrorism law intersects with humanitarian action in these quickly evolving environments.

While it is always difficult to predict longer-term trends when a legal framework and responses to that framework are still in development, a potent combination of factors suggests that the dilemmas highlighted in this paper will continue to affect donor behaviour and humanitarian action for some time to come. Initial concern about this topic may have focused on the potential for aid workers' criminal liability for broadly defined support for terrorism, yet today several factors, when seen together, seem to indicate significant, and possibly permanent, shifts in major donors' approaches to risk and the regulation of government-funded humanitarian assistance in situations of armed conflict involving specific non-state groups.

The first factor is an apparent increase in the number of listed terrorist organisations that have transnational ambitions. These organisations have shifted from a focus on strikes launched from hidden locations to a drive to control territory and exert governance authority. This potential trend, witnessed at the time of writing in Yemen, Syria, and Iraq, may exert significant pressure on government donors to more strictly regulate the flow of their aid funds to territories under the control of listed terrorist groups, while simultaneously forcing humanitarian organisations to devise strategies to engage these groups more directly and with an eye to expanded coordination.

The second factor is increased coordination among major donor governments on approaches to counter-terrorism more broadly. Major powers are exerting pressure to ensure that all states have similar counter-terrorism criminal and regulatory regimes in place, and that governments are easily able to share intelligence, enforcement strategies, and regulatory models across borders.

Third, governments are increasingly aware that diversion of aid or its abuse by listed groups is more likely to be made public quickly, and that terrorist designations or counter-terrorism regulations are also likely to be quickly known *by listed groups*, thereby adding pressure on governments to be even more restrictive in contract drafting and monitoring of funds. This growing awareness stems in part from reporting by traditional and non-traditional media outlets on counter-terrorism laws, designated groups, and potential diversion, as well as the rapid dissemination of information and allegations on these topics on social media platforms such as YouTube, Twitter, and Facebook. In this environment, humanitarian organisations may face stronger pressures to demonstrate to armed actors that their organisations are neutral and independent of government security policies.

Fourth, as the counter-terrorism bureaucracy expands globally and within individual national governments, that bureaucracy is also likely to grow within the aid community itself. The day may not be far off when we see humanitarian and development organisations hiring 'counter-terrorism' consultants, engaging in internal and external audits of their counter-terrorism-related compliance, or investing far more in risk management techniques.

Nearly every indicator suggests that counter-terrorism laws and regulations are expanding to more and more arenas – from criminal law to financial regulation to private sector reform. Meanwhile, swelling national and international counter-terrorism bureaucracies seek to increase their jurisdictional reach and strengthen their enforcement capacities. For their part, globally or regionally ambitious terrorist groups appear to be gaining expertise and experience in controlling territory and access to civilian populations. For large, multinational humanitarian organisations that rely heavily (if not entirely) on government support for their operations, counter-terrorism laws will likely continue to take up ever-more planning, programming, and operational-design resources.

From one viewpoint, counter-terrorism laws and regulations could be said to represent just one more in a long line of specific examples of the enduring and entrenched dilemmas central to the humanitarian project, especially how to act in accordance with the humanitarian principles of independence and neutrality in complex conflicts that involve terrorist groups. Yet from another viewpoint, these laws and regulations may require humanitarian organisations to face new, if no less fundamental, choices about whether to accept government funding for life-saving operations, especially if – as seems possible – donor governments' concerns about the vulnerability of the aid sector to abuse by terrorist groups continue to grow.

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