

HOST STATE COUNTERTERRORISM LEGISLATION AND HUMANITARIAN ACTION

A Discussion Paper

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CONTENTS

Disclaimer	iii
INTRODUCTION	1
Research aims and methodology	2
A. THE GLOBAL COUNTERTERRORISM FRAMEWORK.....	3
The global counterterrorism effort since 9/11	3
Definition of terrorism	4
The counterterrorism framework and humanitarian action in situations of armed conflict.....	5
B. LESSONS OF THE 2013 OCHA/NRC DONOR STUDY	7
C. HOST STATE COUNTERTERRORISM LEGISLATION AND MEASURES	10
Definitions of ‘terrorism’, ‘terrorist act’, or ‘terrorist organization’ in host state legislation.....	11
Criminalization of support to terrorism.....	12
Other relevant legislation and measures.....	15
D. NATIONAL PRACTICE.....	17
Humanitarian access and engagement with armed groups under IHL	17
Restrictions on humanitarian access.....	18
Possible impacts of criminalizing support to terrorist organizations	20
CONCLUSIONS AND RECOMMENDATIONS	21

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Introduction

The threat to impartial humanitarian action from counterterrorism legislation in states hosting humanitarian operations (hereafter, host states) has been insufficiently studied.¹ This discussion paper aims to help fill that gap by looking at the impact—actual and potential—of domestic criminal legislation in selected states. It complements an earlier study commissioned by the United Nations Office for the Coordination of Humanitarian Affairs (OCHA) and Norwegian Refugee Council (NRC) at the request of the Inter-Agency Standing Committee (IASC) on the impact of donor counterterrorism measures on principled humanitarian action, published in July 2013 (hereafter, the 2013 OCHA/NRC Donor Study).²

It has proved challenging to determine, in a comprehensive manner, the impact of host state counterterrorism criminal legislation and associated measures on humanitarian action. That is not to say that such impacts do not exist. Rather, they are not easily discerned, in part because of the sensitivity of the issue and a related reluctance among humanitarian actors to discuss it, for fear of compromising their operations. It is possible to postulate, however, that certain issues of concern for humanitarian actors regarding counterterrorism legislation and associated measures adopted by donor states arise also in relation to counterterrorist action by host states.³ This thesis was tested in the research presented here.

A principal concern relates to the potential criminalization of humanitarian engagement (assistance and related activities) where such engagement interacts with individuals or organizations designated by national authorities as terrorist and which are active or present in areas where humanitarian actors operate. As the 2013 OCHA/NRC Donor Study identified, the types of interaction between humanitarian organizations and designated actors that can fall within the scope of counterterrorism legislation and other measures include:

- Contact and/or engagement with members of a group listed or designated as terrorist in order to access and deliver humanitarian assistance in areas under the control of the group. From the perspective of host states, a central concern is often whether contact or engagement could be seen as ‘recognition’.
- Incidental transactions and logistical arrangements with members of groups designated as terrorist for the purpose of delivering humanitarian assistance.

¹ The present research focuses primarily on domestic criminal legislation. The potential impact of other domestic laws and measures (e.g. civil laws, executive orders, financial regulations, or licensing regimes) could usefully be the subject of further research.

² K. Mackintosh and P. Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, Independent study commissioned by OCHA and the Norwegian Refugee Council, Geneva, July 2013. This Discussion Paper employs the same general definition of ‘humanitarian action’ used in that study (p. 14), namely that ‘it aims to preserve life, prevent and alleviate suffering and protect human dignity’. See also Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts,” Research and Policy Paper, Harvard Law School, May 2014; Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, Harvard Law School, May 2014. Both reports are available at: <http://pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project/>. See further the ongoing work commissioned by the IASC with the aim of developing a COTER (counterterrorism) toolkit led by NRC. The COTER toolkit aims to: a) build a better understanding of applicable COTER measures and the scope and nature of CT restrictions and options to address them’, and (b) strengthen risk management and due diligence practices of IASC members with respect to COTER measures.

³ These include an expansive notion of ‘material support’ to terrorism or the financing of terrorism, and the designation of specific groups as terrorist, with concomitant operational consequences resulting from legislative, administrative, or political counterterrorism measures.

- Humanitarian assistance to individuals living in territory under the influence of groups designated as terrorist.

Confirming findings in the 2013 OCHA/NRC Donor Study, the present research found a significant distinction between laws criminalizing support to a terrorist *act* and those criminalizing support to a designated terrorist *group* or an *individual* designated as terrorist.⁴ To be guilty of providing support to a terrorist act, the contributor will generally have to know that his or her contribution would assist the commission of a crime. However, once an organization or group is designated as terrorist, contributions to it are treated as inherently criminal irrespective of, and without the need for further investigation into, the intent behind the donation or support.

Research aims and methodology

The present research had three aims:

- To review existing legislation and other measures undertaken by selected host states with a view to identifying the potential limitations and/or conditions these regulatory instruments impose on interaction for humanitarian purposes with groups designated as ‘terrorist’, and which could negatively affect humanitarian actors’ capacity to operate in a manner consistent with humanitarian principles.
- To identify key problem areas regarding the impact of criminal counterterrorism legislation on humanitarian action in host states.
- To make recommendations for both host states and humanitarian actors with a view to minimizing any adverse impact of host state counterterrorism legislation on humanitarian action.

The research focused on case studies supported by expert input and review. A range of states hosting humanitarian operations was selected to reflect a variety of contexts (regional representation and differing operational contexts, including both ongoing armed conflict and persistent armed violence). Host states chosen for examination were: Colombia, Ethiopia, Nigeria, Pakistan, Israel (with respect to occupied Palestinian territory), Pakistan, the Philippines, and Sri Lanka. In 2013–14, desk research by Academy researchers looked at the extent, scope, and impact of counterterrorism legislation and measures in those states. In certain instances this was supplemented by interviews of in-country experts and field missions. Field research consisted of interviews with humanitarian stakeholders, selected government representatives, as well as local academics and experts. An international experts meeting to review initial findings and recommendations of the research was held in March 2014 in Geneva.

While conducting the research, difficulties were encountered in ascertaining with certainty the specific effects of counterterrorism legislation and measures on humanitarian action. Genuine security and operational concerns mean that humanitarian actors are often reluctant to discuss openly how host states’ approaches to counterterrorism impact their work. Also, in some host states, it has been difficult to disaggregate the impact of counterterrorism legislation and other measures from other impediments such as physical security or logistical issues, or other means of control or regulation of the humanitarian sector.

⁴ See 2013 OCHA/NRC Donor Study, p. 20.

A. The Global Counterterrorism Framework

Following the 11 September 2001 attacks in the United States of America (USA), the UN Security Council adopted Resolution 1373, the first of a number of resolutions requiring member states to implement wide-ranging counterterrorism measures. Even prior to 9/11, however, a robust normative counterterrorism framework was already in place. Indeed, no fewer than 12 of the 16 multilateral counterterrorism instruments had already been adopted by the time of the attacks as globally, governments sought more effective means to tackle terrorism and enhance the protection of their citizens.⁵

Among the most significant initiatives adopted within the UN framework were the 1979 Hostage-Taking Convention, the 1971 Terrorist Bombings Convention, and the 1999 Terrorism Financing Convention.⁶ The 1999 Terrorism Financing Convention is particularly relevant for our research since, *inter alia*, it requires states parties to take steps to prevent and counteract the financing of terrorism (whether direct or indirect) through groups claiming to have charitable, social, or cultural goals, or which also engage in illicit activities such as drug trafficking or weapons smuggling.⁷

Also in 1999, UN Security Council Resolution 1267, adopted in response to the bombing of two US embassies in eastern Africa, established a mechanism to fight terrorism through a sanctions regime targeted at Taliban and, later, al-Qaeda members.⁸ UN member states are called on to freeze funds and other financial resources of the Taliban and other designated entities associated with al-Qaeda. Resolution 1267 also requires states to prevent designated individuals from entering or travelling through their territory and imposes an arms embargo that aims to prevent direct or indirect transfer of arms and other materiel to designated individuals and groups. The sanctions regime established by the resolution has been supplemented by subsequent resolutions.⁹

The global counterterrorism effort since 9/11

Since the 9/11 attacks, the UN Security Council has played an increasingly active role in promoting counterterrorism. On 28 September 2001, the Council unanimously adopted Resolution 1373 requiring UN member states to implement a series of measures to enhance their ability to combat and prevent future terrorist acts. The measures include criminalizing terrorism financing; freezing the funds of those involved in acts of terrorism; denying financial support to terrorist groups; and cooperating with other

⁵ See: <http://www.un.org/en/sc/ctc/laws.html>.

⁶ Also significant are the 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft; the 1970 Convention for the Suppression of Unlawful Seizure of Aircraft; the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation; the 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents; and the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation.

⁷ The Convention also commits states parties to hold those who finance terrorism liable criminally, civilly, or administratively, and provides for the identification, freezing, and seizure of funds allocated for terrorist activities, as well as for the sharing of the forfeited funds with other states on a case-by-case basis. Bank secrecy is no longer an acceptable justification for refusal to cooperate.

⁸ See <http://www.un.org/sc/committees/1267/>. In the aftermath of 9/11, Resolution 1390 (2002) transformed the regime established by Resolution 1267 into a global list of al-Qaeda and Taliban members, without temporal or geographic limitations.

⁹ Security Council Resolutions 1333 (2000), 1390 (2002), 1455 (2003), 1526 (2004), 1617 (2005), 1735 (2006), 1822 (2008), 1904 (2009), 1989 (2011), and 2083 (2012).

governments to share information, along with investigating, detecting, arresting, and prosecuting individuals and entities involved in terrorist acts.

Resolution 1267 had established a committee to oversee its implementation by member states as well as listing individuals and entities associated with al-Qaeda. A mechanism set out in the resolution¹⁰ enables the creation of 'humanitarian exceptions', allowing the 1267 Committee to authorise the transfer of resources that would otherwise be prohibited to listed individuals 'on a case-by-case basis on the grounds of humanitarian need'.¹¹ In a notable contrast with Resolution 1267, however, Resolution 1373 does not contemplate the possibility of 'humanitarian exceptions', although follow-on statements have clarified this matter.¹²

Most recently, in September 2014 the Council adopted Resolution 2178 ('Threats to international peace and security caused by terrorist acts') by which states are required to suppress and prevent the recruitment, organization, transport, and equipment of 'foreign terrorist fighters'.¹³ Such fighters are defined in the preamble to the resolution as those who travel abroad¹⁴ to engage in terrorist acts, or attend terrorist training, including in connection with an armed conflict.

Definition of terrorism

Yet despite an extensive counterterrorism framework there remains no universally agreed definition of terrorism itself. The first formal attempt to define it in an international instrument was in 1937 when the Convention for the Prevention and Punishment of Terrorism defined terrorism as 'all criminal acts directed against a state and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public'.¹⁵ This definition was criticized for its lack of precision, and the Convention never entered into force, lacking the necessary number of ratifications. The negotiation of a UN Comprehensive Convention on International Terrorism¹⁶ has been effectively stalled since 1996, leaving a plethora of national, regional, and international legal instruments that seek to tackle the phenomenon.

Cumulatively, however, the 16 thematic international legal instruments addressing different aspects of terrorism, such as aircraft hijacking, hijacking of sea vessels, hostage-taking, and financing of terrorism, have identified a number of acts commonly considered to be acts of terrorism. Thus, despite the ongoing controversies it is possible to argue that a substantial degree of political agreement at the international

¹⁰ Operative §4(b).

¹¹ Subsequently, Resolution 1452 widened the scope of 'humanitarian exceptions' including, among others, resources considered 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'. UN Security Council Resolution 1452, 20 December 2002, §1(a).

¹² In January 2013, the President of the UN Security Council issued a statement referring to its sanctions regime where it reiterated 'its continued commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.' Statement of the President of the UN Security Council, UN doc. S/PRST/2013/1, 15 January 2013.

¹³ Resolution 2178, 24 September 2014, §5.

¹⁴ i.e. to a state other than their state(s) of residence or nationality.

¹⁵ Convention for the Prevention and Punishment of Terrorism, adopted by the League of Nations on 16 November 1937.

¹⁶ The draft Convention was elaborated by an Ad Hoc Committee created by UN General Assembly Resolution 51/210 of 17 December 1996.

level does exist on the core concept.¹⁷ These elements are set out in the 1999 Terrorism Financing Convention¹⁸ and Security Council Resolution 1566 (2004).¹⁹

Nonetheless, the lack of a single, agreed comprehensive definition of terrorism may impede the adoption of consistent legislation at the domestic level, which is necessary for effective implementation of the counterterrorism framework. Arguably its absence has contributed to a trend that has seen many states defining terrorist offences in their domestic criminal laws in overly broad terms. The elements of such legislation that are potentially problematic for humanitarian action include criminal offences which are defined in vague terms; criminalization of assistance to individuals or groups deemed terrorist irrespective of any intent to further terrorism; and the granting of exceptionally wide discretionary powers to law enforcement agencies.

The counterterrorism framework and humanitarian action in situations of armed conflict

States have long had to manage the tension between ensuring their own national security and protecting the rights and freedoms of their citizens and of others who fall under their jurisdiction.²⁰ In situations of armed conflict international humanitarian law (IHL) implicitly recognizes the tension between acts that states may regard as militarily necessary and the core humanitarian principle of humanity. In addressing this difficult balance, IHL has developed rules governing impartial humanitarian action, protecting humanitarian relief personnel and recognizing, under certain conditions and circumstances, the belligerent's duty to permit impartial humanitarian organizations access to those affected by an armed conflict. IHL rules require relief actions to be 'humanitarian and impartial in character and conducted without any adverse distinction'.²¹ The level of belligerents' obligation to allow humanitarian access, however, slightly varies according to the qualification of the conflict. Overall, irrespective of the legal classification of the situation, impartial humanitarian activities undertaken in armed conflict are subject to the consent of the parties to the conflict concerned. Under IHL, however, the parties to the conflict

¹⁷ International Commission of Jurists, *Assessing Damage, Urging Action: Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights*, 2009, p. 7.

¹⁸ Article 2(1) effectively defines terrorism for the purpose of the Convention where a person: '...by any means, 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, 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 organization to do or to abstain from doing any act.' The Convention had attracted 186 states parties as of October 2014.

¹⁹ The resolution described terrorism as '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....'

²⁰ See, e.g., Counterterrorism and Humanitarian Engagement Project, 'Counterterrorism and Humanitarian Engagement in Somalia and Mali', Background Briefing, March 2013, p. 2.

²¹ Art. 70(1), 1977 Additional Protocol I. This provision applies only to international armed conflicts. For non-international armed conflicts, Art. 18(2), 1977 Additional Protocol II refers to 'relief actions for the civilian population which are of an *exclusively* humanitarian and impartial nature and which are conducted without any adverse distinction' (emphasis added).

concerned must consent to such activities when the needs of the population under their control are not met.²²

Some of the counterterrorism laws and measures adopted in the last decade may affect humanitarian action significantly.²³ The risk is especially high in situations of non-international armed conflict where humanitarian actors are working in areas controlled by armed groups that are considered by the host state as terrorist organizations.²⁴ These counterterrorism strategies often construe humanitarian dialogue and assistance as similar to any other form of 'material support' that could be diverted to, and therefore benefit, terrorist organizations. The concern is particularly relevant for humanitarian organizations working in unstable environments where interaction and engagement with armed groups may be the only option to reach and deliver aid to vulnerable populations. Here, the tension between addressing the security threat and securing access to humanitarian aid for civilians in need may become particularly hard to avoid.²⁵

²² ICRC, 'Q&A and lexicon on humanitarian access', June 2014, <https://www.icrc.org/eng/assets/files/2014/icrc-q-and-a-lexicon-on-humanitarian-access-06-2014.pdf>.

²³ See Counterterrorism and Humanitarian Engagement Project, 'An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts', Research and Policy Paper, Harvard Law School, May 2014, available at: <http://pilac.law.harvard.edu/counterterrorism-and-humanitarian-engagement-project/>.

²⁴ This is increasingly the case in Gaza, Iraq, Mali, Pakistan, Somalia, Syria, and others. Further, these are often the situations where the risks to humanitarian workers are the greatest.

²⁵ 'Counterterrorism and Humanitarian Engagement in Somalia and Mali', p. 2.

B. Lessons of the 2013 OCHA/NRC Donor Study

This section offers a brief summary of main findings, conclusions and recommendations of the independent Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action (July 2013) commissioned by OCHA and the NRC on behalf of the IASC. An overview of the main impacts of donor counterterrorism measures on humanitarian action is valuable context for an understanding of the corresponding impact in states hosting humanitarian operations.

The 2013 OCHA/NRC Donor Study examined counterterrorism legislation adopted by fourteen states and one regional organization (the European Union). It assessed the resulting counterterrorism policies and some practices of ten significant humanitarian donors, including the conditions the relevant states impose and the actions they take in the context of counterterrorism.²⁶ The Donor Study considers the differing reactions of humanitarian actors to counterterrorism measures, looking in some detail at the real or perceived impact of such measures on humanitarian operations in two situations: Somalia and Palestine (Gaza).

The Study found that counterterrorism laws and measures affect humanitarian action on three levels:

- *Structural*, affecting the framework of action itself and the standard operating procedures for humanitarian organizations
- *Operational*, affecting programmatic decisions
- *Internal*, affecting the functioning of and coordination between humanitarian actors.

Structural impacts identified include limitations on the ability of organisations to operate according to the principles of impartiality, neutrality, and independence and to engage meaningfully with local actors, which may influence how an organisation or sector is perceived. In Gaza, it appears that some programmes are designed first and foremost to avoid contact with or support to Hamas, and only in a secondary manner to respond to humanitarian needs. In some cases, programmes exclude whole groups of people on the basis of their geographic location.

Operational impacts are those likely to be felt more directly by beneficiaries. They include: changes or restrictions in funding to specific geographic areas, beneficiaries, or partners; changes or restrictions in programmes; self-censorship or self-imposed restrictions; decisions not to take funding from certain donors; and increased recourse to subcontracting as agencies are compelled to pass on risks and liabilities to local implementing partners. For instance, in Somalia, the study found a marked reduction in humanitarian funding to southern Somalia after al-Shabaab was designated as a terrorist group by certain donor states. Between 2008 and 2010, US aid to Somalia decreased by 88%, despite the severe food crisis in the country. At least three NGOs stopped operating in southern Somalia in 2010, in part due to lack of funding. Some actors reported a ‘chilling effect’, where decisions regarding where and how to operate were made in part to minimise exposure to legal liability.²⁷ In Gaza, the designation of Hamas

²⁶ Australia, Canada, Denmark, France, Germany, Japan, the Netherlands, New Zealand, Norway, Qatar, Saudi Arabia, Turkey, the United Kingdom, and the United States of America. The states were selected because of their influence on the development of counterterrorism law, as well as to represent a range of civil and common law jurisdictions. A smaller group from this list of states was then selected for study as donors.

²⁷ 2013 OCHA/NRC Donor Study, pp. 82–3. In November 2013, the Humanitarian Assistance Facilitation Act (H.R. 3526) — which would provide a limited exception for humanitarian organizations under US law — was introduced into the US House of Representatives. In October 2014, the Office of Foreign Assets Control of the US Department of the Treasury issued a short guidance paper with a view to clarifying the reach of US sanction legislation and its enforcement with respect to the provision of humanitarian assistance.

as a terrorist group by certain states has seen projects cut or blocked, programmes suspended, and planning and programme design based on avoiding constraints rather than meeting needs.

Internal impacts encompass increased administrative burden and impediments to transparency and coordination between humanitarian actors. For NGOs in particular, the proliferation of different administrative requirements has often been considerable. The effort required to understand and implement the various legal and policy requirements has slowed operations and increased costs. Islamic NGOs in Somalia report particular trouble receiving project funds due to international banking restrictions that delay disbursement. According to the Donor Study, the combination of uncertainty and concern over legal liability also makes agencies reluctant to share information, and to coordinate and collaborate more generally.

Also of particular note from the study is the finding that the nature of the humanitarian organization in question can materially affect how and to what extent it is impacted by counterterrorism measures. The UN, for example, benefits from privileges and immunities set out in several conventions, and agreements protect UN staff from individual criminal responsibility for acts carried out in the course of their work. Furthermore, UN agencies, sometimes collectively, often manage to negotiate more flexible counterterrorism clauses directly with states, without engaging partners.²⁸

This is not the case for humanitarian NGOs. The impact on NGOs will vary significantly according to a predictable set of criteria such as the nationality of staff and the state in which they are registered. Another determining factor is the type of activity in which the NGO is involved. Humanitarian NGOs' mandates can include a wide variety of activities, from delivery of relief items to provision of technical services such as training and legal advice. Moreover, the way NGOs are perceived by governments and, in some cases, by the general public, can also determine how counterterrorism laws affect them. According to the Donor Study, Islamic NGOs appear to face greater scrutiny from certain states and financial institutions in a general climate of suspicion towards Muslim charities.²⁹

Counterterrorism measures imposed by donor states have led to increased tensions between international and national NGOs. This was particularly felt in Palestine where Palestinian NGOs claim they are being marginalized as more aid is conveyed to international NGOs due to some donors' perception that these international NGOs implement stricter counterterrorism risk management strategies.³⁰ More generally, the study found that application of counterterrorism laws is not always uniform across different contexts, jeopardizing the perception of independence of the humanitarian sector as a whole.

Finally, the Donor Study showed that strategies used by humanitarian organizations to cope with counterterrorism measures include a high level of self-limitation and self-censorship. In Gaza, for instance, one NGO excluded two kindergartens from its school feeding programme because of the schools' potential ties with Hamas. In Somalia, humanitarian actors do not even bother to put forward certain projects as they are considered to pose too great a risk. Also, situations of 'over-compliance' were reported, as well as a stifling of the principled debates that would normally be expected from the

²⁸ Recent analysis indicates that an organization's reputation and the terms in which it framed its humanitarian operations could affect its capacity to negotiate counterterrorism-related funding terms with donors. See Counterterrorism and Humanitarian Engagement Project, 'An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts', Research and Policy Paper, Harvard Law School, May 2014.

²⁹ 2013 OCHA/NRC Donor Study, p. 108.

³⁰ *Ibid.*, p. 104.

humanitarian sector. Risks and liability are being passed on to local implementing partners through sub-contracts with a lack of consistency across the various funding agreements, adding to administrative burdens, uncertainty, and risks.

The Donor Study concludes that counterterrorism measures have had, and continue to have, a negative impact on humanitarian action, although the situation should not be construed as a simple opposition of humanitarianism to counterterrorism, or of operational agencies to governmental donors. In tandem with the reported negative impacts came halts and decreases in funding, blocking of projects, suspension of programmes, planning and design of programmes other than on the strict basis of need, and slowed project implementation. Implementation of counterterrorism laws examined in the Donor Study was found, in certain circumstances, to undermine the neutrality, both real and perceived, of humanitarian actors, and the impartiality of their operations.

While considering ways to overcome these problems, the authors of the study stressed the importance of keeping in mind that the objectives of humanitarian action and counterterrorism have significant points of convergence as, fundamentally, both seek the protection of civilian populations from harm through a reconciliation of security objectives with the humanitarian imperative. The Donor Study highlights the need to build on those points of convergence and find ways to reduce the negative impacts detailed in its findings, identifying several examples of ‘creative reconciliation’ of counterterrorism and humanitarian demands without compromising the core objectives of each. The Donor Study cites the case of the UN Relief and Works Agency (UNRWA) in Palestine, which has devoted time and resources to translating counterterrorism objectives into its own self-imposed requirement to maintain neutrality. According to the report, the resulting UNRWA risk mitigation procedures, designed to ensure that UNRWA remains neutral, also protect against diversion of resources to terrorist groups.³¹

The Study called for humanitarian actors to ensure they have appropriate due diligence procedures in place to mitigate aid diversion, balanced against the trend to pass on liability and risk to implementing partners. They called on states to provide exemptions for humanitarian action so as not to hamper critical humanitarian work, and to take care not to undermine the valuable role played by national and local humanitarian actors. This requires that states allow contact or engagement with armed non-state actors for humanitarian purposes, especially in situations where they exercise control over parts of the territory, as IHL foresees.

Other key recommendations to reduce the adverse impact of counterterrorism laws and policies on humanitarian action included a call for the humanitarian community and donor states to engage in sustained and open policy dialogue on how to better reconcile counterterrorism measures and humanitarian action, with donors being more responsive to requests from humanitarian organizations for guidance on the content, scope, and application of counterterrorism measures in specific contexts. In turn, they argue that humanitarian organizations should work together to strengthen implementation of the various policies, procedures, and systems they use to minimize aid diversion to armed actors, including those designated as terrorist, and to demonstrate successes more effectively.

³¹ *Ibid.*, p. 101.

C. Host State Counterterrorism Legislation and Measures

This section focuses on domestic criminal legislation and other measures imposed by host states that define terrorism and terrorism offences as well as preventing the financing or any other kind of support to terrorist organizations or terrorist acts. Host states chosen for examination were: Colombia, Ethiopia, Nigeria, Pakistan, Israel (relating to occupied Palestinian territory), Palestine, the Philippines, and Sri Lanka. Particular attention is given to provisions that may affect the work of humanitarian operators in host states or humanitarian action in general. Those include, notably, criminalization of humanitarian assistance and related activities when provided to individuals or groups designated as terrorist. While the research focuses primarily on domestic criminal legislation, as noted above other measures (e.g. financial regulations) seeking to prohibit or restrict material support to terrorism may also impact on humanitarian action.³²

The parameters of domestic criminal offences related to terrorism that need to be assessed typically include:

- the scope of the prohibition of financial and other ‘material’ support to terrorism
- the forms of interaction with terrorist groups or acts that qualify as criminal offences (*actus reus*)
- the required criminal intent to be in violation of the law (*mens rea*)
- whether the crime consists of contributing to an act of terrorism or to a designated terrorist group, and
- the jurisdictional scope of the provisions or measures.

Domestic counterterrorism legislation and other related measures in many host states generally predate the international framework established by the UN towards the end of the twentieth century and which were reinforced after 9/11. Each state’s counterterrorism legislation reflects first of all the type of terrorism threat with which it has been confronted in its history. Sri Lanka’s legal counterterrorism framework, for instance, finds its origins in the state’s efforts to confront insurgency and internal dissent. The Prevention of Terrorism (Temporary Provisions) Act was adopted in 1979 in response to unrest and the early stages of the Tamil Tiger insurgency.³³ As the title suggests, and according to its Section 29, the Act was to apply for a period of only three years. Act No. 10 of 1982, however, repealed Section 29, making the Act a permanent legal measure against terrorism.³⁴

³² See, e.g., Counterterrorism and Humanitarian Engagement Project, ‘An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts,’ Research and Policy Paper, Harvard Law School, May 2014, Annexes 2a–b, 2d–e, 3a, 3g–h, 4b, 5c, 6a–c, 7c; N. K. Modirzadeh, D. A. Lewis, and C. Bruderlein, ‘Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape’, IRRIC, Vol. 93, No. 883 (September 2011), pp. 634–37; Sara Pantuliano, Kate Mackintosh, and Samir Elhawary, Counter-terrorism and Humanitarian Action, Humanitarian Policy Group (HPG), Policy Brief 43 (October 2011), pp. 5, 7–8.

³³ The Prevention of Terrorism (Temporary Provisions) Act No. 48 (PTA) of 1979.

³⁴ The provisions of the PTA apply at all times (i.e. they do not depend on the existence of any emergency). The PTA grants extraordinary powers to the executive to deal with the threat of terrorism. Sri Lanka’s counterterrorism response also draws on a number of acts implementing some of the state’s international obligations at the domestic level, such as the Regional Convention on Suppression of Terrorism (Act No. 70 of 1988), Suppression of Terrorist Bombings (Act No. 11 of 1999), and the Prevention of Hostage Taking (Act No. 41 of 2000). The post-2001 counterterrorism architecture in Sri Lanka is regulated by the provisions of the United Nations Regulations No. 1 of 2001, giving effect to UN Security Council Resolution 1373, the Prevention of Money Laundering Act of 6 March 2006, and the Convention on the Suppression of Terrorist Financing Act (No. 25 of 2005), with the most recent amendment (as of writing) occurring on 12 February 2013.

Domestic counterterrorism legislation is also shaped by the UN Security Council's requirement under Resolution 1373 that UN member states become party, and ensure their national legislation conforms, to a number of international instruments aimed at countering terrorism. Colombia represents an interesting example of this as it has introduced specific counterterrorism legislation in order to implement the international instruments on terrorism to which it is a party.³⁵ The Penal Code is the main law setting out the national legal framework on terrorism, containing descriptions of prohibited conduct and offences.

Definitions of 'terrorism', 'terrorist act', or 'terrorist organization' in host state legislation

As noted above, the absence of a universally agreed definition of terrorism leaves states that wish to comply with international counterterrorism instruments, as called for in Security Council Resolution 1373, or that simply desire to introduce new domestic counterterrorism laws without thorough guidance on the appropriate international standard. As a result, most legislation examined in the present research contains extremely broad definitions of both 'terrorist' and an 'act of terrorism'.

In Pakistan, for instance, the government adopted the Anti-terrorism Act³⁶ in 1997 with the aim of addressing a specific context of sectarian and political violence that had been taking place in the country over a considerable period of time. The statutory language used to formulate crimes punishable under the Act is very general in nature allowing for expansive interpretation of the scope of offences.³⁷ In addition, the definition of 'organizations concerned in terrorism' is broadly formulated. The law compiles a long list of conducts determining when an organization is considered to be engaged in terrorism, including the commission, facilitation, or participation in acts of terrorism; promotion and encouragement of terrorism; and supporting and assisting any organization concerned in terrorism. This last clause could potentially affect humanitarian actors since it is not entirely clear what may constitute 'support' and 'assistance' to any organization concerned in terrorism.³⁸ In particular, the concern is that this provision might preclude, limit, or impose conditions on interaction for purely humanitarian purposes, either with groups designated as 'organizations concerned in terrorism' or with individuals designated as 'terrorists'.

³⁵ Colombia's national legislation on terrorism can be readily summarized in five laws: Law 526 of 1999 (creating a Department of Information and Financial Analysis with a focus on money laundering and financing of terrorism); Law 599 of 2000 (which includes a description of the various terrorist offences); Law 733 of 2002 (measures against kidnapping, terrorism, and extortion); Law 1.121 of 2006 (measures for the prevention, detection, investigation and punishment of the financing of terrorism); and Law 1.142 of 2007 (legal reform of the penal code and code of penal procedure and incorporation of measures to prevent and suppress crimes of particular significance for coexistence and citizen security).

³⁶ Pakistan's legislative counterterrorism framework predates the UN normative framework put in place after 9/11. The 1997 Act was adopted with the objective of 'preventing terrorist acts, sectarian violence and in order to ensure speedy trials of those involved in [these] offences'. It has, though, been asserted that, at the time of the Act's adoption, the 'anti-terror mechanism' established also served 'as a means to suppress dissent and extent executive control over the legislature and political opponents'. See, S. Fayyaz, *Responding to Terrorism: Pakistan's Anti-Terrorism Laws*, PAK Institute for Peace Studies, 2008, p. 3.

³⁷ See also the amendment under the title Anti-Terrorism (Second Amendment) Act, introduced in March 2013, further expanding the definition of terrorism. According to the new amendments, a terrorist act involves, among others, 'dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or through any other means of communication without explicit approval of the government or its concerned departments'. S. 6(2), new clause 'p', 2013 Anti-terrorism (Second Amendment) Act to the 1997 Anti-terrorism Act.

³⁸ S. 11(A)(1)(d), 1977 Anti-Terrorism Act.

Moreover, the Act does not provide details of a scheme under which the government can designate organizations as terrorist.³⁹ As a rule, the Federal Government of Pakistan proscribes a group simply by deciding to add it to the national list.⁴⁰ This is a tendency found in other host state legislation, such as Nigeria, where the 2011 Terrorism (Prevention) Act gives the Nigerian President the power to declare any group a terrorist organization.⁴¹ Interestingly (and in contrast to several other states⁴² and the UN itself⁴³), the Nigerian Government has refrained from formally designating Boko Haram a terrorist organization, to provide the opportunity for the Government to pursue a diplomatic route that it believes will eventually lead to a solution to the ongoing crisis.

Applying a broad definition of terrorism and scope of offences raises concerns for the protection of fundamental human rights, as does uncertainty regarding listing and delisting of suspected terrorists. In the Philippines, the 2007 Human Security Act defines a terrorism act as a crime which ‘causes widespread and extraordinary fear and panic among the populace in order to coerce the government to give in to an unlawful demand’.⁴⁴ The law allows authorities to arrest terror suspects without a warrant as well as to temporarily detain them without charge. The promulgation of the Act was criticized, among others, by the then UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Martin Scheinin, who raised concern about the overly broad definition of terrorism acts which ‘is seen to be at variance with the principle of legality and thus incompatible with Article 15 of the 1966 International Covenant on Civil and Political Rights’.⁴⁵

Criminalization of support to terrorism

Ending the provision of financial or other material support to terrorism is a central focus of UN Security Council Resolution 1373. The 1997 Terrorism Financing Convention stipulates that an offence is committed when a person ‘by any means 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, in full or in part’ to carry out a terrorist act.⁴⁶ In order to comply with the Convention, a state party must

³⁹ S. 11(A)(1) provides that for the purpose of the legislation an organization is engaged in terrorism if it:

- a. Commits, facilitates or participates in acts of terrorism;
- b. Prepares for terrorism;
- c. Promotes or encourages terrorism;
- d. Supports and assists any organization concerned in terrorism;
- e. Patronizes and assists in the incitement of hatred and contempt on religious, sectarian or ethnic lines that stir up disorder;
- f. Fails to expel from its ranks or ostracize those who commit acts of terrorism and present them as heroic persons; or
- g. Is otherwise concerned in terrorism.

⁴⁰ S. 11-B, *ibid*.

⁴¹ Ss. 2(1)(c) and 9(4), 2011 Terrorism (Prevention) Act.

⁴² The United Kingdom, for instance, has considered Boko Haram a terrorist organization for some time. CNN, ‘Why hasn’t the Obama administration labelled “Boko Haram” a terrorist organization?’, 12 July 2013, <http://thelead.blogs.cnn.com/2013/07/12/why-hasnt-the-obama-administration-labeled-boko-haram-a-terrorist-organization/>. In November 2013, the USA also formally declared that Boko Haram was a terrorist organization. BBC, ‘US names Nigeria’s Boko Haram and Ansaru “terrorists”’, 13 November 2013, <http://www.bbc.co.uk/news/world-africa-24931684>.

⁴³ On 22 May 2014, the UN Security Council added Boko Haram to its list of designated al-Qaeda entities. See, BBC, ‘UN committee imposes sanctions on Nigeria’s Boko Haram’, 23 May 2014, <http://www.bbc.com/news/world-africa-27529566>.

⁴⁴ S. 3(6), 2007 Human Security Act. S. 3 of the law also provides a list of such terrorism acts, which include murder, piracy, kidnapping, arson, and destruction of property.

⁴⁵ The Special Rapporteur added that ‘the strict application of a penalty of forty years’ imprisonment undermines judicial discretion in individual cases and may result in a disproportionate punishment due to the broad definition of terrorist acts.’ See: ‘UN Special Rapporteurs call for changes to the Philippines’ Human Security Act’, 12 March 2007, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=1844&LangID=E>.

⁴⁶ Art. 2, 1999 Terrorism Financing Convention.

introduce this offence into its domestic law as well as ensure that it has jurisdiction over the offence when committed on its territory or by one of its nationals or when the alleged offender is present in its territory and 'it does not extradite that person to any of the other States Parties'.⁴⁷

According to the Convention, the crime of financial or material support requires intent or knowledge that the funds provided will be used to carry out a terrorist act. However, some national laws go much further, criminalizing material support or assistance to terrorism without such knowledge, in particular by formulating the criminal offence in terms of support to a designated group rather than to a terrorist act. To be guilty of providing support to a terrorist act, the contributor will generally have to know that his or her contribution would assist the commission of a crime. Once an organization or group is designated as terrorist, however, contributions to it are treated as inherently criminal irrespective of, and without the need for further investigation into, the intent behind the donation or support.⁴⁸

Sri Lanka has adopted legislation to implement the provisions of the 1997 Terrorist Financing Convention in which it largely reproduces the wording of Article 2, but with subsequent material variation. The Sri Lankan implementing legislation makes it an offence for any person to attempt to commit, to aid or abet the commission of, or, acting with a common purpose with another person or a group of persons, to contribute to the commission of conduct proscribed under the Act. These provisions, in light of the level of intent required as well as the elements of crime, are not *prima facie* a concern to humanitarian operations. However, subsequent amendments that define and amend certain terms used in the original Act require closer inspection. Thus, in a 2011 Amendment Act it was stipulated that:

Any person who unlawfully and wilfully by any direct or indirect means provides or conspires to provide, material support or resources to any terrorist or terrorists or a terrorist organization shall be guilty of an offence under this Act ... Provided however that, *providing assistance on humanitarian grounds by a person or body of persons, shall not amount to an offence* within the meaning of this Act.⁴⁹

In February 2013, however, an amendment replaced this text with new wording deleting the humanitarian exemption clause. Further, compared with the original wording of the 2005 implementing act, the amendments introduce the notion of 'material support or resources', a much wider notion than that set out in the 1997 Convention, which focuses only on criminalization of 'funds'. Furthermore, as a result of amendments in 2011 and 2013, material support or the provision of resources to a 'terrorist, terrorists and terrorist organizations' is now criminalized.

The notion of material support or resources is defined as including:

any tangible, movable or immovable property or service, including currency or monetary instruments or financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment or facilities, weapons, lethal substances, explosives, personnel and transportation, but shall not include medicines or religious material.⁵⁰

Thus, the notions of material support or resources cover a very broad range of engagement with proscribed individuals and groups. While provision of 'medicine or religious material' is explicitly excluded from the notion of material support or resources, the inclusion of 'training' and 'expert advice

⁴⁷ Art. 7(4), 1999 Terrorism Financing Convention.

⁴⁸ 2013 OCHA/NRC Donor Study, p. 20.

⁴⁹ S. 3(3), 2011 Convention on the Suppression of Terrorist Financing (Amendment), Act No. 41 of 2011 (added emphasis).

⁵⁰ *Ibid.*, s. 8.

or assistance' is of particular relevance to humanitarian action. Potentially, conducting training on human rights or IHL or providing expert advice on these issues, as well as the provision of certain resources such as housing, could constitute the crime of support to terrorism.

Nigeria has a similarly broad definition of 'support' to an act of terrorism or to a terrorist organization in its 2011 Terrorism (Prevention) Act, which includes 'offering material assistance', 'training', and offering or providing 'moral assistance'.⁵¹ According to the Act, the concept of 'moral assistance' includes invitation to adhere to a proscribed organization but the law does not provide any other example of unlawful conduct, leaving a wide margin of appreciation to the authorities.

In Pakistan, the 1997 Anti-Terrorism Act contains provisions that directly and/or indirectly regulate the issue of support or assistance to terrorism and terrorist organizations. In its Section 11(H), the Act stipulates that either knowledge or 'reasonable cause to suspect' that money or property 'will or may be used for the purposes of terrorism' is the requisite criminal intent. The offence is punishable on conviction by imprisonment ranging from six months to five years as well as by a fine.⁵²

The Amendment to the Anti-Terrorism Act adopted on 19 March 2013, though, broadens the scope of Section 11(H) by introducing the words 'or by a terrorist or organization concerned in terrorism' to the above definition.⁵³ The amendment thus significantly broadens the scope of the crime of financing terrorism, the primary concern being the potential criminalization of any form of assistance to individuals or groups deemed terrorist, irrespective of any intent to further terrorism. Thus, otherwise routine transactions and supplies to individuals or organizations designated as terrorist, such as inviting and paying the costs for a person to attend a meeting to discuss, for instance, respect for humanitarian norms or the promotion of peace, could potentially be prosecuted under counterterrorism laws.⁵⁴ As in other national jurisdictions, there is a risk that engagement of any form with a proscribed organization could be characterised as assistance and support to terrorism. No humanitarian exemption is provided for in the 2013 Anti-Terrorism Act.

This is also the case for Ethiopia, where Proclamation No. 652/2009 includes support to both the commission of a terrorist act and/or, more broadly, to a terrorist organization.⁵⁵ Nigeria similarly

⁵¹ The Terrorism (Prevention) Act, s. 4(3) defines 'support' to an act of terrorism or to a terrorist organization as:

- a) incitement to commit a terrorist act;
- b) offer of material assistance, weapons, including biological, chemical or nuclear weapons, explosives, training, transportation, false documentation or identification;
- c) offer or provision of moral assistance, including invitation to adhere to a proscribed organization; and
- d) the provision of, or making available, such financial or other related services as may be prescribed in this act.

⁵² S. 11(N).

⁵³ Amended s. 11(H) now states that a person commits an offence if he '[p]rovides money or property, and ... [k]nows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism, or by a terrorist or organization concerned in terrorism.'

⁵⁴ Also of concern in the Act is s. 11(F) insofar as it makes support to a terrorist organization a crime per se, rather than support to a terrorist act. Factors such as intent seem relevant only in relation to the offence of arranging, managing, or assisting in managing, or addressing a terrorist meeting. S. 11F(3)(b).

⁵⁵ See Part 2, s. 5, Proclamation No. 652/2009 (Anti-Terrorism Proclamation), which states that: '1. Whosoever, knowingly or having reason to know that his deed has the effect of supporting the commission of a terrorist act or a terrorist organization:

- a) provides, prepares or gives forged or falsified document;
- b) provides a skill, expertise or moral support or gives advice;
- c) provides, collects or makes available any property in any manner;
- d) provides or makes available monetary, financial or other related services;
- e) provides or makes available any explosive, dynamite, inflammable substances, firearms or other lethal weapons or poisonous substances; or

criminalizes support to both a terrorist act and a proscribed organization based on knowledge: a person who knowingly, in any manner, solicits or renders support for an act of terrorism or proscribed organisation or an internationally suspected terrorist group, is committing an offence.⁵⁶

In the Philippines, the 2012 Terrorism Financing Prevention and Suppression Act outlines measures to be taken in order to combat terrorism effectively, such as making the financing of terrorism as a stand-alone criminal offence and not just an adjunct to another crime. The law defines the crime of financing terrorism along the same lines of the 1997 Terrorist Financing Convention but contrary to that Convention, criminalizes not only the financing of a terrorist act but also the financing of a terrorist organization, association, group, or individual terrorist.⁵⁷

The Colombian Penal Code also considers financing and/or providing material support to a terrorist organization as a criminal offence irrespective of any intent to commit a terrorist act. The relevant provision renders criminal:

Any person who, directly or indirectly, provides, collects, delivers, receives, manages, supplies, custodies funds, properties or financial resources, or makes any other act, which promotes, organizes, supports or finances ... *foreign or domestic terrorist organizations, terrorists or terrorist acts.*⁵⁸

Other relevant legislation and measures

The following examples of legislation and administrative measures are not specifically counterterrorist in nature but could potentially have the effect of restricting action by humanitarian organizations. This is the case of some national laws adopted to regulate in a comprehensive manner the registration and functioning of civil society organizations. Such legislation could have an adverse impact on humanitarian NGOs since it constrains their action by determining when and how such NGOs can access resources, and when they will face penalties.

In Ethiopia, for instance, in 2009 the Government adopted the Proclamation for the Registration and Regulation of Charities and Societies (CSP). The Proclamation requires all organizations to be registered by the Charities and Societies Agency⁵⁹ in one of three categories: Ethiopian Charities or Societies, Ethiopian Residents Charities or Societies, or Foreign Charities.⁶⁰ Only 'Ethiopian Charities and Societies' may work on human rights issues, which are specified to be: advancement of human and democratic rights; promotion of equality of nations, nationalities and peoples and that of gender and religion; promotion of the rights of the disabled and children's rights; promotion of conflict resolution or reconciliation; and promotion of efficiency of the justice and law enforcement services.⁶¹ Organizations

f) provides any training or instruction or directive;
is punishable with rigorous imprisonment from 10 to 15 years.'

⁵⁶ S. 4(1)(a) and (b), 2011 Terrorism (Prevention) Act.

⁵⁷ S. 4 of the Act.

⁵⁸ Art. 345, Colombian Penal Code (added emphasis).

⁵⁹ The Charities and Societies Agency is established by the Proclamation. It has its own legal personality while being an institution of the Federal Government.

⁶⁰ CSP, s. I (General), Art. 2(2), (3), and (4); s. III (Charities), Art. 15(2); and s. IV (Societies), Arts. 55–7 and 64. Application for registration can be refused by the Charities and Societies Agency if, *inter alia*, 'the proposed Charity or Society is likely to be used for unlawful purposes or for purposes prejudicial to public peace, welfare or good order in Ethiopia.' (Art. 69(2)).

⁶¹ See, e.g., Amnesty International, *Stifling human rights work: The impact of civil society legislation in Ethiopia*, March 2012, pp. 5–10.

registered as Ethiopian Charities or Societies may receive not more than 10% of their funds from foreign sources.⁶²

In turn, Ethiopian Residents Charities and Societies and international organizations are prohibited from working on activities that promote human rights and democracy.⁶³ This also applies to charities, societies, and associations (NGOs or CSOs) that receive more than 10% of their funding from foreign sources. In contrast, development agencies may choose to register as Ethiopian Residents Charities or Societies and may be fully funded from foreign sources, provided their work contains no human rights elements. Infringements of the law's provisions can lead to heavy fines or imprisonment for NGO staff.⁶⁴

The law seems to be directed primarily at human rights NGOs but may also affect humanitarian action. This is because it may also apply to local humanitarian organizations⁶⁵ since the Proclamation's definition of Charities provides that a charity means an institution established exclusively for charitable purposes and that gives benefit to the public. In turn, charitable purposes include:

- a. prevention or alleviation or relief of poverty or disaster;
- b. advancement of the economy and social development and environmental protection or improvement.⁶⁶

Similarly, in Sri Lanka, a government circular issued in 2007 sets out guidelines on use of assistance from NGOs, with the aim to 'ensure that [NGOs involved in providing financial assistance as well as in implementing development projects/programmes] involvements and operations fall within the government's development framework and that the funds channelled to various development projects are not associated with 'Money Laundering' and/or 'Terrorist Financing' and/or any other activity undermining national interest'.⁶⁷

In Nigeria, the 2011 Terrorism (Prevention) Act explicitly gives the Registrar General of the Corporate Affairs Commission, which is responsible for the registration of charities/organization, the power to sign a certificate 'refusing or revoking registration of charity based on security or criminal intelligence reports, where there are reasonable grounds to believe that an applicant for registration as a registered charity has made, is making or is likely to make available any resources, directly or indirectly, to a terrorist group'.⁶⁸

⁶² CSP, Art. 2(2).

⁶³ *Ibid.*, Art. 14(5).

⁶⁴ *Ibid.*, Art. 102.

⁶⁵ The proclamation explicitly does not apply to: 'b) international or foreign organizations operating in Ethiopia by virtue of an agreement with the Government of The Federal Democratic Republic of Ethiopia' (Art. 3(2)(b)).

⁶⁶ CSP, s. III (Charities), Art. 14(1) and (2).

⁶⁷ Circular No. MOFP/ERD/2007/1 on Guidelines on Use of Assistance from NGOs, 19 March 2007.

⁶⁸ S. 35(1), 2011 Terrorism (Prevention) Act.

D. National practice

This section discusses how and to what extent counterterrorism laws and associated measures in host states may affect humanitarian action in practice. Different aspects are considered, such as restrictions on access for humanitarian workers in certain areas, especially those controlled by armed non-state actors, as well as criminalization of support to terrorism and its impact on the ability of humanitarian actors to provide assistance to those in need.

Humanitarian access and engagement with armed groups under IHL

Humanitarian access to certain areas in host states is often regulated by a complex patchwork of state policies and practices and international, regional, or national legal provisions that determine the work of humanitarian operators in each given conflict situation. Although not officially recognized by all states, engaging with armed groups to secure access to vulnerable populations is under certain circumstances an operational necessity.⁶⁹

IHL is the primary international framework regulating the roles and definitions of impartial humanitarian organizations in situations of armed conflict. As noted above, IHL lays down specific provisions obliging parties to a conflict to meet themselves the basic needs of the population under their control or to allow aid organizations to do so. Relief operations must be ‘humanitarian and impartial in character’ and ‘conducted without any adverse distinction.’⁷⁰ In situations of non-international armed conflict, IHL provides a clear, albeit limited, basis for humanitarian engagement with organized armed groups for the purpose of assisting populations under their control and promoting compliance with the rules of IHL.⁷¹ Indeed, humanitarian actors can offer relief services to all parties to a non-international armed conflict, including non-state actors.⁷²

The proclaimed aim or ideological motivation of the non-state armed group is irrelevant for the purpose of IHL.⁷³ Thus, in a non-international armed conflict, even a ‘criminal’ group with a purely lucrative aim or a ‘terrorist’ group whose ultimate goal is global *jihad* may still be a party to an armed conflict.⁷⁴ This means that designating and/or listing a non-state actor party to a conflict as a ‘terrorist organization’ or ‘group’ is irrelevant for the applicability of IHL. Regarding terrorist conduct, IHL explicitly prohibits, and requires the repression of, any act of terrorism during armed conflict.⁷⁵ Acts of terrorism in armed conflict include deliberate and direct attacks against civilians and civilian objects, hostage taking, and other acts or threats of violence with the primary purpose of spreading terror among the civilian

⁶⁹ ‘Humanitarian Action under Scrutiny: Criminalizing Humanitarian Engagement’, *HPCR Working Paper*, Program on Humanitarian Policy and Conflict Research, Harvard University, February 2011, p. 5.

⁷⁰ Art. 70(1), 1977 Additional Protocol I. This provision applies only to international armed conflicts.

⁷¹ N. K. Modirzadeh, D. A. Lewis, and C. Bruderlein, ‘Humanitarian Engagement under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape’, *IRRC*, Vol. 93, No. 883 (September 2011), p. 627.

⁷² Art. 3 common to the four 1949 Geneva Conventions. The UN Security Council has reaffirmed these bases by calling on all parties to a conflict to agree to and facilitate humanitarian relief operations and to support and cooperate in monitoring and reporting on violations by non-state armed groups and state armed forces listed by the Secretary-General. See Council Resolutions 1612, 26 July 2005; 1882, 4 August 2009; and 1960, 16 December 2010.

⁷³ ICRC, ‘International Humanitarian Law and the Challenges of Contemporary Armed Conflicts’, 2011, p. 6. Indeed, the same is true for international armed conflicts where the reason for going to war does not matter for the purposes of applying IHL as this question is governed by *jus ad bellum* (the law governing the interstate use of force).

⁷⁴ S. Kraehenmann, ‘Foreign Fighters under International Law’, *Academy Briefing No. 7*, Geneva Academy of International Humanitarian Law and Human Rights, Geneva, October 2014.

⁷⁵ H.-P. Gasser, ‘Acts of terror, "terrorism" and international humanitarian law’, *IRRC*, No. 847, 30 September 2002, pp. 555–7.

population.⁷⁶

As mentioned earlier, though, IHL compliance can be jeopardised by certain counterterrorism measures in some host states, for example where specific non-state actors are designated as terrorist groups. This is the case in a variety of laws, administrative regulations, and organizational policies that restrict, limit, and in some cases criminalize activities that may be central to humanitarian action.

Restrictions on humanitarian access

Securing access to humanitarian organizations in certain territories during an armed conflict is even more delicate and challenging when an armed group exercises effective control over those territories.⁷⁷ At the same time, negotiating access with those armed groups may be the only way to deliver assistance to the local population under their control. Reasons why governments in host states may restrict humanitarian access in certain areas of their territory often depend on the context. In many cases, it is extremely difficult to ascertain with any certainty whether limitations on access must be ascribed to counterterrorism, other political considerations, security, logistic complications, bureaucratic constraints, or a combination of those factors. Often, however, access is successfully restricted without recourse to counterterrorism legislation.

This is the case in Palestine, where counterterrorism legislation and associated measures seem to play a relatively minor role in regulating, much less impeding, humanitarian delivery, simply because a plethora of other administrative and/or practical issues are used to restrict aid.⁷⁸ Analysis of counterterrorism legislation and its specific impact on humanitarian action needs to be considered within the wider context of the belligerent occupation of Palestine. Indeed, many issues addressed by counterterrorism are already captured by the power of the occupying authorities, rendering it very difficult to disaggregate one legal framework from the other. The factual complexity of the situation;⁷⁹ the administrative obstacles, zoning, and physical objects restricting the movement of humanitarian workers and goods;⁸⁰ and the involvement of multiple parties and stakeholders (from Israel as the Occupying Power, the Palestinian Authority in the West Bank, and Hamas in the Gaza Strip) combine to create a uniquely complex and challenging environment for effective delivery of humanitarian aid.

In certain situations, fighting and the resulting security risks can be a legitimate reason to temporarily restrict access for humanitarian organizations. However, in some cases governments go further and impose restrictions to protect sensitive regions from outside observation and prevent reports about human rights and IHL violations from reaching the international community.

In Ethiopia, research did not identify any specific norm or administrative measure explicitly imposing restrictions on humanitarian access, but nonetheless access to the Somali region and activities by humanitarian actors in that area are strictly controlled by the government. Foreign missions and media,

⁷⁶ See Arts. 51–2, 1977 Additional Protocol I. These provisions are considered customary IHL applicable in all conflicts. See ICRC, Customary IHL Study, Rule 2: Violence Aimed at Spreading Terror among the Civilian Population, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule2.

⁷⁷ GPPI, *Evaluation and review of humanitarian access strategies in DG ECHO funded interventions*, June 2012, pp. 25–8.

⁷⁸ Counterterrorism legislative provisions play a more significant role in Gaza than they do in the West Bank.

⁷⁹ The attempted annexation of East Jerusalem by Israel; the division of the rest of the West Bank into Areas A, B, and C, Hebron divided into H1 and H2; as well as the physical separation of Gaza from the West Bank.

⁸⁰ See Maps: http://www.ochaopt.org/documents/ocha_opt_west_bank_access_restrictions_dec_2012.pdf; http://www.ochaopt.org/documents/ocha_opt_gaza_access_and_closure_map_december_2012.pdf.

humanitarian agencies, and workers are not authorized to travel to the region to visit drought and conflict-affected areas or to share information with donors or other organizations about the situation. The Federal Government is reported in the past to have suspended flights to the region for security and other reasons.⁸¹

In some situations, governments restrict assistance to populations that may support non-state armed groups. The Ethiopian Government, for example, has reportedly accused humanitarian workers of supporting rebels and opposition groups, and of providing the UN, donors, and human rights organizations with false information about the humanitarian situation.⁸² During conflict in 2007, access to the Somali region was denied to both *Médecins sans Frontières* (MSF) Netherlands and MSF Belgium.⁸³ Thus, according to MSF:

The issue of access to Ogaden in 2007 to 2008 was marked from the outset by a conflict between MSF's goals and those of the Ethiopian government. The latter regarded international humanitarian organizations' aid to the inhabitants of ONLF-controlled areas as potential support for the rebellion. Any contact with the insurgents, even though such contact was crucial to impartial distribution of aid, was condemned as a sign of lack of political impartiality. This position seems to have been openly expressed and defended during meetings with MSF representatives and in the official correspondence sent to them. In 2009, the president of the Somali regional state even confided to a journalist that he believed 'that MSF has a hidden agenda. MSF is consulting the "elders" who have close relations with the ONLF, and hiring personnel who support the ONLF'.⁸⁴

In 2009, during the Universal Periodic Review of Ethiopia under the Human Rights Council, civil society information included a report by Amnesty International that:

In retaliation to an ONLF attack on an oil installation in the Somali region, the Ethiopian Government mounted a blockade on conflict-affected districts in the region, causing severe food shortages and exacerbating the humanitarian situation in those districts. Although a UN fact-finding mission there led to a partial alleviation of the humanitarian crisis in August 2007, the Ethiopian authorities continue to place restrictions on humanitarian aid in the Somali region.⁸⁵

Another way of restricting access that has been reported is applying additional regulations to encumber humanitarian movements and activities.⁸⁶ Additional time and resources spent on compliance with such regulations and a lack of clarity over what is, and is not, permitted are constraining factors on humanitarian action. Host states often require humanitarian organizations to apply for travel authorizations to access particular areas. Procedures to obtain licences and waivers, when available, can be lengthy and burdensome, hampering a timely response. Research conducted for the present paper found this to be the case for international NGOs in Colombia and the Philippines.

⁸¹ 'In Ethiopia a war on humanitarian staff', *Ethiopian Review*, 30 September 2012, at: <http://www.ethiopianreview.com/forum/viewtopic.php?f=2&t=43103>.

⁸² 'Ethiopian Annihilation of the Ogaden People', *Eurasia Review*, 7 February 2013, at: <http://www.eurasiareview.com/07022013-ethiopian-annihilation-of-the-ogaden-people-oped/>.

⁸³ MSF, *Ethiopia – A Fool's Game in Ogaden*, 2008, at: <http://www.msf-crash.org/livres/en/acting-at-any-price/i-stories/ethiopia-a-fool-s-game-in-ogaden>.

⁸⁴ *ibid.* In 2008, when the situation deteriorated, access was refused for longer, paralyzing the work of MSF teams.

⁸⁵ Working group on the UPR, Summary prepared by the Office of the UN High Commissioner for Human Rights, UN doc. A/HRC/WG.6/6/ETH/3, 22 September 2009, §56.

⁸⁶ *ibid.*

In sum, it is highly challenging to assess and disaggregate with precision the role played by counterterrorism laws and measures in limiting access for humanitarian actors and otherwise affecting humanitarian action.⁸⁷ Clearly counterterrorism legislation can be used for this purpose, but in practice many other avenues remain open to a government that does not wish, for whatever reason, to allow humanitarian actors the opportunity to assist populations in need.⁸⁸

Possible impacts of criminalizing support to terrorist organizations

Criminalization regimes and restrictions on engagement in host states seem to affect different organizations differently. UN agencies whose staff are protected by immunities and privileges may sometimes take a bolder approach when dealing with host states. For instance, when negotiating access to certain areas with governments, UN agencies may be able to be more persuasive and insistent without incurring major risks. UN staff are typically immune from prosecution, while the greater risk run by the organization is, in a worst case scenario that is rarely realized, to be expelled.⁸⁹

Staff of other well established international humanitarian organizations are generally less exposed than small local organizations to the prospect of being prosecuted by host states for providing material support to terrorist organizations. This is explained by the fact that although often they cannot formally rely on immunities or other privileges, thanks to their reputation, their mandate, and the scope of their operations their presence and work is more willingly accepted by host states.⁹⁰ On the one hand they are perceived as less threatening by the local authorities, while on the other restricting their work or expelling them resonates poorly at the international level.

Research suggests that small local NGOs experience the adverse impact of counterterrorism legislation and associated measures in host states to a greater extent than their international counterparts. This is true not only in terms of funding, as highlighted by the 2013 OCHA/NRC Donor Study.⁹¹ No case law was identified by the present research in which staff of national humanitarian organizations had actually been prosecuted specifically for having supported terrorism. However, even in the absence of relevant case law, interviews with local NGOs in several countries indicate there have been, and currently are, instances of threats of criminal prosecution based on counter-terrorism laws or a palpable sense of their work being more strictly controlled and restricted compared with international organizations.⁹²

⁸⁷ This is aggravated by the fact that certain humanitarian organizations are reluctant to share information on their operations for fear of the consequences.

⁸⁸ Of course, under certain conditions restrictions on access by governments may be legitimate.

⁸⁹ Individual staff may also be expelled however, or access denied on the basis of various pretences. This was reported by a WHO staff member from the Emergency Risk Management and Humanitarian Department, interviewed in Geneva on 3 October 2014.

⁹⁰ 'Humanitarian Action under Scrutiny', p. 36.

⁹¹ As noted above, one of the findings of that study was that national NGOs are less likely to receive grants due to the impression, among some donors, that international NGOs implement more robust counterterrorism risk management strategies. 2013 OCHA/NRC Donor Study, p. 104.

⁹² This finding accords with evidence that large international NGOs and UN agencies are requiring local NGOs, as subcontractors, to undertake all of the counterterrorism-related vetting and compliance measures imposed by donors. See Counterterrorism and Humanitarian Engagement Project, 'An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts'.

Conclusions and Recommendations

This concluding section summarizes the main conclusions and recommendations of the research.

Although the global counterterrorism effort since 9/11 has generally seen counterterrorism legislation and discourse becoming broader in scope, determining the precise, disaggregated impact on humanitarian action of counterterrorism measures adopted by host states continues to be challenging. While most legislation assessed during the present research includes an extremely broad⁹³ definition of terrorism and ‘material support’ to terrorism, to date, little direct evidence has been identified of these criminal offences being used directly to constrain humanitarian action through legal prosecution. That said, there remains a clear and serious risk of humanitarian actors being subjected to draconian legal sanctions or other adverse consequences resulting from engagement with armed non-state actors for purely humanitarian purposes.⁹⁴

Sub-prosecutorial impacts and restrictions on access to victims in need of humanitarian assistance remain a major constraint upon impartial humanitarian action, especially in areas under the control of armed groups. This is, in part, the result of fear of counterterrorism measures being used against a humanitarian organization⁹⁵ or as a consequence of political pressure. Indeed, host states have on occasion accused humanitarian operators of acting as agents of foreign intelligence services or in support of ‘terrorist’ groups.

Many counterterrorism laws and measures adopted by host states do not include exemptions for impartial humanitarian action. This is in spite of a January 2013 statement by the President of the UN Security Council, relating to the sanctions regime established under Resolution 1267, in which he reiterated the Council’s ‘continued commitment to ensure that fair and clear procedures exist for placing individuals and entities on sanctions lists and for removing them, as well as for granting humanitarian exemptions.’⁹⁶

The nature of the humanitarian organization in question can affect the extent to which it is impacted by counterterrorism measures. The UN and other intergovernmental organizations’ staff typically benefit from privileges and immunities protecting them from individual criminal responsibility for acts carried out in the course of their work. This is not the case for humanitarian NGOs and their staff. Indeed, a trend was identified of several states using counterterrorism legislation and measures as a basis for controlling the conduct of local NGOs receiving foreign funds. Legislation on charities and societies thus impacts on humanitarian action as operations are constrained by highly exacting reporting requirements, determining when and how such NGOs can access resources, and when they will face penalties.

⁹³ The research confirmed an important distinction between legislative provisions criminalizing support to a terrorist *act* and laws criminalizing support to a designated terrorist *group*. While support to a terrorist act typically requires ‘knowledge’ by the authors that their ‘support’ will assist the commission of a crime, in the case of support to a designated terrorist group contributions may be criminal without further investigation into the intent behind them.

⁹⁴ For instance, incidental transactions and supplies to individuals or organizations designated as terrorist, such as inviting and paying the costs for any person to attend a meeting to discuss matters including respect for humanitarian norms or to promote peace, may be prosecuted under counterterrorism laws.

⁹⁵ A tendency to criminalize (and arguably even target) through counterterrorism legislation and accompanying measures human rights defenders/organizations (as opposed to aid workers) was identified in several states.

⁹⁶ Statement of the President of the UN Security Council, UN doc. S/PRST/2013/1, 15 January 2013.

The research also revealed that local NGOs are generally affected by counterterrorism laws and measures to a greater extent than are their international counterparts. Even in the absence of relevant case law, interviews with local NGOs in several countries indicate there have been, and continue to be, many instances of threats of criminal prosecution or at least a clear perception of their work being more strictly controlled and restricted compared to international organizations.

Counterterrorism measures may also impact negatively on the internal functioning of humanitarian organizations. For example, additional time and resources spent on compliance with counterterrorism laws and a lack of clarity over conduct that is, and is not, permitted are constraining factors on humanitarian action. Procedures to obtain licences and waivers, when available, can be lengthy and burdensome, hampering a timely response.

The research did find a number of examples of creative reconciliation of counterterrorist measures and the humanitarian imperative. For instance, in 2010 Colombia adopted a law prohibiting all contact with non-state armed groups without express government authorization.⁹⁷ This meant that both national and international organizations run the risk of criminal sanction for any form of interaction with armed groups. This has been a potentially significant obstacle to accessing areas under the control of armed groups. However, some humanitarian organizations have overcome this obstacle by interacting and discussing access with local community leaders, who in turn talk to the leaders of armed groups. This initiative, known as *Diálogos Pastorales con actores irregulares para reducir la crisis humanitaria*, began in the 1990s and is tolerated by the government.

Another example is the Philippines, a nation that has for decades been dealing with terrorism threats but whose counterterrorism legislation and related measures seem not to have negatively impacted on humanitarian action. Common concerns in other countries, such as diversion of humanitarian aid by proscribed armed groups, do not seem to be a major issue in the Philippines, and the only case where access may be a problem is in territory controlled by Abu Sayyaf in the southern Philippines, specifically the island provinces of Basilan, Sulu, and Tawi Tawi. There, humanitarian access is currently heavily constrained, principally due to security reasons related to the threat of kidnap by the Abu Sayyaf Group and confrontations between the armed group and state forces rather than for reasons linked to counterterrorism legislation or measures.

Finally, both this research and the Donor Study found that counterterrorism legislation and associated measures generally affect NGOs, especially local organizations, to a greater extent than international organizations. However, while the impact on NGOs in the Donor Study is mostly perceivable in terms of (less) funding, in the host states adverse impact may jeopardize the very existence of the organization the members of whom risk being prosecuted and imprisoned for carrying out impartial humanitarian work.

Based on these conclusions, the following recommendations are offered for consideration by states and humanitarian organizations.

1. Host states should ensure that counterterrorism legislation as well as legislation on charities and societies does not impede the critical humanitarian role played by national and local organizations. National staff of international or local organizations should be specifically protected from the risk

⁹⁷ This includes non-state armed groups labelled as terrorist. See Art. 3, Law 1421 (2010).

of being prosecuted for providing material support to terrorism when they are engaged in impartial humanitarian action.

2. Host states should ensure that their legislation on counterterrorism and related issues explicitly includes humanitarian exemptions so as to ensure the delivery of humanitarian assistance and protection to populations in need in full respect of states' obligations under IHL, international human rights law and Refugee Law.
3. Host states, when defining the concept of 'material support' to terrorist acts or to terrorist organizations in their legislation or administrative procedures, should include an illustrative list, as detailed as possible, of activities that are encompassed by such a criminal offence, as well as of activities that do not constitute 'material support' (e.g. provision of medical care to the wounded and sick).
4. Humanitarian organizations should work together to ensure and demonstrate more effective implementation of regulations and procedures to avoid the risk of aid diversion to non-state armed groups.
5. Humanitarian organizations should engage with host states in sustained policy dialogue on how to better reconcile counterterrorism measures with humanitarian action which promotes the humanitarian imperative, the primacy of respect for humanitarian principles, and the importance of securing humanitarian space and access to populations in need of assistance.