
REPORT ON COUNTER-TERRORISM LAWS AND HUMANATARIAN ORGANIZATIONS

*By Sean S. Carter & Terrance S. Carter**

A. INTRODUCTION

In November 2014, the Humanitarian Practice Network at the Overseas Development Institute, with the Counter-terrorism and Humanitarian Engagement Project at the Harvard Law School, published a report entitled “Counter-Terrorism Laws and Regulations: What Aid Agencies Need to Know” (the “Report”). The Report examines the tension that has developed over the past two decades between anti-terrorism laws and humanitarian action around the world. Over these years, governmental and inter-governmental bodies have adopted progressively tougher counter-terrorism laws and policies. At the same time, the need for humanitarian aid in countries with significant terrorism threats has increased. Unfortunately, although the Report indicates that these initiatives often have overlapping interests, a strain has emerged between the laws and policies that regulate these interests, which has resulted in challenges for governments as well as humanitarian organizations. This *Bulletin* provides an overview of the Report, which outlines the issues humanitarian organizations experience in navigating counter-terrorism laws in high-risk environments as well as appropriate steps such organizations can take to mitigate against these issues.

B. THE NEED FOR HUMANATARIAN ACTION AND COUNTER-TERRORISM LAWS

The Report first outlines the principles of humanitarian action and the framework of international humanitarian law as well as the reasons for and the legislative origins of counter-terrorism law.

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Humanitarian organizations have become a necessary resource whenever a state cannot meet the basic needs of its population, including during instances of armed conflict. When working in areas of armed conflict, humanitarian organizations often need to negotiate and coordinate not only with states but also with non-state parties to gain access and deliver aid. During such situations, these organizations offer assistance in accordance with international humanitarian law.

The Report then describes counter-terrorism as the body of laws implemented by governments and inter-governmental organizations that control and enforce sanctions against terrorist organizations. United Nations Security Council resolutions have created a baseline of counter-terrorism measures that United Nations member states must implement, but member states are also able to enact their own supplementary measures. Accordingly, most states have taken the initiative to criminalize terrorist acts, including acts that are considered to support or prepare for terrorism. One common example of such a supplementary measure is terrorist lists that publicly identify and sanction specific individuals and groups who are thought to be involved in terrorism. Unfortunately, overly broad counter-terrorism laws and policies have also restricted the operations of humanitarian organizations, causing legal and operational challenges for these organizations and their donors.

C. CHALLENGES

The Report next identifies several challenges that humanitarian organizations face with regard to counter-terrorism laws and policies. These challenges exist partly because, in the past, states have been hesitant to engage in dialogue with civil society regarding the development of counter-terrorism laws and policies. Though dialogue is now more common, it is still stunted by governments that do not collaborate in the full scope of counter-terrorism law and policy development, whether this is done intentionally or not. As a result, many humanitarian organizations lack the clarity they need to proceed with their work without breaking rules or incurring liabilities. Alternatively, for those humanitarian organizations that take the time to become conversant with these rules, a ‘chill’ can emerge where the real or perceived threat of liability under counter-terrorism laws curtails an organization’s lawful and essential humanitarian activities.

In some cases, jurisdictions have enacted counter-terrorism laws that criminalize actions that are at the core of international humanitarian law, for example, medical practitioners providing services in a

conflict area, thereby further complicating a solution to the core problem within the conflict area. The Report highlights these inherent contradictions between international law (particularly well-established humanitarian law) and current counter-terrorism laws, and notes that enforcing counter-terrorism laws currently “engenders uncertainty and confusion and presents very serious dilemmas for any responsible organisation seeking to ensure that its activities comport with the law.”

The Report indicates that further challenges that are experienced by humanitarian organizations are not always obvious or direct. For example, counter-terrorism laws can substantially affect humanitarian organizations through interaction with the financial sector. This can happen when banks implement their own measures in response to counter-terrorism initiatives created by states, which may include limiting financial transactions in areas deemed ‘high-risk’. These sanctions are often over inclusive and can significantly impact the operations of humanitarian organizations that depend on resources flowing in and out of the country.

The Report provides some examples concerning why humanitarian activities have not been exempted in financial sanctions to date (if not specifically targeted), including the example of how the Financial Action Task Force (an important multi-lateral policy making body for financial regulation) (“FATF”), in its guidance for national governments on creating counter-terrorism laws and regulations, described non-profit organisations as “particularly vulnerable” to abuse for terrorist financing, and called on states to address this perceived vulnerability. The Report sets out how many organizations in the non-profit sector have begun to address these issues and contribute to the dialogue with national governments by referring to the recommendations to the FATF prepared by the Charity and Security Network (“CSN”) and the Human Security Collective in 2014. The Report notes that the CSN and the Human Security Collective’s recommendations called upon the FATF to, among other things, differentiate between ‘potential risk and actual abuse’ of non-profit organizations, and to recognize the need for tailored strategies to mitigate against potential abuse.

The Report indicates that the issues that humanitarian organizations experience in regards to counter-terrorism laws are exacerbated by the fact that states do not adequately respond when a humanitarian organization is mistakenly caught in the net of counter-terrorism measures. Very few countries that are considered major donors have automatic and comprehensive exemptions for legitimate humanitarian

organizations. The lack of such exemptions results in significant operational, legal, and ethical challenges for humanitarian organizations and the individuals working for them, who may be forced to act or refuse to act in situations which have negative consequences associated with every possible decision. Being forced to make difficult decisions in this context may lead to even further problems, including harm to a humanitarian organization's reputation. That is, humanitarian organizations, particularly those in 'high-risk' environments, may attract scrutiny and criticism even for actions not in their direct control, or even if they are not directly accused of any wrongdoing. The Report notes the growing incidence of reports by government officials, journalists and bloggers, purportedly seeking further transparency and accountability in the non profit sector, to invoke "broad and extraterritorially applicable counter-terrorism laws...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."

D. RESPONDING TO THESE CHALLENGES

The Report completes its analysis by making several recommendations to humanitarian organizations for facing the challenges described above. The main theme of these recommendations is keeping self-informed and keeping others informed of the current relationship between humanitarian action and anti-terrorism laws and policies. Among the Report's recommendations is that organizations should work to document their experience, and thus collect evidence of the adverse or positive impacts of counter-terrorism measures on their operations. Understanding the challenges presented by counter-terrorism laws is essential in being able to document any relevant experience, which also reflects the Report's recommendation of keeping up to date with operational and financial rules, as well as sanctions that humanitarian organizations might be subject to. The Report also highlights the importance of robust risk management policies that consider the varying risk profiles for each operational activity and geographic region, and the constantly burgeoning body of counter-terrorism law. Having a detailed record of the impact of counter-terrorism measures on operations and being able to provide a summary of the risk management policies will assist humanitarian organizations in facing the almost inevitable questions and investigations that will arise.

E. CONCLUSION

The Report indicates that the relationship between counter-terrorism laws and humanitarian action has had a challenging history, which is only going to grow more complex in the future. The Report also identifies that there is significant work left to do to address the risks and liabilities associated with doing humanitarian work. In the meantime, the Report advises that it is important for humanitarian organizations to continue with their goals and not curb their actions due to fear. For each individual humanitarian organization, part of the solution is to become better informed of the current state of affairs, ensuring that it has a robust and comprehensive risk management and due diligence policy, and participating in the larger conversation concerning what needs to be done in the future to address the tension that exists between counter-terrorism laws and humanitarian action. The Report makes it clear that reform in the international counter-terrorism law regime is ultimately necessary and the conflict between counter-terrorism efforts and humanitarian programs need not necessarily exist. Moving forward, humanitarian organizations should add their voices and experiences to the dialogue in order to reform the legal framework of counter-terrorism.

The full Report is available online at: <http://www.odihpn.org/humanitarian-exchange-magazine/issue-09/how-female-heads-of-household-cope-with-conflict-an-exploratory-study-in-sri-lanka-and-cambodia/download/download-the-paper>