

Challenges and Considerations for Humanitarian Assistance in the Current Legal Landscape

What is the current legal landscape for Nonprofit Organizations?

Since the terrorist attacks on 9/11, two trajectories have continued to conflict as calls to enhance each of them have grown. States and international bodies have increasingly adopted laws, policies and counterterrorism measures to respond to threats from non-state actors designated as terrorists. At the same time, increased conflict around the globe has led to numerous humanitarian crises, especially where designated terrorists control territory and access to civilians, which creates continued need for lifesaving assistance. However, counterterrorism laws can block access, delay programs and create overly costly regulatory requirements for humanitarian groups. The lack of adequate exemptions exacerbates the problem. Furthermore, the expansion of counterterrorism measures has increased legal ambiguity over what is permissible, creating a chilling effect on humanitarian aid.

What are the mounting legal pressures?

International context:

On an international level, UN Security Council resolutions have impacted humanitarian operations in terrorist-controlled regions. Resolution 1267, issued in 1999, requires states to combat terrorism through sanctions regimes targeting members of the Taliban and, later, of al-Qaeda and ISIL. This Resolution requires all UN members to freeze funds and other financial assets of individuals and entities designated on its Consolidated Sanctions List, and to prevent the entry into or transit through their territories of listed individuals. The Consolidated Sanctions List includes all individuals and entities subject to sanctions measures imposed by the Security Council. In 2001, following the 9/11 terrorist attacks on the US, the UN Security Council passed Resolution 1373. This requires member states to expand their national laws targeting terrorism, to cooperate with other member state in information sharing and to prescribe criminal penalties. The UN Security Council requires that member states prevent their citizens from providing "any form of support, active or passive" to listed groups.

USA context:

In response to and following 9/11, the US developed a robust and far-reaching framework to counteract perceived threats of terrorism. This includes the criminalization of providing any material support to individuals or entities listed on the State Department's Designated Terrorist List. The criminal prohibition in 18 U.S.C. 2339A (Anti-terrorism and Effective Death Penalty Act, or AEDPA) defines material support broadly as:

"any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials."

The law contains very limited exemptions: only medicine and religious materials are excluded from the prohibition. To clarify what is covered in AEDPA's prohibition, in 2004 Congress passed the Intelligence Reform and Terrorism Prevention Act (IRTPA)¹¹ with the following definitions:

- *Training*: "instruction or teaching designed to impart a specific skill, as opposed to general knowledge."
- *Expert advice or assistance*: "advice or assistance derived from scientific, technical, or other specialized knowledge."
- *Personnel*: when a "person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with one or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction or control."

Since the Supreme Court's *Humanitarian Law Project* decision in 2010, the criminal prohibition has been applied to peacebuilding activities that involve these three terms. Sanctions programs in the U.S. have incorporated the prohibition on material support by way of Executive Orders designating groups and individuals as terrorists.

USAID grantees:

USAID requires a special certification by all of its grantees. That certification states that the grantee: "to the best of its current knowledge, [grantee] did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commits, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts." This broad, retroactive assurance can create problems for nonprofit organizations' (NPOs') non-USAID funded projects, especially those funded by other governments. Humanitarian exemptions in other countries are usually broader than in the U.S. and definitions of material support generally do not cover peacebuilding activity. Grantees also have to take further steps to ensure that key individuals involved in their projects are not on terrorist lists and to share the vetting information with USAID. The counterterrorism clauses in grant agreements have been the focus of recent legal battles (for more information, see FCA claims on Charity & Security Network's website).

What impact do these measures have on humanitarian aid?

A recent study from the Norwegian Refugee Council – [Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action](#) – examines the impact of counterterrorism measures on humanitarian groups' ability to deliver aid to populations under the control of designated terrorist groups. It explores this impact on three levels:

- (1) **Structural** – which relates to organizations' ability to follow their humanitarian principles,
- (2) **Operational** – which relates to organizations' ability to implement their operations, and
- (3) **Internal** – which relates to organizations' administrative and international functions

- **Structural**

Counterterrorism measures are not the only barrier, but they do complicate humanitarian actors' ability to adhere to humanitarian principles. Counterterrorism measures prevent organizations from programming on the basis of need alone, and cause them to avoid certain geographical areas. This may lead NPOs to limit their programming to government-controlled areas, creating a misperception that they are siding with or working for the government and undermining the neutrality that is essential to humanitarian operations.

- **Operational**

The study found that counterterrorism measures do not provide clear directions on what constitutes a terrorist threat or how NPOs are expected to respond. There is also no assurance from U.S. government programs that there will not be negative consequences for operating in high-risk regions. This confusion has created a climate of fear and self-censorship. For example, toward the end of the 2011 famine in Somalia, a license was issued to permit USAID and its grantees to work within Al Shabab-controlled areas. This was too little, too late, in the estimation of many NPOs, especially since non-USAID grantees cannot take advantage of it.

- **Internal**

A major impact of counterterrorism measures on NPOs' internal operating is bank de-risking. Because the US dollar plays an important role in humanitarian aid funding, the increase of risk-averse practices by U.S. financial institutions can be felt around the globe. The report found that Muslim organizations are at greater risk of financial exclusion. As humanitarian organizations are pushed out of the traditional banking system, there is an increase in riskier informal banking practices, like cash carrying.

What can NPOs do moving forward?

Mitigating risks:

- Remote management allows NPOs to transfer risk onto local partners (note: USAID certification also imposes liability on grantees for their subgrantees)
- Informal bank transfer methods
- See the Norwegian Refugee Council's online [Risk Management Toolkit \(2015\)](#)

Advocacy:

- There is need for greater clarity from government and a greater respect for principles of international humanitarian law.
- Advocacy coordination has been stifled - NPOs are slow to share information with one another. Following the success of coordinated efforts to reduce bank derisking and strengthen humanitarian sector participation. This will establish greater transparency and dialogue between humanitarian organizations.
- Advocate for humanitarian exemptions as well as for their proper implementation U.S. government agencies.
- Focus on neutrality as a core principle of humanitarian action, which is under threat from counterterrorism measures.
- NPOs must advocates for humanitarian exemptions as well as for the proper implementation of humanitarian exemptions by U.S. government agencies.
- There should be a primary focus on neutrality as a core principle of humanitarian action, which is under threat from counterterrorism measures that impose partisanship on NPOs.
- Advocacy should take place on both a country (including INGO forums, working Groups) and a global level (UN Inter-Agency Standing Committee subsidiary bodies, UN Office for Counterterrorism).

Additional Resources

This information was sourced from a Charity & Security Network webinar: **“Current Counterterrorism Measures and Issues for Principled Humanitarian Action.”**

Available at bit.ly/OnlineDiscussionCounterterrorism

Charity & Security Network Report: **“Safeguarding Humanitarianism in Armed Conflict” (2012).**

Available at bit.ly/2012SafeguardingReport

Norwegian Refugee Council Report: **“Principles Under Pressure: The Impact of Counterterrorism Measures and Preventing/Countering Violent Extremism on Principled Humanitarian Action.”**

Available at bit.ly/PrinciplesunderPressure

From Harvard Law School Program on International Law and Armed Conflict’s **Counterterrorism and Humanitarian Engagement (CHE) Project.**

Available at: bit.ly/PILAC_CHEP

This information should not be construed as legal advice, you should always seek legal counsel if necessary.

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