

Assessing the Implications of Counter-Terrorism Measures for Non-Governmental Organisations

INTRAC
International NGO Training and Research Centre

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List of Acronyms

CTM	counter-terrorism measures
FATF	Financial Action Task Force
INGO	international non-governmental organisation
INTRAC	The International NGO Training and Research Centre
NGO	non-governmental organisation
NNGO	Northern non-governmental organisation
SDB	Somali Development Bank
SNGO	Southern non-governmental organisation

Executive Summary

Terrorism is ubiquitous in the media, the Internet, and in the minds of many people - heightened by 9/11, the London and Madrid bombings, and other similar events. A common governmental and multi-lateral response has been the passage and enforcement of various counter-terrorism measures, laws and practices (CTM) intended to reduce the risk of terrorism.

One arm of CTM seeks to interdict the flow of resources (including support and assistance) to terrorists and organisations which support terrorism. For non-governmental development organisations working with local NGOs and communities throughout the developing world, the risk of unintentionally violating CTMs is substantial. Therefore, NGOs have in many instances searched for suitable ways to comply with CTMs while simultaneously continuing their mission.

The threat of unintentional violation of CTMs includes civil and criminal penalty, as well as the loss of charitable status. Informal evidence to date shows that CTMs have, and will continue to have, a chilling effect on the work of many NGOs. CTMs affect NGO decision making in both strategy and programme, where NGOs limit their work – intentionally or not – to reduce risk. Some NGOs may even need to (and have already) shut down or proceed at great risk.

Although in some countries a great deal of NGO effort has been expended on compliance with CTM laws, there has been no comprehensive and deliberate effort to assess the indirect effect of CTM on NGO operations and decision making. How will CTMs develop in the future and how can NGOs best respond? Should NGOs consider co-ordinated responses to CTMs to better inform governmental regulators and legislatures?

By convening the dialogue among Northern and Southern NGOs as described in this document, INTRAC seeks to assess and answer these questions and provide NGOs with better information with which to make decisions.

Background and Overview

The concepts of terror and counter-terror are omnipresent. The 2004 US Presidential election was characterised, according to some observers, by ‘the politics of fear.’¹ The US 9/11 Commission Report states that ‘countering terrorism has become, beyond any doubt, the top national security priority of the United States.’² In Brussels during December 2004, ‘the European Council reiterated its unyielding determination to combat the continuing terrorist threat through a comprehensive and integrated approach reinforcing both internal and international cooperation, in accordance with the principles on which the European Union is founded.’³

But how are counter-terrorism laws and practices affecting Northern and Southern NGOs? Within civil society, will the evolving nature and enforcement of CTMs help or hinder NGO efforts to aid low-income communities and contribute to realising the Millennium Development Goals (MDGs)? Will NGOs with diverse origins, callings and constituencies be differently affected by CTMs? Beyond compliance, to what extent do NGOs consider and assess how CTMs are affecting their activities and programmes?

While CTMs may apply to all parts of society, due to their outreach to the poor and disaffected and their role in the transfer of resources, NGOs are a particular target of concern for security services and insecure governments. Thus INTRAC foresees disproportionate and far-reaching CTM effects on public giving, international co-operation agendas, movement of funds and other types of support. How, then, will CTMs directly or indirectly affect human rights and poverty? How do CTMs affect the diversity of, and relations within, civil society? For example, how are service providers, extremist groups, social movements, interfaith and other communities affected? INTRAC believes that NGOs need to assess the extent to which CTMs are affecting and could potentially affect the international development system, and therefore their own decision making and operations. A ‘wait and see’ approach by NGOs may result in a CTM context in which it is too late for NGOs to voice their concerns and express their expertise on the potentially damaging outcomes of CTMs on international development.

INTRAC is organising NGO dialogues to share understanding, explore implications and consider next steps. INTRAC has already obtained and seeks additional funding to hold an exploratory workshop for NGOs in each of four geographic areas that are most affected by aid generation and (MDG-related) distribution: Europe, North America, sub-Saharan Africa and Asia. Dependent on experience, additional workshops can be organised in other regions such as Central Europe, the Broader Middle East and North Africa, Central America and the Caribbean, South America and the Pacific.

Convening a mix of NGOs is vitally important. CTMs affect every relationship within the aid system – from back donor to international NGO, to local offices of the INGO, to Southern NGO and the Southern community. Not only do CTMs affect each institution in this long chain – but within each institution CTMs affect its officers, directors, employees and other directly related persons. The ‘ripple’ caused by the

¹ VandeHei, J. and Kurtz, H. (2004) ‘The Politics of Fear, Kerry Adopts Bush Strategy of Stressing Dangers,’ *The Washington Post*, September 29, p A01.

² The Final Report of the National Commission on Terrorist Attacks Upon the United States (New York: W.W. Norton & Company 2004).

³ Council of the European Union, Presidency Conclusions – Brussels, 16/17 December 2004, p 8.

CTMs 'stone' reaches every corner of the global 'pond.' It affects even those who have never heard of CTMs or their associated laws. Workshops can help paint a picture of why and how CTM effects will vary in location, class, gender, belief, community and country.

The workshops will provide an opportunity to analyse and share experiences of the relationship between CTMs and NGO work. They will include both Southern and Northern NGOs. This project will equip NGOs with the information and insights needed for internal review of the implications of CTMs on their governance responsibilities, strategies, decision making, operations and relationships. It will also provide input to the discussion of whether or how there may be a collective NGO response to CTMs.

Legal Implications

Legal and visible

The laws that regulate counter-terrorism actions introduce and rely on government-specified lists of proscribed individuals and organisations. Such lists are shared between governments and are posted globally on the Internet. Because the lists come from national and international security services and the prospect of terrorist acts makes governments risk averse, they cannot be effectively challenged. For example, a British charity named Interpal was designated as a terrorist organisation by the US Government, for its alleged role in channelling funds to Hamas. On investigation, the Charity Commission found absolutely no evidence of any illegal activity on the part of Interpal and indicated that the charity is 'well run and committed'. Despite this finding, the British Government would not intercede to have the designation removed⁴. In addition, the Somali Development Bank (SDB) was put on the list of banned organisations by the US Government. This has led to much hardship amongst large sections of the Somali population that are dependent on remittances, which were being channelled through the SDB by relatives earning abroad to support their families in the aftermath of prolonged conflict. While the US Department of State may have had good reason to question the Bank, no specific reasons were given for the imposition of the ban soon after the events of September 2001. To date the ban still remains.

Where legislation is a government's counter-terrorism strategy of choice, three major interlocking principles can already be observed. They can be summarised as 'know yourself', 'know your partner +', and 'follow the money.' The US is probably the most advanced in applying and refining a strongly legislative approach to CTM. Therefore, while perhaps extreme, US examples show what might occur, be adopted or be copied elsewhere.

1. Know yourself

This aspect of legislation and 'voluntary best practices'⁵ requires an NGO to ensure that none of its staff or those known to be providing funding are on a proscribed list. For example, in July 2004 the Director of the Combined Federal Campaign – a US system that provides automatic deduction of payments to nonprofit organisations from the salaries of government employees – affirmed that participating organisations must certify that they do not employ anyone named on government terrorist lists.⁶

⁴ Letter from BOND, British Organisation of NGOs for Development, 7 December 2004.

⁵ US Department of Treasury, 'Voluntary Best Practices,' www.treas.gov/press/releases/docs/tocc.pdf.

⁶ http://www.guidestar.org/news/features/question_oct04.jsp.

'Know yourself' implies adopting and continually monitoring procedures to ensure compliance with CTM laws. A natural tension arises when NGO employees find themselves subject to employer scrutiny. Moreover, CTM practices now suggest that NGOs create an external confidential reporting system so that NGO employees may report suspicious actions anonymously.

Demonstrating and confirming in writing that an applicant for public finance is able to comply with CTM are now part and parcel of USAID's procedures and a formal requirement for AusAid. Given that many NGOs are often highly dependent on tax-based funding, investing in compliance is a necessity if annual budgets are to be maintained or increased. But the (proportional) costs of doing so may be prohibitive for small or financially weak organisations. For example, US auditing rules are already far more onerous than those of other donor countries. This condition limits the numbers and type of NGOs able to access US money primarily to the larger US-based INGOs. It also leads to higher than internationally acceptable overheads being paid to the US INGOs. But such generosity is not passed onto partners, which makes it both unfair and more difficult for them to comply with CTM.

2. Know your partner +

Counter-terrorism legislation is creating a direct obligation for Northern NGOs (NNGOs), foundations and similar funders to vouch for the probity of the recipients of their support in terms of eligibility and ultimate use of assistance. Some interpretations of CTM laws suggest that a funder is required to vouch for a partner's partner or, even further, for the legitimacy of the final beneficiaries. Some US Government agencies now require a NNGO to certify in writing that it has not only checked lists of terrorist organisations but has also investigated the data available publicly about its grantees.⁷ An informal practice has begun in the US whereby recipient NGOs sign such a certification and then send the donor agency a 'hedge' letter in which the NGO states that in signing the required certification, the NGO has assumed the certification is properly interpreted with reasonable views of materiality and detail (i.e. 'strict' compliance is unreasonable for a donor to seek). The hedge letter is intended to present some legal defence to any impending criminal or civil sanction against the NGO. Some such hedge letters have apparently been rejected by US agency donors. As explained below, some NGOs have declined funds rather than sign the required 'certification.'⁸

CTM has come after a period when many aid departments have been reabsorbed into foreign ministries (Sweden, Norway, the Netherlands and Denmark). While the UK does not have this administrative situation, its Foreign Office is starting its own security-related aid programmes.

3. Follow the money

To ensure that financial resources are not directly or indirectly deployed to support

⁷ 'Also suggested...is that charities be able to demonstrate they conducted a reasonable search of public information to determine whether a foreign recipient is or was implicated in any questionable activity, and verify the recipient organization wasn't linked to money laundering or terrorism by government lists.' *Nonprofits Fear False Accusations of Terror Grants*, May 1, 2003, *The NonProfit Times*, by Jeff Jones.

⁸ An example certification Acquisition and Assistance Policy Directive AAPD 04-07 of USAID requires, among others, that the recipient has not provided funds or material support to terrorists but also that it 'will take all reasonable steps to ensure that it does not ...' and that it will 'take into account its own knowledge and information that is public in making the [c]ertification.' See AAPD 04-07, p 3.

terrorists or their causes, new laws on international financial transfers are now being applied to NGOs. Moreover, regulations defined by the existing Financial Action Task Force (FATF) to combat money laundering are being more vigorously enforced. In 2002 FATF's mandate was extended to combat terrorism financing.⁹

Government vigilance is also directed at Diaspora transfers of funds to people's countries of origin. This includes refugees and other international migrants who are increasingly relied upon in developed countries' economies. 'Globally, the value of remittances outweighs overall aid transfers by fifty percent.'¹⁰ In other words, the CTM agenda is not just about restrictions in relation to the misdirection of public funds allocated to international development, it is also about sources and channels for private international remittances and 'informal' banking systems which are often necessitated by exclusion from formal banking systems of diasporic groups.

Two other implications arise. First, the US CTM laws apply not only to money. They also prohibit 'material support' to terrorists or foreign terrorist organisations.¹¹ These and related laws define support as 'lodging, training, expert advice or assistance, safe houses...communications equipment or other physical assets except medicine or religious materials.'¹² Second, the US and many other laws prohibit money laundering. This means that the NGO must not only track where that NGO sends money, but also where it came from (to ensure that it is not being 'laundered' through the NGO).¹³

Legal but not necessarily visible

Alongside these public and overt measures, there are indications of less transparent ways in which counter-terrorism strategies are being pursued by governments. In the case of aid, governments are seldom challenged legally about the way public funds are allocated to NGOs. There are two reasons for this.

First, procedures for aid allocation rely on policies established within a government agency and interpreted in relation to the political position of the administration in power. As long as there is minimum 'due process' and compliance with applicable law and administrative transparency in fund allocation, any regime has the right to establish how it will prioritise what it does with public money. Consequently, a choice can be made to tighten requirements, for example by demanding more information, and to apply more stringent risk assessments. It is easily argued by a government agency that the public now demands this, after the events of the last few years.

A second reason why decisions about fund allocation may not be challenged is because NNGOs do not wish to seem to be too difficult or demanding. In the last analysis, aid allocations are a judgment and not an exact science. Consequently, there is a fear that open complaint by a NNGO about how a bureaucracy alters its rules may work against that organisation in the longer term. Thus, self-censorship by

⁹ With thanks to J Bentham. See: www.oecd.org/fatf, especially Special Recommendations on Terrorist Financing, Recommendation VIII and Annexe 'Typologies of terrorist misuse of non-profit organisations', 31 October 2001, FATF Annual Report 2003–2004.

¹⁰ Bakewell, O. (2004) 'Migration as a Development Strategy: A Challenge to Development NGOs', Informed bulletin No. 10, Oxford: INTRAC.

¹¹ See 18 United States Code §§2339A and 2339B.

¹² See 18 United States Code §§2339A and B. See also *Handbook on Counter-terrorism Measures*, InterAction, Council on Foundations, Independent Sector and Day, Berry & Howard Foundation, 2004.

¹³ See, for example, *Money Laundering: A Banker's Guide to Avoiding Problems*, Office of the Controller of the Currency, Washington DC, December 2002; and *Combating the Abuse of Non-profit Organizations*, Financial Action Task Force, Paris, December 2002.

NNGOs may result in grudging compliance. Obviously, the political realities of a country determine the degree to which this covert scenario plays out. But reluctant compliance must be recognised as a real part of 'doing business' that may be reinforced by a more competitive funding environment.

Program Implications – CTM Impacts on NGOs

The scale and severity of what CTM might mean for NNGOs and Southern NGOs (SNGOs) are currently difficult to assess accurately. However, on the basis of growing experience a number of potential or actual impacts on NNGOs can already be predicted as more and more countries design, copy and implement CTM.

In addition, two factors make the situation for SNGOs less clear and potentially more worrying. First, the 'downstream' affects of NNGO compliance with CTM on Southern counterparts are only just starting to occur. It is far from clear how this CTM transmission path will play out for the South. Second, the design and application of CTM within developing countries is less well observed, documented or crystallised.¹⁴

Burdens and Criminal Liabilities

CTM laws require great diligence on the part of NGOs. Examples are: staff educational programmes on the laws, background checks on employees, internal notification systems and confidential reporting procedures, manual or electronic review of lists of 'blocked' organisations, use of 'red flag' checklists to identify potentially dangerous grantees, complex grant agreements and procedures, reduction or elimination of cash transfers in favour of international correspondent banks, and certification by the recipient NGO confirming proper fund use.

The costs involved in compliance are likely to be added to organisational overheads. This will place additional strain on an already contested (comparative) measure of NGO efficiency. And it is far from clear that donors will allow their funds to be used to satisfy CTM requirements. As noted above, unlike other donors, the US has accepted very high overhead levels due to auditing compliance requirements. The danger for non-US NGOs is that their respective countries adopt CTM but are not willing or able to accept the extra costs required for compliance.

Violation of the CTM laws has serious consequences. In the US, organisations and individuals associated with them that make improper financial transfers are subject to both criminal and civil penalties.¹⁵ Additionally, charities have the risk of losing their charitable and tax-exempt status. It is vital that governing bodies are aware of their new or additional responsibilities and penalties for not getting it right.

Risk Avoidance

A normal organisational response to increased threats and uncertainties is to reduce risk. Examples of NGO concerns that demand updated risk management policies and strategies are illustrated in a recent article in *The NonProfit Times*:

- 'Complying with the guidelines could stretch the resources of nonprofits, especially smaller organizations;
- Even if charities follow the guidelines they don't receive a safe harbor like the financial industry receives when filing reports;

¹⁴ Kenya's attempt to introduce counter terrorism laws met with much hostility and claims that it violated the Constitution. The original Bill was withdrawn.

¹⁵ 'The risks [of stiff criminal penalties] are not academic.' *Seeking a Safe Harbor*, Foundation News and Commentary, May/June 2004, p 35.

- International field offices that investigate banking practices and family relationships of staff and board members they work with could jeopardize field workers' safety;
- Muslim charity donors are concerned that they could be held accountable if a specific program to which they give is later linked to terrorism;
- The guidelines could somehow become de facto measures for what constitutes good grant making or management practices and become part of future legislation.¹⁶

The answer to minimising risk is illusive. 'Grantmakers are seeking a 'safe harbor' – clearly defined written guidelines that describe exactly what they need to do to be in compliance with counter-terrorism measures. But neither the [U.S.] Internal Revenue Service nor the Treasury Department has provided this or is expected to do so.'¹⁷

There are various approaches to risk reduction, such as partner selection and making significant effort to fully comply with legal and administrative requirements. Another possibility is for a governing body to revisit and redefine their risk tolerance levels and risk management strategies and communicate them publicly to show both awareness and openness that improves public image and funders' confidence.

Several US NGOs have developed a set of 'principles' that parallel US CTMs but are consistent with development practice.¹⁸ Although NGOs accept that they must comply with CTMs, they also recognise that they are not supposed to be acting as government agents, enforcing laws or policies reflected in the CTMs. The balance between CTM compliance and governmental agency is a continuing challenge.

Relational Implications

Gagging and Self-Censorship

CTM is producing examples of politicians and government agencies trying to gag critics of the policy interpretations and practices being produced. In the US, this process has been reported as 'Continuing Attacks on Nonprofit Speech: Death By a Thousand Cuts II'.¹⁹ Investigation for this report found:

- 'Retaliatory action against government grantees that engage in controversial policy discussions or active advocacy that includes points of view different from the administration's;
- Aggressive application of the global gag rule, and signs of a back door 'domestic gag rule' that illegally imposes government rules on private funds of grantees;
- Selective enforcement of laws against nonprofits engaged in direct action; and
- Overbroad implementation of homeland security policy that chills nonprofit action.'

While:

'Federal agencies have used audit and other powers to take action against federal grantees that exercise their right to advocate on issues with their

¹⁶ *The NonProfit Times*, May 1, 2003 by Jeff Jones.

¹⁷ *Seeking a Safe Harbor*, Foundation News and Commentary, May/June 2004, p 36.

¹⁸ See *Principles of International Charity* developed by the Treasury Guidelines Working Group, March 2005.

¹⁹ www.ombwatch.org/article/articleview/2490/1/3?TopicID=3

private funds. Government funds and resources have also been used as a wedge to limit open debate and availability of information to inform policy discussions.'

In Europe, following their critical comments on the link being made between CTM and government 'recalibration' of aid funds, NGOs in Denmark have been under attack and their public funding threatened by a minor party in the ruling coalition. Retaliation against nonprofits that articulate views that run counter to the government of the day is effectively an attack on free speech and a core of democracy itself.

As noted above, in response to such hostility, self-restraint and self-censorship by NGOs on what they say and advocate is a potential outcome of CTM.

Shrinking, Freezing and Fading Away

NGOs that are not willing to accept CTM related conditions because of what they mean or might imply for limiting expression or relationships, or because of possible legal consequences face the prospect of shrinking budgets. For example:

'[T]he American Civil Liberties Union has rejected \$1.15 million from the Ford and Rockefeller foundations, rather than accept restrictions intended to prevent grant funds awarded by the foundations to be used to underwrite terrorism or other unacceptable activities, the *New York Times* reports. Anthony D. Romero, ACLU executive director, said the language of the contracts governing the grants was broad and ambiguous, leaving them open to interpretation that could impede free speech and limit advocacy work not only at his organization but also at other nonprofits.'

Governing bodies of NGOs are usually averse to declining budgets, so this example may be an unusual step for an NGO. But it is an option that NGOs may have to consider. One feature of this option – seldom applied - would be to ask Southern partners if they have any problems with conditions under which funds destined for them are to be made available. Taking this step would imply having the courage to turn down 'back donor' funding if counterparts objected to the terms involved.

An NGO may reasonably fear that it may suddenly find its assets frozen because of security 'doubts' about a recipient, or lose its tax exempt status, or become subject to civil and criminal sanctions against it and its directors/officers/trustees. Deregistration of NGOs on spurious grounds is not a wholly uncommon way for governments to deal with critics. CTM can provide even more false grounds for such behaviour.

Where the proportional costs of compliance are too high, some NNGOs may simply have to pack up.²⁰ Apparently inexplicable losses in funding from prior Northern partners may also lead to the SNGOs shrinking and fading away.

Conclusion

The assessment described in this document is based on trends observable but not yet tested. These trends suggest that:

- Terrorism and CTMs will be a part of our social landscape for the foreseeable future.

²⁰ Anecdotal evidence suggests that some large NGOs believe that the practice of buying and using computer programmes to check the lists of 'blocked' persons or organisations will soon be required.

- NGOs may realistically expect that CTMs will tighten rather than loosen as governments and their employees do not wish to be considered 'soft on terrorism'.
- The anecdotal evidence of NGO self censorship and risk avoidance is affecting and limiting international aid and charity.
- Because compliance with CTM has been foremost in the minds of NGOs, little effort has been directed to assessing the effect of CTMs on international aid and NGO programmes.

It is in this context that INTRAC is undertaking to assess and report on these issues, in order to help NGOs better respond to CTMs in ways that preserve the core values and mission of the Third Sector. It is also essential for those who represent voters and who are also interested in Development and knowing about public funds being spent in this direction, to be fully aware of the multifarious implications of the war on terror, and in particular on the development process itself.

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