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The changing face of the 'war on terror': New developments in counter-terrorism legislation and its impact on civil society

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Introduction

This paper provides a short update on issues around the impacts of the use of counter terrorism measures (CTMs[2]) and their impact on civil society internationally. Since initial INTRAC research the language of the 'war on terror' has been abandoned in both the UK and US[3]. Nonetheless, although the phrase is used less frequently, the underlying impact of the approach has changed little and civil society is still adversely affected.

Seeking to distinguish itself from the previous administration, the Obama administration took initial steps to close the Guantanamo detention facility and declared its determination to change the United States' relationship with the Muslim world. However, the substance of the counter-terrorism legislation remains in place. In 2010, President Obama signed into bill the extension of expiring provisions of the US PATRIOT Act. This indicates that anti-terrorism laws have become embedded in the political and social systems of many states, and institutionalised as part of a new counter-terrorism regime[4]. Polls indicate that when a terror-related incident occurs, it is followed 'very closely' by much of the American public[5]. Therefore challenging overly aggressive CTMs policy regimes, instituted in the wake of the 9/11 attacks, will require much more than a change of language. This is unlikely to be achieved without pressure from society at large, and civil society organisations in particular.

Although CTMs aimed at preventing violence have broad support and can be justified by the necessity of protecting the publics' security, the intended and unintended consequences of CTMs have serious implications for the work of civil society worldwide. Muslim charities have been most seriously affected. However, it has become obvious that CTMs have an impact on the whole non-profit sector. A recent US Supreme Court ruling on CTMs and what constitutes 'material support' to terrorist organisations (which included advice and training for peaceful purposes in the category) shows that CTMs regimes are deeply entrenched in socio-political systems and that the thinking associated with the 'war on terror' and '3 D' paradigm (defence, diplomacy and development) still dominates Western policymaking circles. Whilst recognising the importance and necessity of CTMs in the current environment, there is a need to reconsider and rebalance some of the regulations and instruments which have been instituted in the wake of a post-9/11 climate of fear and emergency.

This paper gives an overview of recent developments in CTMs, concentrating on the UK and US, and discuss its implications for civil society. The conclusion points to actions that CSOs might take to alleviate the administrative and moral burden they have to carry as a result of CTMs.

[1] The author would like to thank Jonathan Benthall and Joseph McMahon for valuable suggestions and comments on the earlier drafts of this paper.
[2] In this paper 'CTMs' refers broadly to the many forms of counter-terror laws, regulations and policies implemented by governments.
[3] See our earlier publication on this topic, *Civil Society and the War on Terror*, Sen with Morris 2008
[4] Howell and Lind 2010
[5] Pew Research Centre 2010

Sweeping laws, harsher counter-terrorism regimes worldwide

The adoption of counter-terrorist legislation has become a pervasive feature in the post 9/11 environment. It was put in place in both long-established western democracies such as the US and the UK, and countries which allegedly have a considerable deficit of democratic procedures – such as China, Ethiopia and Uzbekistan. According to Whitaker, by 2007 at least 33 states have adopted counter-terrorist laws – this is not taking into consideration the countries which have added special clauses into the already existing criminal codes[6].

Despite differences in the legislation and political systems of the states where the counter-terrorism legislation was introduced, previous INTRAC research indicated there is a consensus that it has had an adverse impact on civil liberties and human rights, as well as the state of democracy in the majority of states. In Western democracies, the adoption of CTMs laws has sparked debates about how far civil liberties and human rights can be limited under the pretext of national security. In the developing countries, where there is no history of long-standing democratic institutions, the question is even more pertinent: what impact will this type of legislation have on the consolidation of democracy, accountability and rule of law?[7].

In the developing world, anti-terrorist legislation is very easily used to punish dissent and to close the space for political opposition, civil society and social protest. For instance, in Thailand 'red-shirt' leaders, members of Thaksin's United Front for Democracy Against Dictatorship, face terrorism charges despite the fact that red-shirt movement can hardly be categorised as a terrorist organisation[8]. In Swaziland, the opposition leader from the People's United Democratic Movement was arrested and charged with supporting illegal organisations under the Suppression of Terrorism Act 2008[9]. Similarly, in Rwanda, the leader of the opposition party was charged with collaborating with a terrorist group[10]. This list could be continued.

In most countries, counter-terrorist legislation was adopted without consultation with citizens and civil society[11]. It is notable that in South Korea and Kenya – countries with a relatively short history of democracy – drafts of the CTMs laws were rejected due to pressure from human rights groups and civil society[12]. In Costa Rica, the government argued that existing articles of the penal code were sufficient to tackle the terrorist threat. However, in the end the government of Costa Rica felt it had to draft an anti-terrorist law due to pressure from the UN Counter-Terrorism Committee and the country's obligation to fulfil Resolution 1373[13].

In many situations, the CTMs legislation is so broad and vaguely defined that it gives sweeping powers to law enforcement authorities: in 2007, the government of Paraguay introduced a proposal to modify the anti-terrorist law which would define 'dangerous interventions or obstacles on public roadways' as acts of terrorism[14]. This shows that anti-terrorist legislation can be abused in states without strong legal or democratic systems. This problem is currently being researched by the Centre for Conflict Studies at Utrecht University in the project 'shrinking 'room of manoeuvre' of local NGOs and CSOs' and ways to deal with it[15].
Most Western democracies have also adopted CTMs. However, the legislation has been different in degree and scope: there are divergences in what is considered due process, material support to

[6] Whitaker 2007, 1019
[7] Whitaker 2007
[8] ICJ 30 June 2010
[9] ICJ 01.06.2010
[10] ibid
[11] Fowler and Sen 2010
[12] Whitaker 2007, 1028
[13] ibid, 1022
[14] Cregan, 2007
[15] The results of research are due in February 2011.

terrorist organisations and pre-charge detention limits. These differences are manifest not only between the US and European states. Even within the European Union itself, countries which have experienced similar extent of terrorist attack, Spain and the UK, responded in opposite ways. Spain incorporated anti-terrorist legislation within its existing criminal code, whilst the UK introduced a new set of counter-terrorist laws and regulations. According to Colas, the Spanish response to terrorist attacks on 11 March 2004 has been a continuation of 'politics as usual' whereas in the UK, the 7 July 2005 attacks triggered the institutional re-organisation and reshaping of the state–society relations[16], which have led to the 'normalisation of exceptional'[17]. At the moment, the new Conservative-led coalition in the UK is in the process of reviewing some elements of the counter-terrorism regime instituted under the previous government[18].

Thus, despite the fact that many countries have a similar threat of terrorism, responses to it are varied. Only the UK and Australia have introduced control order legislation[19], an instrument used to deal with terrorist suspects who cannot be deported or prosecuted. In the UK, suspects under control orders were not presented with a case filed against them – which was recognised by the European Court of Human Rights to be a breach of the right to a fair trial. The Parliamentary Joint Committee on Human Rights also questioned the sustainability of the control order regime, but on 2 March 2010 the House of Commons renewed the control order system for another year[20]. In addition, the new Counter-Terrorism Bill introduced in the UK in 2008 has been seriously criticised by the UN Human Rights Committee: the Bill extended the period of pre-charge detention of terrorist suspects from 14 to 28 days – the proposed maximum having been 42 days; endorsed the control order regime and a broad definition of 'encouragement and glorification of terrorism'[21].

Switzerland provides a contrasting example to the policies adopted by the UK, US and EU. A recent decision by the Swiss Confederation states that it will not implement the UN terrorist sanctions to named people on the UN terrorist list if this person has not been brought to court within three years; did not have an opportunity to access a remedy from an independent authority, and had not been charged by any judicial authority[22]. Switzerland's approach to counter-terrorism measures stresses that in a democratic state a person cannot or should not be deprived of fundamental rights for an indefinite period without charge. It also stresses the fact that terrorist lists should be reconsidered, have delisting mechanisms built in and should not be viewed as unquestionable for an indefinite period of time.

Secret evidence, surveillance and lack of due process

One of the worrying features of the current counter-terrorism regime is that it allows for a wide use of secret evidence and surveillance methods. This has an adverse impact on transparency and lawfulness of the socio-political systems in both newly emerging democracies and established ones. As one example, the extension of the US PATRIOT Act in February 2010 came as a surprise because the three renewed provisions endorse surveillance methods in combating terrorism, including roving wiretaps, seizure of records and property for counter-terrorism purposes and surveillance of suspects of foreign origin not affiliated with an organisation or country[23].

[16] Colas 2010,315
[17] Howell 2010
[18] The review is made in six major areas: the use of control orders; stop and search power and anti-terrorist legislation in relation to photography; pre-charge detention of terrorist suspects; use of deportations to remove terrorist suspects; measures dealing with organisations promoting violence; use of surveillance by local councils and access to communications data (BBC 2010).
[19] Justice 2010
[20] ICJ 31.03.2010
[21] ICJ 31.08.2008
[22] ICJ 31.03.2010
[23] ICJ 31.03.2010

The stress on secret evidence and surveillance rather than due process in preventing terrorism is reflected in a recent EU instrument for 'collecting data and information on the processes of radicalisation in the EU'[24]. This surveillance project intends to gather personal data about suspected radicals who espouse violent ideologies, broadly defined as extreme right/left, Islamist, nationalist, anti-globalisation – which could potentially include some environmental activists, anti-war protesters and others. In other words, the programme proposes placing a very wide spectrum of political activists under surveillance, and gathering and exchanging information on their friends, family, beliefs, internet use and even psychological traits among the member states[25].

In addition, in July 2010 the European Parliament voted for a new version of the Swift anti-terrorist agreement on bank data transfers to the US, allegedly ensuring enhanced safeguards against the abuse of personal information. The new agreement will allow US-based counter-terrorist specialists to access the European bank data held by Swift, which carries out millions of bank transactions per day. One important feature of the new proposal is the plans to set up an EU equivalent of the US 'Terrorist Finance Tracking Program' (TFTP), which will preclude 'bulk' data transfers to the US, and increasing the power of Europol to ensure that the data transferred is justified by counter-terrorism needs[26]. Whereas the European Parliament has tried to build a system of checks and balances in the new agreement, this comes with the import of US anti-terrorist instruments and institutions to the EU.

The counter-terrorism regime in the US, which is often replicated in different contexts, has been strongly criticised by human rights groups, especially around the upsurge of political surveillance in the US over recent years. An American Civil Liberties Union report documented more than 100 incidents of political surveillance in recent years in the US which targeted peace protesters, environmental groups, Muslim charities and human rights groups, including well-established organisations such as Amnesty International and the American Civil Liberties Union[27]. According to Sidel[28], hundreds of NGOs were affected as a result of surveillance programme: had events observed, conversations wiretapped and transactions tracked. In addition, the US government used the donor tracking software 'to search and correlate donors to as yet undefined range of non-profit institutions'[29]. The scope of the surveillance phenomenon, identified in 33 US states and the District of Columbia, caused ACLU to compare the situation with the Cold War era when political spying was a norm[30].

Those defending basic human rights clearly state that secret evidence and surveillance as an approach to tackling terrorism violates basic rights to due process, such as fair trial, the ability to defend oneself and even knowing the charge filed against oneself. Therefore the right to due process and fair trial has emerged as one of the most important issues on the agenda of CSOs campaigning for changes in anti-terrorist legislation. This issue has been especially pertinent in the US where charities accused of being linked to terrorist organisations have no rights of appeal, to contest a probable error or defend themselves, and can be subjected to closure 'pending investigation'. According to the American Civil Liberties Union:

> The laws prohibiting material support for terrorism provide federal officials with wide discretion in choosing groups or individuals for designation, empower the Department of Treasury to seize the assets of charitable organizations with no notice or hearing and on the basis of secret evidence, and contain inadequate procedures for challenging designations. The laws also allow the seizure and indefinite freezing of a

[24] Bunyan 2010
[25] Lewis 2010
[26] European Law Monitor, 2010
[27] Bock 2010; ACLU 2010a
[28] (2010, 32)
[29] Ibid
[30] ACLU 2010a

> charitable organization's assets 'pending investigation,' without notice, charges, opportunity to respond, or meaningful judicial review[31].

Recent court decisions in the US unveiled the scope of the American surveillance programme aimed at detecting terrorist suspects - which has disproportionately targeted Muslim charities. The surveillance programme adopted shortly after 9/11 attacks directly authorised National Security Agency officials to intercept electronic communications believed to be linked to al-Qaeda, thereby bypassing the courts[32]. However, in March 2010, the US District Court for the Northern District of California ruled that the National Security Agency acted in violation of federal law when wiretapping the phone conversation of two American lawyers and al-Haramain Islamic Foundation without a warrant[33]. The court decision ruled that surveillance of the Al-Haramain Islamic Foundation under the 'Terrorist Surveillance Programme' from 2004-07 was illegal, rejecting the assertion that such an action could be justified by 'state-secret' privilege[34]. Earlier, in November 2008, the District Court in Oregon ruled that the closure of Al Haramain Islamic Foundation violated the process of due rights, and that the definition of material support for terrorists is constitutionally vague[35].

The case of KindHearts: struggling for the right to due process

KindHearts for Charitable Humanitarian Development was founded in 2002 to 'provid[e] immediate disaster relief and establish programmes to improve the quality of life and foster future independence for those in need'[36] . The key areas of the programme were water and sanitation, emergency relief, sheltering refugees, sponsorship of orphans, widows, and poor families; medical and healthcare etc.

KindHearts was established after the US government closed a number of Muslim charities, such as Holy Land Foundation and Global Relief Foundation, accused of having supported Hamas. The representative of the US Treasury Department argued that the new organisation was 'the progeny of Holy Land Foundation and Global Relief Foundation, which attempted to mask their support for terrorism behind the façade of charitable giving.'[37]

In February 2006, all the assets of KindHearts, worth $1 million were frozen 'pending investigation into whether KindHearts is subject to designation …for being controlled by, acting for or on behalf of, assisting or providing financial support to, and/or being associated with Hamas.'[38] The press-release of Office of Foreign Assets Control (OFAC) asserted that KindHearts was financing Hamas-affiliated organisations in the West Bank and Lebanon.

Whilst KindHearts has been 'provisionally determined' a Specially Designated Terrorist Organisation, it has neither been presented with the evidence which supported the potential designation nor had the specific charges against it explained. Furthermore, at the initial stage of the process KindHearts was denied access to the blocked funds in order to pay attorneys or to the seized documents in order to respond to OFAC allegations[39]. Despite the fact that in the end KindHearts wasn't found guilty in any wrong-doing and was not designated as a terrorist organisation[40], it had been effectively shut down in 2006 when its assets were frozen.

[31] ACLU 2009, 39
[32] Associated Press 2010
[33] ibid
[34] ICJ 27 April 2010
[35] Guinane 2008
[36] Investigative Project on Terrorism n.d, 2
[37] ibid
[38] Charity and Security Network 2010a
[39] ibid
[40] ACLU 2010b
[41] ibid

The case filed by KindHearts in 2008 and supported by ten NGOs in 2009 resulted in the Federal Court ruling which stated that freezing a charity's assets by the OFAC and Treasury without a warrant based on a probable cause was unconstitutional. The Court also ruled that OFAC's failure to provide the charity notice of the charges against it or an opportunity for a meaningful response to such charges violated the constitutional guarantee of due process[41].

Adapted from Charity and Security Network (2010a), ACLU (2010b)

The court rulings on Al Haramain Islamic Foundation and KindHearts represent a significant step forward in reinstalling the rights to due process lost in the post-9/11 period, during which the assets of eight charities in the US were frozen without warrants based on a probable cause or court approval[42]. Yet a serious concern for civil society is that many small organisations and NGOs do not have the background or resources to mount a challenge to illegal limitations or infringements.

Thus, whilst acknowledging the need to take measures to preclude possible acts of terrorism, the threat of terrorist attacks should not compromise the core values on which democracy is founded. Anthony Dworkin of the European Council on Foreign Relations published a report in which he argues that irrespective of the difference in position, all states should base their counter-terrorism laws around existing legislation on torture, extraordinary rendition and the guarantee of a fair trial, and that the fundamental principles should be also safeguarded in conflict situations[43].

Anti-money laundering legislation, Partner Vetting System and its impact on civil society

In the wake of the 9/11 attacks, charities came under scrutiny from many governments due to the allegation that they are easily abused by terrorist organisations. This contention rests not only on post-9/11 investigations of the links between some Islamic charities and Al-Qaeda[44], but also on the history of some Islamic charities, especially Saudi ones, being involved in transferring funds, including armed shipments, to support the anti-Soviet war by the mujahideen in Afghanistan in the 1980s[45]. It is less widely remembered that as part of the cold war struggle against the Soviet Union, the US government was itself covertly supporting mujahideen[46], many of whom later became the core of the Taliban movement, formed after the withdrawal of Soviet troops. However, even given the history of some Islamic charities having previously been engaged in supporting military campaigns, as of now there is little publicly available evidence that charities are used by the terrorist organisations or are knowingly supporting terrorism. In the US, only 8 out of 1.8 million US charities have been closed since 2001[47] which is only 1.4% of the 497 entities on the Treasury's Office of Foreign Assets Control Specially Designated Global Terrorist list[48]. In the UK, Interpal, a Muslim charity, has been under investigation by the Charity Commission on three occasions in recent years for allegedly supporting Hamas, but has been cleared of supporting designated terrorist groups in Palestine – though it was directed to improve some of its monitoring procedures and dissociate from the Union for Good, which is a controversial umbrella organisation set up to bring aid to Palestinians[49]. According to the report of the Charity Commission[50]:

[42] Adams 2009
[43] in Sazawal 2009
[44] Alterman 2007, 67
[45] Alterman and Hippel 2007, viii
[46] Benthall 2007,1
[47] Rob Buchanan, quoted in Charity and Security Network 2009a, 9. Rob Buchanan spoke about seven US charities having been closed, however, as of now the number is eight.
[48] Global Nonprofit Information Network 2008, 1
[49] Whilst the inquiry report by Charity Commission says that Interpal 'has maintained clear financial audit trails in their delivery of aid for humanitarian purposes', there remain some areas of concern: lack of due procedures for independent verification of Interpal's partners in Palestine; not full implementation of due

> The true scale of charitable funds being diverted for terrorist purposes, charity links with terrorist activities and other abuse is not known but, as the Home Office Review acknowledges, 'actual instances of abuse have proven very rare'. Our own experience indicates that the number of cases in which there is evidence to prove charities have been involved in directly, indirectly, deliberately or unwittingly supporting terrorist activity is very small.

Despite the fact that there are many ways to transfer funds illegally across borders both through legitimate and illegal businesses, individual bank transfers and trade, charities remain vulnerable to possible abuse because of their ability to transfer funds and people internationally and because the work of charities is based on trust[51]. This said, even if there is a risk of charity personnel abusing the privileges of the charity, in many cases the governing body will not be aware of this. However, the counter-terrorism measures applied to the non-profit sector in the wake of 9/11 have been disproportionate to the actual threat posed by it and indiscriminately harsher than the measures applied to private organisations accused of similar wrong doing. To give an example: from 1997 to 2004, Chiquita Brands International transferred $1.7 million to two groups in Colombia designated as terrorist organisations. On admitting the payments, the company was only asked to pay a fine of $25 million with no criminal charges filed, no accounts frozen or property seized, and no designation as an entity supporting terrorists, despite the clear evidence[52]. This is in contrast to the treatment received by NGOs under investigation which are often effectively shut down and included in the list of terrorist organisations without being formally charged.

However, despite lack of evidence that charities are abused by terrorist groups or knowingly support them, some governments, especially the US, introduced a flurry of different legislative measures against money-laundering. These include Treasury's Department Anti-Terrorist Financing Guidelines, Voluntary Best Practices for US-Based Charities and USAID's Partner Vetting system[53]. Whilst in the UK Charity Commission, an independent regulatory body, has been given a key role in the investigation of charities suspected in supporting terrorism and cooperating with law enforcement agencies where necessary, in the US the power is almost entirely wielded by prosecutors and assets control bodies[54]. Thus, the US Treasury has substantial powers that allow it to shut down organisations it suspects of supporting terrorist organisations. It is notable that the Obama administration has not introduced new laws in this field but rather maintains the laws and policies from the Bush era[55]. The report of Charity and Security Network argues that the US anti-terrorist regime restricts the work of the civil society sector beyond what is required to protect national security'[56]. Kay Guinane[57] characterises the situation as follows:

> The Treasury believes that charities have supported terrorists. They have shut down organisation without prior notice, freezing all funds and ceasing all files, equipment and tangible property including financial and donor records, and charitable donations. There are no clear standards to help charities to learn what Treasury considers terrorist support. There is not an independent review of Treasury's action. In fact, its regulations only allow an organisation to send a letter and submit information asking for consideration. This is made more difficult by use of secret evidence – it means

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diligence and monitoring procedures towards partners when these procedures are in place and close association with the Union For Good, which might be linked through the membership to designated terrorist organisations (Charity Commission 2010, 33). Interpal implemented all the Charity Commission's directions and recommendations in 2010.

[50] Charity Commission 2008, 5
[51] Benthall 2008, 22
[52] OMB Watch and Grant Makers without Borders 2008, 4
[53] Charity and Security Network 2009
[54] Sidel 2010
[55] Preston 2010
[56] Charity and Security Network 2009a
[57] Charity and Security Network 2010b, 2

> accused charities cannot confront the evidence against them effectively. The Treasury only allows organizational funds to be used for legal defence in very limited circumstances.

In addition to the Treasury regulations, in 2009 USAID introduced a final rule for the Partner Vetting System (PVS)[58] which requires all organisations receiving funds from USAID to disclose extensive personal information about its employees, trustees and partners in order to ensure that there is no link to terrorist organisations[59]. As with some of the other initiatives, the Partner Vetting System thus does not respect the right to due process, defence or appeal. If someone from the list of ten employees submitted to USAID is suspected to be a terrorist, the name of the person will not be disclosed and the whole organisation will suffer the consequences. It also results in a huge administrative burden for the NGO sector: whereas big NGOs have the resources to cope with the additional costs stemming from the regulations, for smaller NGOs complying with the USAID regulations might be an uphill task.

One of the most contentious issues associated with the PVS is the fact that it is based on the collection of extensive personal information which can be used for surveillance purposes – a concern expressed by a number of CSOs, especially those working in conflict areas. One of the key complaints of US NGOs about the counter-terrorism regime, which applies to the PVS system, is that they are virtually 'forced to become agents of the US government'[60]. In many situations, complying with the PVS system can have an adverse effect on the level of trust between the US NGO and its partners. However, a more serious implication of PVS is the threat to the safety of the personal information of the local staff submitted to USAID, as foreign nationals are not protected under the US Privacy Act. The worrying feature of the proposed PVS is that its final version released in June 2009 proposed to 'exempt portions of this system of records from one or more provisions of the Privacy Act'[61]. This would allow USAID to 'withhold the screening results from the NGOs that turn over the data, because the findings would be based on classified and sensitive information'[62]. Ellen Willmott from Save the Children stresses that the problem with PVS is that the personal and sensitive information submitted to the US Government with the aim of comparing it against the Department of Justice can be shared with all the US law enforcement agencies and foreign governments, and can be stored in the special systems but not in the public lists[63].

This puts the NGO sector in an ambiguous and dangerous position of gathering personal information about potential terrorist suspects and combating terrorism, which makes it akin to the departments of CIA or FBI:

> In addition, we have new regulations coming out called SPOT, which is the Specialised Predeployment Operational Tracker, which is going into effect in Afghanistan and Iraq in connection with the USAID and Department of State Funding. It is a military database. It is owned, operated, maintained by the Department of Defence, the US Army to be exact. It too, is a database that is not confidential; it is subject to sharing information with other US agencies, and the like. We are being asked to input personal, sensitive information of our staff, the staff of sub-partners, the staff of sub-sub-partners who are funded through USAID or Department of State into this database[64].

[58] For a detailed discussion see Charity and Security Network (2009b)
[59] The information would include 'the full name, place and date of birth, social security and passport numbers, current mailing address, telephone and fax numbers, email addresses, country of origin, and nationality, citizenship, gender and profession or other employment information' (Eremus, 2007)
[60] McMahon 2007, 2
[61] USAID, 2009
[62] Eremus 2007
[63] in Charity and Security Network 2010, 11
[64] Willmott, quoted in Charity and Security Network 2010, 12

The new US regulations fail to acknowledge the challenges encountered by NGO staff working in conflict zones and the centrality of impartiality principle for humanitarian workers. The trend of increasing violence against aid workers in the last decade[65] might be one visible consequence of the blurring line between the military and NGOs: if NGOs compromise their perceived impartiality and neutrality, they will lose the protection received under humanitarian law.

The ambiguous nature of working with PVS, lists of terrorist organisations and other regulations can be shown by the example of NGOs supporting local charitable organisations in Palestine, of which local zakat committees constitute a considerable proportion. As many NGOs in Palestine historically sprung out of political parties, and individual members of zakat committees can be affiliated with political movements, Palestinian zakat committees, even if not designated as terrorist organisations (in the US, but only in Israel), are still regarded as affiliated to terrorism.

Financing terrorist organisations in Palestine: the dubious case of zakat committees

The interpretation of Palestinian zakat committees[66] as subsidiaries of Hamas has become a key element in lawsuits filed against several UK and US-based NGOs, accused and in some cases convicted (in the US) of providing financial support to Hamas, i.e. supporting terrorism. For instance, the criminal case filed against Holy Land Foundation was based on evidence that the organisation was supporting Hamas by 'providing $12.4 million in hospital construction aid to the poor in the Palestinian territories between 1996 and 2001'[67]. Whilst the government acknowledged that a substantial amount of aid forwarded by Holy Land Foundation was targeted towards noble causes, it charged the Holy Land Foundation with distributing funds to local zakat committees which are 'otherwise associated' with Hamas, even if zakat committees themselves do not feature on OFAC's (Office of Foreign Assets Control) list[68]. Thus, aid used for genuine charitable purposes, such as building hospitals and feeding the poor, was considered material support to terrorist organisation because it allegedly freed up resources for Hamas' terrorist purposes, including supporting schools 'that served Hamas ends by encouraging children to become suicide bombers and recruit suicide bombers by offering support to their families'[69].

The prosecution of Holy Land Foundation and a number of other charities was based on the assumption that zakat committees are controlled by Hamas and thus encourage terrorism by spreading its ideology and mobilising supporters[70]. However, recent research into zakat committees suggests that before a centralisation reform carried out by the Fatah-controlled Palestinian Authority in the West Bank in 2007– which has to a certain degree compromised their independence – zakat committees in the West Bank 'operated as genuinely needs-based charities before 2007' (the time frame of the Holy Land Foundation case) and 'efficient grass-roots organisations' which largely managed to maintain autonomy from political parties[71]. The research also shows that designation of a whole zakat committee as a wing of Hamas based on the grounds that one or more of its members are closely affiliated to Hamas is highly problematic[72].

The credibility of zakat committees as charitable organisations can be demonstrated by the fact that they have been receiving funding from key international development agencies, ranging

[65] Stoddard 2006
[66] For a detailed discussion of zakat committees in Palestine, the problem of their interpretation and the question of their politicisation see Benthall (2008) and Schäublin (2009)
[67] The Global Nonprofit Information Network 2010
[68] OMB Watch 2008
[69] US State Department of the Treasury n.d
[70] Eaton, 2007
[71] Schäublin 2009, 10, 60
[72] Ibid 52-59

from USAID to CARE - organisations which have stringent procedures to verify their partners and evaluate performance[73]. However, in the wake of 2006 elections, in which Hamas won a sweeping victory, as well as the 2007 centralisation reform, the independence of the zakat system in Palestine has been compromised. Zakat committees were increasingly being politicised in both the Fatah-controlled West Bank and the Hamas-controlled Gaza Strip, because of the power struggle between Hamas and Fatah[74].

Whilst the research findings cited above are not sufficient to judge whether the charges against Muslim NGOs channelling funds to zakat committees are grounded or misplaced, they suggest that the issues surrounding financial support to zakat committees by Muslim charities are more complex than a straightforward relationship of supporting terrorism and abuse of humanitarian aid, based on the highly contested allegation of committees' direct affiliation with Hamas.

Another issue to consider is the impact of anti-money laundering and counter-terrorist legislation on banks, who have exerted extra caution in assessing the potential risks posed by their clients. After the civil lawsuit filed in New York by American and Israeli families, victims of terrorist acts in Palestine, against the Arab Bank over a claim that the bank was supporting the Al-Aqsa (Second) Intifada in Palestine and providing financial services, such as 'life insurance', to the families of the Palestinian suicide bombers,[75], it became clear that banks with branches in the US might be sued for millions of dollars if accused of engagement with a designated terrorist organisation. In 2006, NatWest was sued by people injured as a result of suicide bombings in Israel carried out by Hamas on the grounds that the bank transferred money from the account of Interpal to Hamas[76]. As a result, in 2007 NatWest closed Interpal's account due to potential risks in maintaining them and pressure from the US legal system.

As a consequence of such lawsuits, the charities are subjected to closure of accounts due to vague allegations of supporting terrorist organisations not based on any substantial evidence but most probably pressure from external bodies. To give an example: Interpal, which has been under investigation of the Charity Commission for several years, was subjected to closure of accounts several times: first from NatWest, then from Lloyds TSB – the latter refusing to reopen the account even after the latest inquiry of the Charity Commission which cleared this organisation.

The case of Ummah Welfare Trust based in Bradford presents an even more troubling example of the extent of the vulnerability of charities to arbitrary banking decisions. Ummah Welfare Trust is an Islamic charity, registered with the Charity Commission, and has at no time been suspected or accused of supporting terrorist organisations. However, Barclays decided to close the account of the charity, which means a 30% loss of its revenue[77] due to not being able to accept direct debits. The alleged reason behind the closure of the charity's account was its support to Interpal, which was under Charities Commission investigation at that time. It is believed that that the decisions of both banks to close the accounts of the charities were in part due to pressure from the US Department of Treasury, which still considers Interpal to be a terrorist organisation[78], and by aversion of risks associated with possible lawsuits in the US.

Holder v. Humanitarian Law Project and its implication for the NGO sector

Whilst the previous regulations adopted within the framework of US anti-terrorist legislation have clearly diminished the space for civil society, a recent Supreme Court ruling in the US, *Holder v. Humanitarian Law Project 561 U. S. ____ (2010)*, will have even more serious implications for the

[73] Benthall 2008, 23
[74] Schäublin 2009, 60-65
[75] Preston 2004, Vincent 2010
[76] Sidel 2010, 42
[77] Guinane 2009a
[78] Guinane 2009b

future of the non-profit sector in the country. The decision of the Supreme Court (6-3) came as a surprise to human rights groups because it ruled that material support includes not only financial support, contributions of weapons but also 'expert advice', ''training, and 'service'[79]. This means that advice to groups designated as terrorist on how to engage in peace negotiations is illegal and that professional negotiators, academic researchers and humanitarian workers could bear the consequences of their action. The only kind of assistance permitted under the Supreme Court ruling is medical and religious materials.

Holder v. Humanitarian Law Project

The case was brought after an American human rights group, the Humanitarian Law Project, challenged the law which prohibits 'material support' to terrorist organisations. The PATRIOT Act included 'expert advice or assistance' as material support. The law project intended to give advice to two groups which appear on the State Department's list of terrorist organisations — the Liberation Tigers of Tamil Eelam and the Kurdistan Workers' Party — on ways to achieve peaceful conflict resolution and to engage with the United Nations. Despite the fact that the law project tried to reduce the violent activities of two groups, the court ruled that the project's programme was illegal. It stated that even peaceful support to terrorist groups can further terrorism since it legitimises them and allows them to pay lip service to negotiations whilst plotting violence in the meantime.

There was a powerful argument by the dissenting Justices who claimed that if providing legitimacy to a terror group constitutes a crime, legitimisation of a terrorist group through speech should also be considered a crime, which it is not. 'Never before, Justice Stephen Breyer said, had the court criminalized a form of speech on these kinds of grounds,' noting with derision the notion that peaceful assistance buys negotiating time for an opponent to achieve bad ends'.

The ruling of the court clarified that acts had to be coordinated with terror groups to be considered illegal. However, many forms of assistance may still constitute a criminal act, including filing a case against the government in a terror-group lawsuit. The ruling also carries serious implications for academic researchers which might be arrested for doing field work in difficult environments and discussing their research with members of the terrorist groups, as well as journalists writing about the motivations, activities and nature of these groups. The FBI has already questioned people it viewed as being the sources for a New York Times article about terrorism, and warned that they could be arrested for providing material support.

Adapted and quoted from New York Times editorial, 21 June 2010

This ruling has huge implications for the work of development organisations in conflict areas, for the whole of humanitarian sector and peace-building initiatives. For instance, some peace-building organisations have already stated that designation of the Philippine Communist Party as a terrorist organisation will thwart the efforts to bring the warring parties to the peace table and resolve the conflict. The Supreme Court ruling clearly states that the actions of peace-builders, capacity-trainers, and negotiators who often have to engage with proscribed organisations as part of their profession will be considered illegal. Under applicable US law and the ruling in this case, providing 'material support or resources' includes 'expert advice or assistance' in subjects such as 'how to use humanitarian and international law to peacefully resolve disputes' or how to 'petition various representative bodies' such as the United Nations for relief[80]. The ruling in *Holder v. Humanitarian Law Project* states that where a designated organisation has both legitimate humanitarian aims as well as violent goals, aid to the humanitarian aim alone is nonetheless prohibited. The Court's rationale, among others, is that such organisations do not 'maintain legitimate financial firewalls

[79] Liptak 2010
[80] Supreme Court of the United States 2010

between funds raided for civil, non-violent activities and those [funds] used to support violent, terrorist operations.'[81]

In Sri Lanka, during the 2004 tsunami a considerable part of the country where thousands of people live was controlled by the Liberation Tigers of Tamil Elam (LTTE), a designated terrorist organisation. The testimony of Ahilan Arulanantham[82], attorney for the American Civil Liberties Union of Southern California, to the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security about his experience of volunteering for relief organisations during the tsunami, highlights the dilemmas facing humanitarian workers in dangerous environments:

Humanitarian relief in 'terrorist' controlled areas: Sri Lanka

…'Unlike our material support laws, the tsunami did not differentiate between areas under the LTTE's control and those controlled by the Sri Lankan government.

Thousands of people living in LTTE-held territory died, and hundreds of thousands more were displaced into camps, many having lost some or all of their family members and in urgent need of food, shelter, and medical care. In fact, because the LTTE controls large segments of the eastern seaboard of the island, which was most directly hit by the tsunami, people in LTTE territory were some of the most severely affected.

Sadly, though, our material support laws contain no exception for support even if it is necessary to save the lives of people who happen to live in LTTE-held territory. In fact there is no exception for humanitarian assistance at all, except for 'medicine and religious materials'. While this exception is important, it is sorely inadequate to meet the needs of people caught in humanitarian crises.

For example, in the first few days of relief work, we focused on treating people's immediate medical needs - injuries, wounds, dehydration, respiratory infections - with medicines and dressings. Such assistance would probably fit under the exception for 'medicine.' But within a week, the most serious public health problems for the hundreds of thousands of displaced people changed. In situations of mass displacement, the greatest killer is often infectious disease, which spreads through contaminated water, inadequate sanitation, and exposure from a lack of shelter. To prevent outbreaks, humanitarian organizations must provide displaced people with water purification systems, toilets, tents, and other such goods which are not 'medicine' but nonetheless serve an absolutely critical medical function.

Yet our material support laws do not appear, as a practical matter, to allow humanitarian organizations to provide such vital resources to people living under the LTTE's control, because such resources generally cannot be provided without providing 'material support' to the LTTE as the statute defines that term. For example, as currently written the law defines material support to include '*any* property, tangible or intangible, or service'. This definition appears to encompass much of what I saw was needed for humanitarian relief work, including water, water purification systems, sanitation equipment such as toilets, all forms of shelter (including even children's clothing), and many of the materials needed for longer-term reconstruction such as boats and building materials. Because the law makes no distinction between lethal aid - such as weapons or ammunition - and non-lethal aid, a group seeking to provide toilets to the LTTE's health ministry to take to camps in an area under its control may be violating the material support laws.

The statute also criminalizes the provision of expert advice or assistance (if derived from

[81] ibid
[82] Quoted from ACLU 2005

specialized knowledge). Thus, a public health expert who wants to advise the LTTE -- and the LTTE is the government for all practical purposes in the areas it controls -- about how to set up camps so as to minimize the spread of diseases, such as dysentery or cholera, probably cannot do so under the statute. Indeed, even training psychological counsellors working with the LTTE in their territory - which is a crucial need for children who lost parents in the tsunami -- may violate the 'training' or 'personnel' provisions, as long as the training imparts a 'specific skill' and the counsellors work under the LTTE's 'direction and control.'…

The problematic nature of this ruling and the broader legislation regulating the activities of NGOs lies not only in the definition of what constitutes material support, but also in what represents a designated terrorist organisation receiving material support. The confusion over which organisation and at what time is considered terrorist can be illustrated by the fact that the Communist Party of Nepal – Maoist, which is now the biggest party in the Constituent Assembly of Nepal, has been on the US terrorist list for many years.

Whilst at the moment the Supreme Court ruling concerns organisations within the US and those receiving funds from USAID, this is a worrisome development for civil society since US has been a trend-setter in terms of the counter-terrorist legislation. The decision puts at stake the independence of the non-profit sector and its ability to operate in difficult environments, preserving neutrality and impartiality as core principles of humanitarian action. This is resonant with a wider issue of the increasing militarisation of aid, closer inter-linkage between the military and humanitarianism which threatens the reputation of the non-profit sector and its ability to effectively deliver on its core mission.

Conclusion: What role for civil society?

What can civil society do in this situation? Total repeal of the anti-terrorist legislation appears to be unrealistic at present. One alternative might be to focus on concrete areas and work out specific proposals on the ways to improve the current regulatory environment which diminishes the space for NGOs' action. This is the route taking by civil society in the US where a network of NGOs under the leadership of Charity and Security Network started a campaign for three major requirements:

- Humanitarian exemption: ensuring that the sector can carry out the work in difficult environments without comprising the principles of neutrality and impartiality
- Clear standards and fair procedures, such as procedures of appeal, delisting of organisations
- Institution of an independent regulatory body similar to the Charity Commission in the UK.

In the UK, there is no specific network of organisations working to change or clarify the already existing counter-terrorist regulations. Whilst Bond convenes a group which meets to discuss these issues, there is still no formal campaign or network of NGOs working on a concrete proposal as to what can be done to open up the space for civil society. One of the issues that emerged at a recent Bond meeting was the lack of evidence and hard data on how CTMs affects civil society. Therefore it was concluded that there is a pressing need in research on the 'assassination of NGOs' and 'humanitarian deficit' engendered by anti-terrorist laws. This research would quantify different ways in which the anti-terrorism regime affected the work of charities: closure of accounts, and freezing of assets; impact on the beneficiaries in the developing world, i.e. how many could not receive food, medicine etc on time; consequences for peace-building and humanitarian NGOs to sustain programmes in difficult environments and distribute aid in areas which are problematic due to the presence of designated terrorist organisations etc. It was argued that without such data from the UK context it will be difficult to hold a substantive conversation with policy-makers and lobby for change.

Another option would be to reject a defensive position which tries to prove that NGOs are not connected to the terrorist groups and stress instead the importance of preserving a viable NGO sector, adherence to principles of impartiality and neutrality on behalf of humanitarian NGOs, and keeping open methods of providing peace-building skills to groups that are or have had a violent wing. This type of campaign could start by proving that the elements in CTM concerning NGOs are not effective and do not reach its aim of reducing terrorist threats. On the contrary, they carry a serious negative side effect not only for civil society but also for social cohesiveness and therefore the whole society, undermining the principles of transparency, due process and rule of law which are the pillars of any democratic society.

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