
UK Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action

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Introduction

This is a summary of a roundtable discussion held by the International Law Programme and the International Security Department at Chatham House, supported by Charity Finance Group and Conciliation Resources.¹ The meeting considered the impact of the UK's counterterrorism legislation on the operation of non-governmental organizations (NGOs) undertaking humanitarian, peacebuilding and development action, as well as possible recommendations for the future. Participants included representatives of NGOs especially affected by this legislation, government departments and legal practitioners.

The meeting was held under the Chatham House Rule.²

UK counterterrorism legislation

Two distinctive features of UK counterterrorism legislation are broad definitions of key terms, including the definition of 'terrorism' in section 1 of the Terrorism Act 2000 (the Terrorism Act),³ and the availability of broad discretions to those who apply it. The UK definition of 'terrorism' can be summarized as follows.⁴

There are three cumulative elements to 'terrorism':

- 1) The actions (or threats of actions) that constitute terrorism, which encompass serious violence against a person; serious damage to property; and actions that endanger life, create a serious risk to health or safety, or are designed seriously to interfere with or seriously to disrupt an electronic system;⁵
- 2) The target to which those acts must be directed: they must be designed to influence a government or international organization, or to intimidate the public or a section of the public;⁶ and
- 3) The motive that must be present: advancing a political, religious, racial or ideological cause.⁷

This definition of terrorism is one of the broadest in the world. In *R v Gul*, the Supreme Court stated that 'the current law allows members of any nationalist or separatist group to be turned into terrorists by virtue of their participation in a lawful armed conflict, however great the provocation and however odious the regime which they have attacked.'⁸ The definition is also capable of covering the publication or threatened publication of words. In *David Miranda v Home Secretary*, the High Court found that the publication of stolen classified information which, if published, would reveal personal details of members of the armed forces or security and intelligence agencies thereby endangering their lives, could fall within section 1 of the Terrorism Act.⁹

The consequence of such a broad definition is that it grants unusually wide discretion to all those concerned with the application of the law. This includes ministers exercising the power to impose executive orders, police officers deciding whom to arrest or stop at a border, and prosecutors deciding

¹ This summary was prepared by Jack Stewart.

² When a meeting, or part thereof, is held under the Chatham House Rule, participants are free to use the information received, but neither the identity nor the affiliation of the speaker(s), nor that of any other participant, may be revealed.

³ The Terrorism Act 2000 as amended by subsequent counterterrorism legislation.

⁴ As described in *The Terrorism Acts in 2013*, July 2014, at 10.6: <https://terrorismlegislationreviewer.independent.gov.uk/wp-content/uploads/2014/07/Independent-Review-of-Terrorism-Report-2014-print2.pdf>.

⁵ Terrorism Act 2000 sections 1(1)(a), 1(2).

⁶ Terrorism Act 2000 section 1(1)(b).

⁷ Terrorism Act 2000 section 1(1)(c).

⁸ *R v Gul* [2013] UKSC 64, quoting David Anderson QC.

⁹ *David Miranda v Secretary of State for the Home Department* [2014] EWHC 255.

whom to charge.¹⁰ It is possible to argue that wide discretion is necessary in order to respond to the ever-changing threat that is terrorism, and in the UK these discretions are exercised responsibly; and that laws that in another country could be used in the service of tyranny are acceptable in the UK because the Home Secretary receives sensible advice, she herself is sensible, and the police on the whole act in an appropriate manner.

While it may be true that discretion in the UK is largely exercised responsibly, it was asserted at the roundtable that this is not a sufficient justification for the breadth of the law. Where many people are able to exercise broad discretion, it is inevitable that not everyone will use it in the correct way. This has the potential to create a mythology of oppression and grievance; and as cases of misuse multiply, that mythology becomes more true. Additionally, there is potential for the law to have a ‘chilling effect’ if it deters what is otherwise legitimate activity. The Supreme Court in *R v Gul* acknowledged this potential when it noted that prosecutorial discretion leaves citizens ‘unclear as to whether or not their actions or anticipated actions are liable to be treated by the prosecution authorities as innocent or criminal’.¹¹ Examples of this chilling effect in operation include the student who decides not to do a thesis on a particular subject because it would involve handling materials that it may be unlawful to possess, or Tamil people who wish to demonstrate with flags but who are worried that the police may construe them as signs of support for a proscribed organization.

Thus, the basic framework of UK counterterrorism legislation poses a variety of problems. Additionally, the legislation of other Western countries, which are often the donors of NGOs operating in the humanitarian, peacebuilding and development sectors, contributes to the problem. Regulatory risk in the US affects the banking sector. Countries where NGOs operate have their own counterterrorism laws. These specific issues are coupled with the more general climate of suspicion that is associated with ‘terrorism’.

Problems facing humanitarian, peacebuilding and development organizations

Conflict between legal and practical requirements for access

Under international humanitarian law (IHL), parties to a conflict, whether international or non-international, must ‘allow and facilitate the rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control’.¹² In both international and non-international armed conflicts, the consent of the state is required for relief action to take place.¹³ Additionally, in a non-international armed conflict, the consent of the faction or factions that control the territory is also legally¹⁴ and practically necessary. Therefore, there is a need for interaction between NGOs and non-state groups that control territory in which people require humanitarian relief. Under section 12(2) of the Terrorism Act, however, it is an offence to arrange, manage or assist in arranging or managing a meeting that, among other things, the organizer or manager knows is to further the activities of a proscribed organization,¹⁵ or is to be addressed by a person who belongs or professes to belong to a proscribed organization.¹⁶ While section 12 does not have extraterritorial reach, it is not clear on the face of the legislation the extent to which it captures the activities of UK NGOs that work in the UK but arrange for activities overseas.

¹⁰ *R v Gul* [2013] UKSC 64, quoting David Anderson QC.

¹¹ *R v Gul* [2013] UKSC 64.

¹² Rule 55, ICRC Customary International Humanitarian Law Study.

¹³ Article 70(1) Additional Protocol I; Article 18(2) Additional Protocol II.

¹⁴ Rule 55, ICRC Customary International Humanitarian Law Study.

¹⁵ Section 12(2)(b) Terrorism Act 2000.

¹⁶ Section 12(2)(c) Terrorism Act 2000.

Several NGOs highlighted the difficulties in complying with UK counterterrorism legislation in this regard. To take one example, the borders in certain areas of Syria are controlled by non-state groups. These groups require taxes to be paid before access is granted to territory under their control. Given the prohibition against meeting members of proscribed organizations, NGOs are concerned as to potential breaches of counterterrorism legislation, and also anti-bribery legislation, if the taxes are paid. The payment of such taxes may also fall foul of other provisions of the Terrorism Act that criminalize the making available of funds that may be used for the purposes of terrorism.¹⁷ It was further noted that the development of trusting relationships between NGOs and groups that may be considered ‘terrorist’ is a necessary part of peacebuilding work, and that counterterrorism legislation provisions that prohibit the arranging of meetings may impede efforts to end armed conflicts. Thus, there is a clear conflict between the demands of providing humanitarian services on the ground, the requirement of consent under IHL, and counterterrorism legislation.

Finance, banking and the management of risk

It is a criminal offence for a person to provide money or property knowing or having reasonable cause to suspect that it may be used for the purposes of terrorism.¹⁸ It is also a criminal offence to enter into, or become concerned in, an arrangement as a result of which money is made available to another, knowing or having reasonable cause to suspect that it may be used for the purposes of terrorism.¹⁹ Several NGOs highlighted the difficulties in identifying members of proscribed organizations. This identification is necessary because when providing services in, or making payments into, territory under the control of non-state groups, NGOs risk committing the above offences if UK legislation considers the group to be ‘terrorist.’ It was noted that individuals who may be providing humanitarian relief may also take up arms to fight factions encroaching on their territory. Additionally, command structures of non-state groups may include a proscribed organization. It may therefore not be clear whether a non-state entity that controls territory in which an NGO wishes to provide its services will be classified as a ‘terrorist’ organization.

It was observed that these provisions have had an impact on the ability of NGOs to raise sufficient funds to address the humanitarian crises in Syria and Gaza. Partners in the corporate world are deciding not to fund appeals or provide in-kind support. This reluctance was thought to be due to the ‘chilling effect’ of counterterrorism legislation. It was noted that where there are strong, well-established partnerships between NGOs and corporate donors, assurances provided by NGOs are sufficient to satisfy the donors’ concerns. However, where partnerships are new and less well-established, or where the NGO is a small one, corporate donors are less likely to offer funds or services. Counterterrorism legislation thus has the effect that it is much harder to create new partnerships.

The merger of legislation, regulation and expectation across a number of countries is making the transfer of funds into high-risk zones increasingly difficult, and individual accounts are being cancelled as a result of ‘de-risking’. While there have not been a large number of NGOs that have lost their bank accounts as a result of de-risking, the impact on those that have is significant. It was noted that small organizations, particularly Islamic NGOs, operating in high-risk zones have been the most affected. Concern was raised that no explanation was provided to such NGOs as to why they were no longer deemed credible, which made appealing the decisions difficult. This possibility of arbitrary withdrawal of financial services by banks also leaves NGOs exposed to the risk of not paying their suppliers on the ground.

¹⁷ See sections 15 to 17 Terrorism Act 2000.

¹⁸ Section 15(3) Terrorism Act 2000.

¹⁹ Section 17(1) Terrorism Act 2000.

It was noted that the problems of regulation are not limited to counterterrorism legislation, but also include financial sanctions, regulatory expectations and anti-corruption laws. One example of the type of issue encountered involved the regular transfer by a peacebuilding organization to a local partner in Myanmar (Burma) suddenly being rejected by a bank. Payment was said to be prevented under counterterrorism legislation, as Myanmar is subject to sanctions, despite the fact that the organization had made such payments regularly for two years.

Global banks are under instruction to reduce their risks. Given that NGOs often operate in high-risk zones, it can be impossible to provide the level of certainty required by banks. It was asserted that the UK government's licensing regime is unnecessarily bureaucratic as it requires decisions from a number of separate ministries in order to satisfy the licensing requirements, which can delay time-sensitive payments. There is a lack of confidence among NGOs as to how they are to reassure themselves, and their banks, that payments do not fall foul of counterterrorism legislation.

As the transfer of funds forms part of a chain of payments, payments that are cleared by banks in the UK may later be held up as a result of counterterrorism legislation elsewhere. This issue therefore has to be addressed at the international level. In the past, there have been issues with ownership of such initiatives. One NGO attempted to work with the European Commission to coordinate the licensing frameworks across member states with regard to the application of EU Syria regulations, but failed to reach a workable solution for this reason.

When money is moved into high-risk zones, some of it will inevitably go to people who are not the intended recipients. The degree of tolerance by regulatory authorities accorded to NGOs that work in this area has yet to be determined. It was suggested that a balance needs to be struck between the implementation of counterterrorism legislation on the one hand, and the public good that NGOs provide on the other.

The burden of compliance

There are increasing legal and contractual burdens placed on NGOs to comply with counterterrorism legislation. Due diligence requirements have an impact on the ability of NGOs to fulfil their mandate, as complying with this ever-growing burden consumes resources, meaning their ability to provide their services is diminished. This burden is further increasing as a result of requirements set by donors under the influence of counterterrorism legislation. The lack of legislative guidance often means that NGOs have to choose between obtaining expensive legal advice and withdrawing their services altogether. Furthermore, the legal advice may be ambivalent. Larger NGOs have the luxury of strong legal and administrative teams, whereas smaller NGOs often do not have these resources at their disposal.

Reporting and reputation

Section 19 of the Terrorism Act places a duty of disclosure on an individual who believes or suspects that another has committed an offence under sections 15 to 18. Sections 15 to 18 concern criminal offences that may be applicable when NGOs make payments that end up in the hands of 'terrorist' organizations. Failure to disclose to a constable such a belief or suspicion, and the information on which it is based, is a criminal offence.²⁰

²⁰ Section 19(2) Terrorism Act 2000.

It was argued that NGOs' independence is their defining feature. However, individuals on the ground sometimes view Western-funded organizations as de facto intelligence agencies, which impedes their humanitarian activities. Several NGOs raised the concern that the duty to report further entrenches this perception. Concern was also raised that the threshold at which the duty to report is engaged is too low. If NGOs were to report every 'belief or suspicion' they would be constantly submitting reports to the police.

In view of the potential for prosecution and reputational damage, many NGOs fear reporting that their money has been seized by, or diverted to, terrorist groups. Confidence needs to be built within the charitable sector around reporting. The diversion of funds is not an unusual occurrence. Recent constructive engagement with the police and the Charity Commission by some larger organizations on these issues was welcomed.

Wider impact, including on UK foreign policy goals

Given the consequences under counterterrorism legislation, some humanitarian NGOs are currently undergoing a process of internal review to consider whether providing relief in certain areas is worth the risk. There is emerging evidence that as the counterterrorism framework becomes tighter and increases its focus on NGOs that operate in high-risk areas, NGOs will simply withdraw from working in those areas. This has implications for their ability to fulfil their humanitarian mandate, and has repercussions for UK foreign policy, as the provision of humanitarian aid in areas such as the Middle East is seen as an important part of the UK's contribution towards stabilizing the region. In Syria, where large organizations have withdrawn, these have been replaced by new organizations that apparently lack experience in the delivery of aid in conflict zones and which are not as well resourced. It was also noted that the general climate of suspicion and risk-aversion in the NGO sector has resulted in organizations failing to work together because they are not confident that they can openly share information.

Recommendations for the way ahead

Clarity of legislation, advice and messaging

It was argued that broad laws, enforced by people with broad discretion, can only be acceptable if there is a clear need for such laws and the application of these laws is predictable. While interpretative guidance in some areas is available,²¹ more such guidance is necessary so that there is clarity as to how and where the law will be enforced in relation to NGOs carrying out important and difficult work in high-risk areas.

In sum, there needs to be clearer, bolder, less ambiguous guidance by government and regulators, accompanied by positive and supportive public statements about the work done by international NGOs to provide humanitarian aid, to prevent and resolve conflict, and to support international development.

It was proposed that FAQs be issued by the Home Office. There is a precedent for this, as in 2013 the Treasury issued FAQs regarding domestic financial sanctions.²² Provision of FAQs would be less burdensome than changing the law, and would address some of the uncertainty created by the broad definitions and discretions. It was noted that the Treasury welcomed the introduction of the FAQs in its own case because it reduced the number of enquiries they received. While it was accepted that the

²¹ In 2015 the Home Office issued guidance clarifying the interpretation of a 'genuinely benign meeting' for the purposes of section 12(2) Terrorism Act 2000: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/472956/Proscription-update-20151030.pdf.

²² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/302397/August_2013_version_-_amended.pdf.

government cannot issue legal advice, there is nothing that would prevent the Home Office setting out how it understands its own laws to operate.

To address the issue of broad prosecutorial discretion, the Crown Prosecution Service (CPS) should issue guidance as to how it intends to operate its discretion in relation to NGOs who operate within the counterterrorism framework.

The initiation of a dialogue between the Home Office and NGOs was welcomed. This should be widened to include all relevant government departments so that the government speaks with one voice. There is an urgent need for a dialogue including NGOs, banks, government and regulators.

Both Australia and New Zealand have humanitarian exemptions in their counterterrorism laws. Australian criminal law prohibits associating with a terrorist organization, but specifies that this does not apply in a number of situations, including ‘where the association is only for the purpose of providing aid of a humanitarian nature’.²³ In New Zealand, it is a defence to a claim that property or money has been made available to a proscribed organization if the property was made available in a manner that does no more than satisfy essential human needs.²⁴ It was suggested that such exemptions should be considered again for UK counterterrorism legislation.

This issue is of concern to several government departments, including the Treasury, the Home Office, the Department for Business, Innovation & Skills, and the Department for International Development. There is a clear lack of coherent messaging from these departments. NGOs expressed concern that one government department provides funding for humanitarian operations while another department is at the same time overseeing the enactment of counterterrorism legislation, with an unintended impact of constraining and restricting their activity. A further purpose of consistent messaging by the government would be to counter negative and misinformed media.

NGO actions

Although the government is not in a position to give specific legal advice to NGOs, early conversations between government departments and NGOs could ameliorate some of the problems outlined above; such conversations of course require that government officials with sufficient authority give access to NGOs. Recently, some NGOs have been having such conversations with government departments before submitting licensing applications. Government departments, in particular the Department for Business, Innovation & Skills and the Treasury, have been able to assist with framing these applications. Early conversations are preferable because once the application is submitted, the scope for cooperation becomes more limited.

The point was raised that, counterterrorism legislation aside, charity law imposes basic procedures with which NGOs and charities are required to comply. Charities must perform due diligence procedures, and must monitor and maintain documentation on the end use of their funds. This ensures that the money charities spend and the services they provide reach the intended recipients. It was, however, recognized that these basic requirements should be translated into a more accessible format. One participant organization argued that most NGOs do comply with these basic requirements despite the lack of guidance in this area. The problem comes in addressing the residual risk that remains after NGOs have completed their due diligence.

²³ Division 102.8 Criminal Code.

²⁴ Section 10 Terrorism Suppression Act 2002.

When NGOs operate in high-risk zones, often having to interact with non-state armed groups, they are inevitably vulnerable to abuse, meaning there is a real risk that their funds are taken by proscribed organizations. This has the potential to engage the duty under section 19 Terrorism Act to report such diversion of funds or services to the authorities. It was emphasized that NGOs have nothing to fear when complying with this obligation provided they do so quickly. Concern was expressed that charities are more likely to report the diversion of funds to their donors rather than to the Charity Commission or the police. Prompt reporting means the issue is more likely to be dealt with sensitively. To address concerns surrounding reputational damage, it was thought that the Charity Commission could inform the media that the NGO has acted responsibly in reporting. It was noted that there are prior examples for such action being taken. Comparison was drawn with the banking sector, where banks are legally obliged to report suspicious activity but are offered certain protections when doing so. One such protection is that in some instances reports are kept confidential.

In order for legislation to be amended, or policy established, the government needs to be made aware of the problems facing NGOs. NGOs were therefore encouraged to provide case studies and concrete evidence that underline the scale of the problem.

Taking ownership

The need for a government department or government committee to take ownership of these issues in order to find workable solutions was a constant theme. An example of such ownership being taken is the response to the Disasters Emergency Committee appeal for Gaza in 2014. Within a few hours of the launch of the appeal, the CEOs of several financial institutions made phone calls to the banking association to discuss how the appeal would work. This timely and constructive action meant that a meeting was held the next day, including banks, the Charity Commission and relevant government departments, that paved the way for determining how the money raised by the appeal could be transferred to Gaza. Such ownership and leadership in finding a solution has not materialized in the case of Syria, for example.

Another recurring theme at the workshop was that the impact of counterterrorism legislation, particularly on banks, has a strong international aspect. There is a need for urgent dialogue between charities, banks, governments and regulators at the international level so that humanitarian work can continue. The international community must come together to find a way to get funds to NGO partners in high-risk zones. Ownership of the issue must be taken by governments in order to push the issue internationally.

The problems surrounding consent and access also have a strong international element. Often the money that NGOs use comes from mixed funds, meaning that these organizations have to comply with the counterterrorism legislation of several different countries. This has created a major barrier in terms of the ability of NGOs to understand the parameters that are set on the use of such funds. If the UK government considers that UK NGOs constitute an important sector that is a valuable asset internationally, it should raise these issues at the intergovernmental level.

Regarding finance, it was suggested that if governments want funding and support for aid to continue, they need to be prepared to take the associated risks away from banks. Again, this requires ownership of the problem and leadership in finding a solution. An example was given of the US government guaranteeing a transaction to a high-risk destination so that a transfer of funds could go ahead without risk to the bank.

While a coalition of NGOs and umbrella groups has been exploring the modalities for a working-level dialogue on many of these issues with government and regulatory bodies, such an initiative will not be successful unless such efforts are supported and endorsed at a senior level within government.