

Legislating against humanitarian principles: A case study on the humanitarian implications of Australian counterterrorism legislation

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Abstract

The humanitarian principles – humanity, neutrality, impartiality and independence – have come to characterize effective humanitarian action, particularly in situations of armed conflict, and have provided a framework for the broader humanitarian system. Modern counterterrorism responses are posing significant challenges to these principles and the feasibility of conducting principled humanitarian assistance and protection activities. This article explores the origins of the principles, the history behind their development, and their contemporary contribution to humanitarian action. The article then discusses some of the ways in which the principles are threatened, both by practice and by law, in the Australian context, and finally makes suggestions as to how the principles can be reclaimed and protected for the future of effective, impartial humanitarian action.

Keywords: humanitarian principles, principled humanitarian action, international humanitarian law, counterterrorism, anti-terrorism laws, Australia.

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In 1991, as the United Nations (UN) was creating the Department for Humanitarian Affairs, the UN General Assembly (UNGA) outlined some principles for humanitarian action. These principles were derived from the Fundamental Principles of the International Red Cross and Red Crescent Movement (the Movement),¹ and included humanity, neutrality, impartiality and independence.² These principles have underpinned modern humanitarian action and practice ever since.

However, in the context of new legal frameworks being developed as part of counterterrorism strategies, the application of the humanitarian principles is increasingly being challenged. There are instances of sanctions regimes and counterterrorism legislation effectively prohibiting the provision of material support to designated terrorist organizations (DTOs), which in some cases is

- 1 Humanity, impartiality, neutrality, independence, volunteer service, unity and universality are the seven Fundamental Principles of the Red Cross and Red Crescent Movement, proclaimed by the 20th International Conference of the Red Cross in Vienna in 1965. They bring together the humanitarian work of the National Red Cross and Red Crescent Societies, the International Committee of the Red Cross (ICRC) and the International Federation of Red Cross and Red Crescent Societies (IFRC). Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary*, 1 January 1979, available at: www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm (all internet references were accessed in July 2015). It is important to note that the first three principles of humanity, neutrality and impartiality also appeared in the very first Geneva Convention of 1864: Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864 (entered into force 22 June 1865, no longer in force), available at: www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?action=openDocument&documentId=477CEA122D7B7B3DC12563CD002D6603.
- 2 These first three principles – humanity, impartiality and neutrality – were strongly affirmed as core principles within the UN system following the adoption of UNGA Res. 46/182, 19 December 1991. In 1994 the International Red Cross and Red Crescent Movement and disaster relief NGOs developed a Code of Conduct, which introduced the fourth humanitarian principle, independence. See ICRC and IFRC, Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief (1994 Code of Conduct), Geneva, 1994, available at: www.icrc.org/eng/resources/documents/publication/p1067.htm.

having a knock-on effect on the principled delivery of humanitarian aid. In other instances, contractual obligations required by donors directly threaten the neutral and independent status of humanitarian organizations. If one examines the unintended consequences of such legislation, it appears that States are effectively legislating against principles they have supported and endorsed through both hard and soft law. While some States, like Australia, have sought to minimize the unintended humanitarian consequences of counterterrorism legislation by offering protections to humanitarian actors through exemptions, these exemptions are rarely comprehensive and often limited in scope. Whether protection in the courtroom is sufficient in terms of protecting a humanitarian organization's reputation and ability to provide principled assistance to all in a neutral and impartial manner is still in question.

The year 2015 marks the 50th anniversary of the Fundamental Principles of the Movement, but even beyond the Movement, these principles have been espoused by many in the humanitarian system, and the humanitarian sector has an interest in defending them. This article will explore the origins of the humanitarian principles, and how the first four principles of the Movement (humanity, neutrality, impartiality and independence) came to characterize effective humanitarian action. The article will then discuss some of the ways in which these principles are threatened both by practice and by law, with a particular focus on the Australian context, and discuss the implications that such threats have for people in need of humanitarian assistance. Finally, the article will conclude by suggesting how the principles can be reclaimed and protected for the future of effective, impartial humanitarian action.

The humanitarian principles: A brief history

Whilst the origin of modern-day humanitarian principles is often credited to the Movement, and in particular to one of the Movement's founding fathers, Henry Dunant, broad concepts of humanitarian principles date back to the beginning of recorded history.³ Similarly, though humanitarian principles are championed as essential for effective humanitarian response, anthropologists have found evidence that as far back as prehistoric times, societal concepts of "charity" were derived from a sense of collective survival rather than altruism.⁴

The humanitarian principles, particularly impartiality – the concept of non-discrimination and the notion that urgency and distress ought to dictate which individuals' cases are given priority – are found in cultures and religions around the world.⁵ This knowledge has helped demonstrate that these principles

3 Jean Pictet, *Humanitarian Law and the Protection of War Victims*, Henry Dunant Institute, Geneva, 1975, p. 28.

4 Elizabeth Ferris, *The Politics of Protection: The Limits of Humanitarian Action*, Brookings Institution Press, Washington, DC, 2011, p. 7.

5 ICRC, *The Fundamental Principles of the Red Cross and Red Crescent*, Publication Ref. 0513, 1996, p. 4, available at: www.icrc.org/eng/assets/files/other/icrc_002_0513.pdf.

were never solely the concern of western ideals or gentlemen such as Henry Dunant. From the obligations of *zakat* in Islam⁶ and *tzedakah* in Judaism;⁷ to the *dāna* in Hinduism⁸ and Buddhism,⁹ principles abound that the most vulnerable members of society should be assisted in times of need. Impartiality in providing assistance to others is therefore not a new concept.

Ideas regarding limiting the suffering of war had already begun to emerge by the time Dunant had witnessed the battle of Solferino in 1859. It was Dunant, rallying villagers to assist the wounded and dying from both sides of the battle of Solferino, who began to solidify the idea of impartiality as a cornerstone of humanitarian response.¹⁰ Initially, the notion of impartiality was linked to Dunant's idea of voluntary relief societies undertaking humanitarian activities on the battlefield. However, when the 1864 diplomatic conference for the first Geneva Convention began, Dunant advocated that impartiality should also apply to military medical personnel. His idea was successful and the obligation of impartial assistance to all wounded persons on the battlefield became one of the cornerstones of international humanitarian law (IHL), binding government armed forces and humanitarian organizations alike.¹¹

This shared legal obligation on armed forces and medical personnel, enshrined in Article 6 of the 1864 Geneva Convention, went further than impartiality – the Convention also cemented the idea of neutral humanitarian assistance. For instance, Article 5 stated: “Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer.”¹² Military ambulances and hospitals were explicitly recognized as neutral and therefore required to be respected and protected,¹³ along with military medical personnel and chaplains.¹⁴

6 *Zakat*, or the practice of giving alms, is “a form of Islamic social financing through which all Muslims whose wealth falls above a certain threshold are required by the Qur’an to give 2.5% of their assets each year to help people in need”: Chloe Stirk, *An Act of Faith: Humanitarian Financing and Zakat*, Global Humanitarian Initiative Briefing Paper, March 2015, p. 5.

7 *Tzedakah* is “a form of self-taxation rather than a voluntary donation” in which “money is generally given to the poor, healthcare institutions, synagogues or educational institutions”: *ibid.*

8 *Dāna* in Hinduism “can be given as offerings to deities (nirmalya), to individuals, to priests, spiritual guides or teachers and institutions (NGOs). Some scriptures suggest giving 10% of an individual’s earnings to charity, with the caution that a householder should never give gifts beyond their means – they should not make their family and dependents worse off on account of their generosity”: *ibid.*

9 The concept of *dāna* is a form of almsgiving that also exists in Buddhism. It is considered “the first of the Ten Perfecting Qualities (Dasa Parami Dhamma) that helps a Bodhisathwa to attain Buddhahood”: *ibid.*

10 ICRC, *Solferino and the International Committee of the Red Cross: Background, Facts and Figures*, June 2010, available at: www.icrc.org/eng/resources/documents/feature/2010/solferino-feature-240609.htm.

11 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) (GC I), Arts 12, 15; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) (GC II), Art. 12; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Art. 27.

12 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864, Art. 5.

13 *Ibid.*, Art. 1.

14 *Ibid.*, Art. 2.

Further, all those evacuating the wounded and sick, along with the facilities used to do this, such as ambulances and hospitals, were to be considered “absolutely neutral”.¹⁵

The principles enshrined in the 1864 Convention have withstood the passage of time as the Convention has been revised, updated and consolidated. Indeed they have been rearticulated and expanded throughout the Geneva Conventions and their Additional Protocols.¹⁶ Of particular note is Article 3 common to the four Geneva Conventions, which provides a “right of initiative” for “an *impartial* humanitarian body” to care for the wounded and sick, further solidifying the clear necessity of impartial humanitarian action under international law.¹⁷ This is noteworthy because while the Geneva Conventions deal predominantly with international armed conflict, common Article 3 sets out the most basic obligations required in non-international armed conflicts.¹⁸ The inclusion of the right of initiative of impartial humanitarian bodies in common Article 3 demonstrates the importance given by States to ensuring that impartial humanitarian assistance is possible regardless of the categorization of the conflict, and cements it as one of the most fundamental expectations of States during times of armed conflict.¹⁹ Additional Protocol I strongly reinforces this in its Article 81, stating that States party to a conflict must facilitate the humanitarian work of Red Cross and Red Crescent National Societies, and where possible other humanitarian organizations, in favour of the victims of conflict in accordance with the principles of the Conventions and the Movement.²⁰ Thus, over 150 years since the adoption of the First Geneva Convention in 1864, the idea of neutral and impartial assistance for the sick and wounded – from both belligerent powers and humanitarian actors – has remained a bedrock of IHL. The unique universality of the Geneva Conventions makes these obligations all the more definite.²¹

¹⁵ *Ibid.*, Art. 6.

¹⁶ GC I; GC II; Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III); GC IV; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) (AP II).

¹⁷ Common Art. 3, emphasis added.

¹⁸ International law categorizes armed conflict into two distinct types: international armed conflict (IAC) and non-international armed conflict (NIAC). While an IAC is concerned with conflict between two or more States (or High Contracting Parties to the Geneva Conventions), a NIAC is restricted to those conflicts taking place either between government armed forces and non-governmental armed groups, or between such groups. In terms of applicable treaty law, the four Geneva Conventions and AP I apply to IACs, whereas common Article 3 and AP II apply to NIACs.

¹⁹ Common Art. 3.

²⁰ AP I, Art. 81(2–4).

²¹ As of 15 June 2015, there are 196 signatories to the four Geneva Conventions – that is, every State in the world. ICRC, *States Party to the Following International Humanitarian Law and Other Related Treaties*, 15 June 2015, available at: www.icrc.org/applic/ihl/ihl.nsf/.

Today, the humanitarian principles of humanity, impartiality, neutrality and independence²² are four of the seven Fundamental Principles of the Movement, the largest international humanitarian network in the world, and are enshrined in modern-day international law as obligations of States and humanitarian actors.²³ The Movement has refined and reaffirmed these principles in practice and “soft law”, starting with their formal adoption into the Movement Statutes in 1921.²⁴ Since then, the Fundamental Principles have been reaffirmed at International Conferences of the Movement,²⁵ with their current form being adopted in 1965. This required not only the consent of Movement components (the International Committee of the Red Cross (ICRC), the International Federation of Red Cross and Red Crescent Societies, and the National Societies), but also the High Contracting Parties to the Geneva Conventions.²⁶ This further demonstrates the strong commitment made by all States to uphold and respect these essential humanitarian principles.²⁷

The first three principles – humanity, impartiality and neutrality – were also strongly affirmed as core principles in humanitarian response within the UN

- 22 The Movement defines these four fundamental principles as follows: “**Humanity**: The Red Cross, born of a desire to bring assistance without discrimination to the wounded on the battlefield, endeavours – in its international and national capacity – to prevent and alleviate human suffering wherever it may be found. Its purpose is to protect life and health and to ensure respect for the human being. It promotes mutual understanding, friendship, co-operation and lasting peace amongst all peoples. **Impartiality**: It makes no discrimination as to nationality, race, religious beliefs, class or political opinions. It endeavours only to relieve suffering, giving priority to the most urgent cases of distress; **Neutrality**. In order to continue to enjoy the confidence of all, the Red Cross may not take sides in hostilities or engage at any time in controversies of a political, racial, religious or ideological nature. **Independence**: The Red Cross is independent. The National Societies, while auxiliaries in the humanitarian services of their Governments and subject to the laws of their respective countries, must always maintain their autonomy so that they may be able at all times to act in accordance with Red Cross principles.” J. Pictet, above note 1.
- 23 “The first systematic presentation of the principles of the Red Cross ... dates from 1955 and served as the basis for the official Proclamation which today has the force of law”: *ibid*. Additionally, the 25th International Conference of the Red Cross reaffirmed the importance of the Fundamental Principles by including them in the Preamble to the Movement’s Statutes and, at all times, States are called upon to respect adherence by the Movement to the Fundamental Principles: ICRC, above note 5.
- 24 In 1921, the Fundamental Principles of the Movement were incorporated into the revised Statutes of the ICRC: *ibid*.
- 25 J. Pictet, above note 1.
- 26 Statutes and Rules of Procedure of the International Red Cross and Red Crescent Movement, adopted by the 25th International Conference of the Red Cross at Geneva in October 1986. The Statutes were first adopted in 1928, then revised in 1952. ICRC, *Red Cross Law*, 31 October 1995, available at: www.icrc.org/eng/resources/documents/misc/57jmr8.htm.
- 27 The 19th Session of the League’s Board of Governors (Oxford, 1946) adopted a declaration confirming the 1921 principles. The 18th International Conference of the Red Cross (Toronto, 1952) reaffirmed those principles adopted in 1946. The principles were not, however, the subject of a systematic treatise until 1955, when Jean Pictet defined and analyzed all the values which guide the work of the Movement. On the basis of this in-depth study, the Movement’s seven Fundamental Principles as they stand today were unanimously adopted in 1965 by the 20th International Conference of the Red Cross. The 25th International Conference of the Red Cross (Geneva, 1986) reaffirmed the importance of the Fundamental Principles by including them in the Preamble to the Movement’s Statutes. The responsibility of the National Societies to respect and disseminate knowledge of the Principles was underscored in new statutory provisions, while States were called upon to respect at all times the adherence by all components of the Movement to the Fundamental Principles.

system in 1991, when the UNGA adopted Resolution 46/182. The Annex to that resolution outlines guiding principles for humanitarian assistance and notes that “humanitarian assistance must be provided in accordance with the principles of humanity, neutrality and impartiality”.²⁸ These principles were again reaffirmed in a second UNGA resolution in 2004.²⁹

In 1992, after the adoption of Resolution 46/182, the Steering Committee for Humanitarian Response and the ICRC developed a comprehensive document on humanitarian principles for the humanitarian system at large.³⁰ As a result, the 1994 Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief was developed.³¹ Absent was any direct reference to neutrality, which was viewed as too constrictive a principle to apply universally to the sector. However, next to the principles of humanity and impartiality, the authors included the fourth humanitarian principle discussed above, independence. In 2014 the Core Humanitarian Standard on Quality and Accountability, a document resulting from the Joint Standards Initiative,³² reintroduced neutrality as one of the four “core humanitarian standards” guiding humanitarian action, alongside humanity, impartiality and independence.³³

Over time, these principles have been affirmed and reaffirmed in international fora, such as the Sphere project,³⁴ the European Consensus on Humanitarian Aid³⁵ and the Good Humanitarian Donorship principles.³⁶ These projects and initiatives, often instigated by States, persistently reaffirm the humanitarian principles and demonstrate that governments are aware of their obligations not just to understand but also to respect these principles in humanitarian action.³⁷

28 UNGA Res. 46/182, above note 2.

29 UNGA Res. 58/114, 5 February 2004.

30 Steering Committee for Humanitarian Response, *SCHR Members*, 2015, available at: www.schr.info/about.

31 1994 Code of Conduct, above note 2.

32 Comprised of the Humanitarian Accountability Partnership (HAP) International, People In Aid and the Sphere Project, which joined forces to seek greater coherence for users of humanitarian standards.

33 Groupe URD, HAP International, People In Aid and the Sphere Project, *Core Humanitarian Standard on Quality and Accountability*, 1st ed., 2014.

34 Through its voluntary initiative, the Sphere Project brings together a broad spectrum of humanitarian agencies who share the common goal of wanting to improve the quality of humanitarian assistance and the accountability of humanitarian actors. The Sphere Project outlines a Humanitarian Charter and has over 540 organizational signatories: www.sphereproject.org/about/.

35 The European Consensus on Humanitarian Aid is a strategic framework working to guide the actions of the European Union and its member States to deliver effective, high-quality and coordinated humanitarian assistance, see <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:ah0009>.

36 “The Good Humanitarian Donorship (GHD) initiative is an informal donor forum and network which facilitates collective advancement of GHD principles and good practices. It recognises that, by working together, donors can more effectively encourage and stimulate principled donor behaviour and, by extension, improved humanitarian action”, see www.ghdinitiative.org/.

37 States are made aware of these obligations through the four Geneva Conventions and various relevant UNGA and UN Security Council (UNSC) resolutions.

Legislating at the expense of humanitarian principles: Unintended consequences?

Despite these commitments to the humanitarian principles, new threats to global security and the ensuing political responses to them are having a dangerous effect on the ability of humanitarian organizations to consistently apply the principles. While States grapple with terrorism and other forms of violent extremism, two security-based responses are having an impact on principled humanitarian action: increasingly strict parameters on conditions for funding for humanitarian organizations, and the adoption of new and increasingly rigid counterterrorism legislation. The consequences have been the creation of laws and financial regulations that run counter to the long-established humanitarian principles. This in turn risks undermining the basis of the modern humanitarian system.

On 20 September 2001, George W. Bush stated in his address to a Joint Session of Congress and the American people: “Either you are with us or you are with the terrorists.”³⁸ In this statement the president set a clear divide between those supporting the action and approach of the United States and those supporting terrorism. However, in reality – particularly in principled humanitarian action – this divide is not so clear-cut. In humanitarian response situations, where the principles of impartiality and neutrality dictate one’s actions or approach, there is no room for taking sides.

As a result of this “with us or against us” approach, tensions between the humanitarian principles and concerns relating to the sponsorship, support and expansion of terrorist activities have increased.³⁹ In the immediate aftermath of the September 11 attacks on the World Trade Centre in New York, the United Nations Security Council (UNSC) passed Resolution 1373 recognizing international terrorism as a threat to international peace and security. Acting under Chapter VII of the UN Charter, the Security Council called on member States to implement domestic measures to “prevent and suppress the financing of terrorist acts”⁴⁰ and to “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts”.⁴¹ States should also

[p]rohibit their nationals or any persons and entities within their territories from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of persons who commit or attempt to commit or facilitate or participate in the commission of terrorist acts, of entities owned or controlled, directly or

38 George W. Bush, address to a joint session of Congress on 20 September 2001, available at: <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript/>.

39 Jessica Burniske, Naz Modirzadeh and Dustin Lewis, *Counter-Terrorism Laws: What Aid Agencies Need to Know*, Humanitarian Practice Network, November 2014, available at: www.odihpn.org/hpn-resources/network-papers/counter-terrorism-laws-what-aid-agencies-need-to-know.

40 UNSC Res. 1373, 28 September 2001, para. 1(a).

41 *Ibid.*, para. 2(a).

indirectly, by such persons and of persons and entities acting on behalf of or at the direction of such persons.⁴²

No humanitarian or protection exemptions were included in the drafting of Resolution 1373, despite the obvious conflict caused by the practice of providing neutral and impartial aid.⁴³ This is a noticeable absence that has carried through into many domestic anti-terrorism laws – something that will be addressed below in the discussion of the Australian case.

Many States had already enacted counterterrorism laws prior to 2001, but the shock of September 11, combined with this directive from the Security Council in response to the threat of increasing terrorism, provided the impetus to implement stronger legislation. A wave of new, far-reaching (and often hastily drafted) anti-terrorism laws swept across the globe. Measures were introduced prohibiting financial and material support to terrorist groups and ensuring cooperation with other governments on anti-terrorism activities. This cooperation granted the capacity to investigate, arrest and prosecute individuals engaged in terrorist acts.⁴⁴ However, perhaps unintentionally, the reach of these measures is having a significant effect on humanitarian actors, particularly in their ability to provide principled aid and training to groups that have been designated as terrorist organizations. This has given rise to a growing tension between counterterrorism responses and principled humanitarian action.

Three of the important consequences of these legislative changes are the criminalization of providing material or other support either directly or indirectly to terrorists, the implementation of broad sanctions regimes, and the contractual obligations that donors place on humanitarian organizations delivering assistance to those who may live in territory controlled by a DTO. In some cases, these measures impede humanitarian organizations in their ability and capacity to provide assistance to those in greatest need, and to do so in a manner consistent with the humanitarian principles; and yet, examples of all three areas of concern are readily identifiable in national counterterrorism regimes around the world.

This issue – that counterterrorism measures are threatening to undermine principled humanitarian action – has been extensively discussed as regards the United States.⁴⁵ This is primarily because the United States presents the most

42 *Ibid.*, para. 1(d).

43 Kate Mackintosh and Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, UN Office for the Coordination of Humanitarian Affairs and Norwegian Refugee Council, July 2003.

44 UNSC Res. 1373, above note 40. This has been written on extensively: see K. Mackintosh and P. Duplat, above note 43; J. Burniske, N. Modirzadeh and D. Lewis, above note 39; George Williams, “A Decade of Anti-Terror Laws”, *Melbourne University Law Review*, Vol. 37, 2011.

45 See, for example: K. Mackintosh and P. Duplat, above note 43; Justin A. Fraterman, “Criminalizing Humanitarian Relief: Are U.S. Material Support for Terrorism Laws Compatible with International Humanitarian Law?”, *New York University Journal of International Law and Politics*, Vol. 46, Spring 2014, pp. 399–470; Peter Margulies, “Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid”, *Suffolk Transnational Law Review*, Vol. 34, 2011, pp. 539–568; Sam Adelsberg, Freya Pitts and Sirine Shebaya, “Chilling Effect of the Material Support Law on Humanitarian Aid: Causes, Consequences, and Proposed Reforms”, *Harvard National Security Journal*, Vol. 4, No. 2, 2012–2013, pp. 282–319.

obvious case study, as its counterterrorism regime is extensive and a number of its anti-terrorism laws have been tested in the courts. What is not as widely known is how the Australian context has developed, and how it compares with the US regime.

Australia's anti-terrorism laws: An overview

Similar to other jurisdictions, Australian laws relating to counterterrorism were relatively disparate prior to September 2001 and ranged from acts from the 1970s dealing with crimes committed on aircraft⁴⁶ to legislation dealing with the recruitment and training of mercenaries.⁴⁷ In 2002, the Australian federal parliament embarked on a turbulent period of anti-terrorism lawmaking.⁴⁸ In the decade following September 11 and the adoption of UNSC Resolution 1373,⁴⁹ Australia enacted a total of fifty new federal laws, with many others enacted in various States and Territories of Australia.⁵⁰ At the time of writing, sixty-four pieces of counterterrorism legislation had been passed into law,⁵¹ establishing a new legal reality within the country – a permanent, entrenched anti-terror regime reflective of a persistent threat of terrorism, rather than a “transient, short-term legal response”⁵² to the September 11 attacks. In his book *The 9/11 Effect: Comparative Counter-Terrorism*, Kent Roach describes Australia as “exceed[ing] the United Kingdom, United States and Canada in the sheer number of new antiterrorism laws that it has enacted since 9/11”.⁵³ He writes that “this degree of legislative activism is striking compared even to the United Kingdom’s active agenda and much greater than the pace of legislation in the United States or Canada”.⁵⁴

The anti-terrorism laws encompass a wide range of issues, but as regards the restrictions placed on humanitarian organizations, several provisions under Australia’s Criminal Code Act 1995 (Cth) (Criminal Code)⁵⁵ are of particular interest. These provisions fall into three categories: material support, sanctions and contractual obligations. Despite the proliferation of legislation since 2001, in several ways the Australian legislative experience has been quite different to that

46 See Civil Aviation (Offenders on International Aircraft) Act 1970 (Cth), which implemented the Convention on Offences and Certain Other Acts Committed On Board Aircraft, signed at Tokyo on 14 September 1963, to which Australia acceded on 22 June 1970. This act has now been replaced by the Crimes (Aviation) Act 1991 (Cth).

47 Crimes (Foreign Incursions and Recruitment) Act 1978 (Cth).

48 G. Williams, above note 44, p. 1137.

49 UNSC Res. 1373, above note 40.

50 Edwina MacDonald and George Williams, “Combating Terrorism: Australia’s *Criminal Code* since September 11, 2001”, *Griffith Law Review*, Vol. 16, No. 1, 2007, pp. 27–54, available at: www.gtcentre.unsw.edu.au/news/docs/Terrorism_Criminal_Law2.pdf.

51 Andrew Lynch, Nicola McGarrity and George Williams, *Inside Australia’s Anti-Terrorism Laws and Trials*, NewSouth Publishing, Sydney, 2015.

52 G. Williams, above note 44, p. 1137.

53 Kent Roach, *The 9/11 Effect: Comparative Counter-Terrorism*, Cambridge University Press, Cambridge, 2011, p. 310.

54 *Ibid.*

55 Criminal Code Act 1995 (Cth), 15 March 1995 (Criminal Code).

of the United States. This is seen most notably in relation to exemptions in various legislative provisions for humanitarian assistance⁵⁶ – though these are not uniformly included across all relevant legislative provisions as a matter of course.

For example, the Criminal Code makes it an offence to associate with a terrorist organization – something that is unique among most first-world counterterrorism regimes. Under division 102.8 of the Act, a person commits an offence if, on two or more occasions, he or she intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, a terrorist organization.⁵⁷ However, subsection 102.8(4) explicitly identifies several exemptions to this provision, including association for the sole purpose of “providing aid of a humanitarian nature”.⁵⁸

As mentioned above, exemptions for humanitarian aid are not included across all relevant legislative provisions. For example, there are two provisions relating to training. One is found in division 101.2 of the Criminal Code and relates specifically to offences of providing or receiving training connected with terrorist acts.⁵⁹ These offences mirror UK and European counterterrorism legislation.⁶⁰ The second is found in division 102.5, where it is an offence to intentionally provide training to, receive training from or participate in training with a terrorist organization.⁶¹ This is an extremely broad provision with no exemption for training that may form part of a purely humanitarian mission, for example the provision of first-aid training or dissemination of IHL. As regards dissemination of IHL, this is in direct contravention of the obligation placed on both States and National Societies and the ICRC to disseminate the laws of war.⁶²

Under division 102.6, it is an offence to intentionally and directly or indirectly receive funds from, or make funds available to, a terrorist

56 As Mackintosh and Duplat identified in K. Mackintosh and P. Duplat, above note 43, p. 46: “Although it is traditional for sanctions regimes to contain some form of humanitarian exemption, this is not always the case ... the statutory humanitarian exemption in US sanctions law (under the IEEPA) was overridden in the case of US counter-terrorist sanctions. An alternative type of humanitarian exemption is offered by the provision of a licence or waiver for one or more humanitarian organisations to operate in contexts subject to sanctions. However, as these licences apply to liability under economic sanctions regimes they do not provide any kind of legal immunity from prosecution under material support laws in jurisdictions where material support could encompass humanitarian action.” Unlike the United States, Australia has incorporated a humanitarian exemption into its domestic counterterrorism law, as will be discussed below.

57 Criminal Code, div. 102.8.

58 *Ibid.*, div. 102.8(4)(c).

59 *Ibid.*, div. 101.2.

60 UK Terrorism Act 2006, section 6 (refers to providing “instruction or training”); EU Council Framework Decision of 13 June 2002 on combating terrorism (2002/475/JHA), Art. 2 (refers to “supplying information or material resources, or by funding its activities in any way”).

61 Criminal Code, div. 102.5.

62 See GC I, Art. 47; GC II, Art. 48; GC III, Art. 127; GC IV, Art. 144. Art. 47 of GC I states: “The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.” See also the Statutes of the International Red Cross and Red Crescent Movement, Art. 3(2), which stipulates that National Societies “disseminate and assist their governments in disseminating international humanitarian law”.

organization.⁶³ Again, no exemption based on humanitarian grounds has been written in as a defence. This could possibly mean that a humanitarian agency which was, for example, compelled to pay for access into a region controlled by a DTO in order to legitimately deliver humanitarian assistance to the civilian population would be in breach of the law.

Attached to these provisions are penalties that depend on whether these acts were done in the full knowledge that the group in question was a terrorist organization (twenty-five years' imprisonment) or whether the person was simply reckless in failing to ascertain this information (fifteen years' imprisonment).⁶⁴ Similarly to the US laws, Australian legislation claims extraterritorial jurisdiction over these crimes and can prosecute non-citizens with the consent of the Attorney General, although at the time of writing, no prosecutions had been made under the Criminal Code.⁶⁵ These provisions, particularly those void of a humanitarian exemption, pose significant challenges to Australia's humanitarian community and the ability of humanitarian actors to engage effectively in principled humanitarian assistance.

In addition, there is uncertainty regarding the extent of the exemption for "providing aid of a humanitarian nature", as the term is not defined in the Criminal Code. Arguably, therefore, the exemption may not extend to activities which are illegal under other provisions of the Criminal Code, meaning that a contravention of one counterterrorism provision could result in many other offences also applying (in a similar way that illegal activities may disqualify an organization from a status as a charity).

There is also uncertainty as to the extent to which humanitarian organizations can associate and cooperate with other organizations (such as partner NGOs) which may themselves be involved in breaches of the Criminal Code, either under the express counterterrorism provisions or through other means, such as provisions aimed at combating organized crime.

Australia also made recent legislative changes with extremely broad prohibitions for Australian citizens and residents entering or remaining in a "declared area".⁶⁶ Specifically, division 119.2 of the Criminal Code makes it an offence to intentionally enter, or remain in, an area in a foreign country that has been labelled a "declared area" by the foreign affairs minister, where the person knows or should have known that the area is a declared area. At the time of writing, the Australian foreign affairs minister has declared the Mosul district in Ninewa province in Iraq and Al-Raqqa province in Syria to be areas invoking division 119.2.⁶⁷ This provision originated from the Australian government's

63 Criminal Code, div. 102.6.

64 *Ibid.*, divs 102.6(1) and (2) respectively.

65 K. Mackintosh and P. Duplat, above note 43, p. 24.

66 The term "declared area" is defined by the Australian government as an area in a foreign country in which it is established to the satisfaction of the minister for foreign affairs that a listed terrorist organization is engaging in hostile activity. Australian Government, *Australian National Security*, available at: www.nationalsecurity.gov.au/WhatAustraliaIsdoing/Pages/FrequentlyAskedQuestionsDeclaredAreaOffence.aspx.

67 Australian Government, *Australian National Security*, available at: www.nationalsecurity.gov.au/WhatAustraliaIsdoing/Pages/DeclaredAreaOffence.aspx.

concern that “Australians who travel to conflict zones would return ... with skills and intentions acquired from fighting or training with terrorist groups”.⁶⁸ The offence carries with it absolute liability and imprisonment for up to ten years.⁶⁹ While there have been some obvious criticisms of the broad scope of this provision, it does include an exemption for those remaining “solely for legitimate purposes”, which includes providing “aid of a humanitarian nature”.⁷⁰

Unintended humanitarian consequences: Three areas of concern

In 2007, in the case of *United States of America v. Tarik Ibn Osman Shah, Rafiq Sabir and Mahmud Faruq Brent*, doctors providing medical support to Al Qaeda were convicted under material support laws.⁷¹ Three years later, in the case of *Holder v. Humanitarian Law Project*,⁷² the US Supreme Court ruled that the provision of training by a human rights organization to a designated terrorist organization could constitute material support under the relevant statute, irrespective of the humanitarian nature of the training provided.⁷³ These consequences have become a real concern among humanitarian organizations since the post-9/11 introduction of counterterrorism laws throughout the world. While Australia’s position is not so different, a higher *mens rea* standard and the existence of a humanitarian exemption within the Criminal Code makes it difficult to imagine the realistic prosecution of an organization that is operating in accordance with the humanitarian principles. However, the way in which these laws are written still threatens the ability of humanitarian organizations to provide support, resources and training to all people everywhere in a neutral and impartial way.

Material or other support

The first counterterrorism measure of significance for humanitarian organizations is the nature of material support or resources that are prohibited by law. In the United States, an act considered to be in “material support” of terrorism is punishable by

68 *Ibid.*

69 Criminal Code, divs 119.2(1) and (2).

70 *Ibid.*, div. 119.2(3)(a).

71 US District Court, *United States of America v. Tarik Ibn Osman Shah, Rafiq Sabir and Mahmud Faruq Brent*, 474 F. Supp. 2d 492, SDNY 2007. Significant factors in these convictions were both the ideological affinity of the doctors and their intent to work under the “direction and control” of the group, which were found to be indicative of their material support for the group. Despite this, there does not seem to be a push to prosecute doctors operating independently of DTOs. The prosecution in *Shah* indicated that a doctor in the normal course of treating a “jihadist”, or an NGO doctor working in the course of his or her work, would not be prosecuted, though this has not yet been tested in court. See also Sara Pantuliano, Kate Mackintosh and Samir Elhawary with Victoria Metcalfe, *Counter-Terrorism and Humanitarian Action: Tensions, Impact and Ways Forward*, Humanitarian Policy Group Brief No. 43, October 2011, p. 11.

72 US Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2010.

73 J. A. Fraterman, above note 49, p. 409.

fifteen years' imprisonment, regardless of the nationality of the accused. Under US federal law, "material support or resources" includes

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, except medicine or religious materials.⁷⁴

Although there is an exemption for "medicine and religious materials",⁷⁵ it is significant that an individual does not have to intend to further an organization's terrorist activities to be found guilty under the statute.

Australian provisions relating to support are narrower than US counterterrorism laws. Under Australian counterterrorism laws, a person will have committed an offence if they provide "support or resources" that would help an organization engage (directly or indirectly) in preparing, planning, assisting in or fostering the execution of a terrorist act.⁷⁶ In the United States, there are restrictions on the provision of support to particular DTOs – that is, other than "medicine or religious materials", it seems that the provision of any material support or resources to these organizations, irrespective of its humanitarian nature, would invoke US criminal law.⁷⁷

In Australia, even though no explicit exemptions for humanitarian actors are given, if support or resources are provided in an independent, impartial and neutral manner, and not in aid of a terrorist act, it is difficult to envisage that humanitarian organizations would find themselves in contravention of the support provision.⁷⁸ This is because the legislation requires that donors "intentionally [provide] to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation", and paragraph (a) includes "preparing, planning, assisting in or fostering the doing of a terrorist act".⁷⁹

Interesting for the purposes of comparison is New Zealand's Terrorist Suppression Act,⁸⁰ which takes its humanitarian exemption one step further in this regard. It includes a list of "reasonable excuses" for the offence of providing "property, or financial or related services" to a terrorist organization. The types of property which fall within the definition of a "reasonable excuse" include food, clothing, medicine and other items that serve to do no more than "satisfy

74 18 USC 8 2339A(b)(1), 2006 and Supp. 1112009.

75 *Ibid.*

76 Criminal Code, div. 102.7. Despite its use throughout, the Criminal Code fails to define the term "support".

77 K. Mackintosh and P. Duplat, above note 43, p. 41.

78 Criminal Code, div. (1)(a).

79 *Ibid.*, div. 102.1.

80 Terrorism Suppression Act 2002.

essential human needs of (or of a dependent of) a designated individual”.⁸¹ This provision more fully appreciates the principle of impartiality.

As mentioned previously, in Australia it is an offence to intentionally make funds available to, or collect funds for or on behalf of, a terrorist organization.⁸² While this has not yet been tested in court, an accusation made by the Israel Law Center (Shurat HaDin) against World Vision Australia and AusAID shone a light on the potential humanitarian gap in the legislation. In October 2012, Shurat HaDin claimed to have evidence supporting an allegation that World Vision Australia and AusAID were funding a proscribed terrorist organization, the Popular Front for the Liberation of Palestine (PFLP), through the distribution of funds to a Palestinian NGO, the Union of Agricultural Work Committees (UAWC).⁸³ As part of its work, the UAWC has been responsible for delivering plant and seedling nurseries to the West Bank and Gaza in an attempt to provide food security to over 1,000 low-income households in those areas.⁸⁴ An AusAID examination eventually concluded that there was no evidence to support this allegation, making assurances that “project funding from AusAID through World Vision is not being used to support terrorists but is being spent on agreed, high priority development activities”.⁸⁵ However, if the allegations had been proven, the fact that the funds were intended solely for a humanitarian purpose would not have been a valid defence. Despite these findings, and given the non-existence of a humanitarian exemption to the offence of getting funds to, from or for a terrorist organization, World Vision Australia might have found itself liable for criminal activity, irrespective of whether or not those funds were intended for a humanitarian purpose. While IHL does not grant humanitarian organizations unlimited humanitarian access to conflict zones, treaty and customary law do expressly allow for humanitarian access,⁸⁶ and these counterterrorism measures are threatening humanitarian organizations and their ability to provide such access.

As regards “training”, the first provision relates to providing or receiving training specifically related to terrorist acts,⁸⁷ following a similar approach taken in the UK and Europe as mentioned above. Here the Australian provisions are sufficient, and not a matter of concern to humanitarian actors. Again, as a point

81 *Ibid.*, section 10(3).

82 Criminal Code, div. 102.6.

83 NGO Monitor, *World Vision*, 29 June 2014, available at: www.ngo-monitor.org/article/world_vision_international.

84 Australian Minister for Foreign Affairs, Union of Agricultural Work Committees, media release, 31 May 2012, available at: http://foreignminister.gov.au/releases/2012/bc_mr_120531.html.

85 *Ibid.*

86 See GC IV, Arts 10, 11, 23, 50, 59, 63; AP I, Art. 70(1); common Art. 3; AP II, Art. 18; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 55: “The parties to the conflict must allow and facilitate 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.” See also Naz K. Modirzadeh, Dustin A. Lewis and Claude Bruderlein, “Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011, p. 626.

87 Criminal Code, div. 101.2.

of comparison, the UK and European approaches provide greater detail and clarity regarding what would constitute a training-related terrorism offence. In the UK, for example, the Terrorism Act⁸⁸ makes it an offence to provide or receive instruction in the making or use of firearms, radioactive material or weapons designed or adapted for the discharge of any radioactive material, explosives, or chemical, biological or nuclear weapons.⁸⁹ Further legislation adopted in 2006 in the UK defines “training”, and sets out specific acts that constitute an offence, thus placing narrow parameters around the 2000 Act.⁹⁰

Similarly, in the 2005 Council of Europe Convention on the Prevention of Terrorism, “training for terrorism” is defined as:

to provide instruction in the making or use of explosives, firearms or other weapons or noxious or hazardous substances, or in other specific methods or techniques, for the purpose of carrying out or contributing to the commission of a terrorist offence, knowing that the skills provided are intended to be used for this purpose.⁹¹

However, the second tranche of training offences in Australia goes beyond the training of terrorist acts, giving cause for concern for humanitarian actors. These provisions seem to lack both clarity and feasible parameters around training for and by humanitarian organizations. The law states that a person commits an offence if he or she intentionally provides training to, receives training from or participates in training with a terrorist organization.⁹² There are two issues of particular concern here. The first is that there is no definition given in the legislation for “training”, meaning that there is a lack of clarity in relation to what will constitute a crime under this section. The second is the very broad definition given for a terrorist organization in this section, as it includes blanket coverage of any organization specified in the regulations.⁹³ These two factors could severely limit the ability of humanitarian actors to engage with groups in any given area for humanitarian-related training, such as first-aid training or the dissemination of IHL. The prohibitions may also weaken the ability of humanitarian organizations to provide assistance if that assistance, or gaining access to a population in need of that assistance, necessitates engagement with a terrorist organization, the nature of which could be reasonably seen as “training”.

88 Terrorism Act 2000.

89 *Ibid.*, section 54.

90 The Terrorism Act 2006 provides a definition of the crime of training to supplement the training offence under section 54 of the 2000 Act. The definition under section 6 of the Act includes specific acts such as “the making, handling or use of a noxious substance”; “the use of any method or technique for doing anything else that is capable of being done for the purposes of terrorism, in connection with the commission or preparation of an act of terrorism or Convention offence or in connection with assisting the commission or preparation by another of such an act or offence”; and “the design or adaptation for the purposes of terrorism, or in connection with the commission or preparation of an act of terrorism or Convention offence, of any method or technique for doing anything”. This is in stark contrast to the definition taken by the United States in the *Holder* case.

91 Council of Europe Treaty Series, No. 196 (entered into force 1 June 2007), Art. 7.

92 Criminal Code, div. 102.5.

93 *Ibid.*, div. 102.1(1).

Further, being limited by and accepting of what the Australian government declares a “terrorist organization” potentially jeopardizes the impartiality, neutrality and independence of humanitarian actors.

Finally, read alongside the amendments made by the Australian Foreign Fighters Act,⁹⁴ the ambiguous training provision also creates potential complications for humanitarian actors entering or remaining in a “declared area” of a foreign country without a “legitimate purpose”.⁹⁵ Not only does this provision have implications for freedom of movement, but, despite the inclusion of an exemption for the provision of humanitarian aid,⁹⁶ it also raises legitimate concerns for humanitarian actors providing, receiving or participating in training in a “declared area”. This is, so far, an untested area of the law.

This ambiguity over what would constitute training under Australia’s current counterterrorism legislation was raised in a Supreme Court of Victoria case regarding the provision of financial support to the Tamil Tigers following the 2004 Boxing Day tsunami.⁹⁷ In his conclusions, the presiding judge made reference to Dr. John Whitehall, who at that time was chairman of paediatrics and child health at the University of Western Sydney. In 2004, Dr. Whitehall travelled to Sri Lanka and was there when the Boxing Day tsunami hit and devastated the country. During his time in Sri Lanka, Dr. Whitehall provided paediatric training to young medical students who he later came to learn were from the medical wing of the proscribed terrorist organization, the Liberation Tigers of Tamil Eelam (LTTE). Even though the training was unrelated to the terrorist activities of the organization and was done purely for humanitarian purposes, his acts still fall within the scope of “training a terrorist organisation or receiving training from a terrorist organisation” under division 102.5 of the Australian Criminal Code. The judge asked: “Is Dr Whitehall guilty of an offence ...? Technically he might be. I suspect he knows not of this offence, but ... we manage to turn a blind eye.”⁹⁸ Obviously the approach of hoping law enforcement and the judiciary “turn a blind eye” to anything that may fall foul of the legislation is not a satisfactory one for many humanitarian organizations who are faced with ongoing uncertainty as to what limits these provisions place on their policies and activities across a range of complex contexts.

These laws, which essentially withhold humanitarian training or relief from certain groups of people, erode the very concept of impartiality in the provision of humanitarian assistance. Such assistance must be based on need only, and not on criteria relating to potential or actual affiliation to certain groups deemed terrorist organizations by a particular government.

94 Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014.

95 Criminal Code, div. 119.2.

96 *Ibid.*, div. 119.2(3)(a).

97 Supreme Court of Victoria, *R v. Vinayagamoorthy*, VSC 148, 31 March 2010.

98 Kate Hagan, “‘Terror Arrest’ at Gunpoint: Police Warned”, *Sydney Morning Herald*, 5 February 2010, available at: www.smh.com.au/national/terror-arrest-at-gunpoint-police-warned-20100204-ngw0.html#ixzz3hRcbdx6D.

These consequences are therefore disturbing. The apparent criminalization of the provision of medical assistance is in direct contrast to a long tradition of respect and concern for the health and welfare of one's own troops, but also those of the enemy – something that has been constantly reiterated by States since the first Geneva Convention of 1864. The benefit of IHL is the reciprocity of care and treatment, for those *hors de combat* or the wounded or sick on the battlefield.⁹⁹ More generally, respect for hospitals and medical centres, and for doctors and health-care workers, has also long been a central part of international law and international discourse. This principle of IHL was reaffirmed at the 31st International Conference of the Red Cross and Red Crescent, where the Movement and States passed a resolution focused on “Health Care in Danger” and reiterated the need for States to “recall the obligations to respect and protect the wounded and sick, as well as health-care personnel and facilities” consistent with their international legal obligations.¹⁰⁰ This resolution has provided the basis of a global Movement campaign on the protection of the medical mission, acknowledging that medical personnel and services are increasingly under threat. More recently, the UN has debated the fact that health-care is increasingly under threat in both armed conflict and other situations of violence, and has again called on all parties to conflict to respect medical facilities, medical transport and medical and health-care professionals.¹⁰¹ The principle of good treatment and respect by all parties to a conflict for each other's combatants – the principle of impartiality in action – is key to the conduct of armed conflict being consistent with international law. If one side criminalizes such care and assistance, even in response to apparently indiscriminate and disproportionate conduct from the other side, the delicate balance of IHL is challenged, and the humanitarian system that has for so long supported the victims of armed conflict will come under threat.

Sanctions

In addition to the limits on the kinds of support that can be offered to populations in need, the second measure affecting humanitarian agencies is the wide range of sanctions regimes that have had a significant impact on the freedom of humanitarian action. Some of these regimes target specific groups considered a threat to international peace and security. Kate Mackintosh explains how humanitarian organizations, by bringing assistance to civilians living in areas controlled by people or groups listed under these sanctions regimes, could be seen as providing “material support” to terrorists.¹⁰² Using the US laws as an

99 GC I, Art. 12; GC II, Art. 12; GC III, Art. 16.

100 Health Care in Danger, Resolution 5, 31st Conference of the International Red Cross and Red Crescent Movement, 2011, para. 1, available at: www.icrc.org/eng/resources/documents/resolution/31-international-conference-resolution-5-2011.htm.

101 United Nations, “Governments, International Community Must Better Protect Health-Care Workers, Facilities during Armed Conflict, Deputy Secretary-General Tells High-level Event”, press release, DSG/SM/805-IHA/1345, 25 September 2014, available at: www.un.org/press/en/2014/dsgsm805.doc.htm.

102 Kate Mackintosh, “Holder v Humanitarian Law Project: Implications for Humanitarian Action: A View from Médecins Sans Frontières”, *Suffolk Transnational Law Review*, Vol. 34, No. 3, 2011.

example, Mackintosh says, “as long as the individual who provides any of the listed resources knows either that the group is on the list or that it engages in terrorist activities as defined by U.S. law, he or she will be in violation of U.S. criminal law”.¹⁰³ These sorts of restrictions expose humanitarian organizations and their staff to criminal liability, which was the case with the Humanitarian Law Project’s training activities in *Holder*.¹⁰⁴

As many scholars have observed, Somalia has become a leading case study for the humanitarian fallout, and decline in the perception of principled humanitarian action, resulting from the inability of NGOs to make the necessary assurances against aid misappropriation under sanctions regimes.¹⁰⁵ In 2008, UNSC Resolution 1844¹⁰⁶ implemented sanctions against organizations and individuals in Somalia, including Islamist DTO Al-Shabaab, which controlled a significant amount of territory in southern Somalia. The result was a suspension of a much-needed \$50 million in humanitarian aid to Somalia in 2009.¹⁰⁷ In 2010, the USAID Famine Early Warning Systems Network first anticipated the food crisis in Somalia. In that same year, the UNSC created a humanitarian exemption to the Somali sanctions regime due to the “importance of humanitarian aid operations”.¹⁰⁸ Despite this, humanitarian agencies were still slow to respond¹⁰⁹ and the US government did not issue even limited licences to NGOs until August 2011, by which time the famine had reached its peak.

While the causes of the famine are complex and multidimensional and will not be addressed in this paper, it is estimated that nearly 260,000 people died, half of them children younger than five years old. The myriad difficulties in delivering humanitarian assistance – the demands of al-Shabaab, general insecurity in the region, and the complexities and fear of prosecution under counterterrorism legislation – all contributed to the fact that 4.6% of the overall population in southern Somalia died.¹¹⁰ This is a clear indicator that the humanitarian system is at breaking point, and work needs to be done to address these difficult issues.

In Australia, UN sanctions regimes are given effect under the Charter of the United Nations Act 1945 (Cth) (UN Charter Act).¹¹¹ Under this act, the foreign minister is granted the power to list proscribed persons or entities for the purposes of implementing UNSC resolutions, including Resolution 1373.¹¹² Australia also imposes restrictions on financing terrorism through autonomous

103 *Ibid.*

104 *Ibid.*

105 K. Mackintosh and P. Duplat, above note 43, p. 81.

106 UNSC Res. 1844, 20 November 2008.

107 S. Pantuliano, K. Mackintosh and S. Elhawary with V. Metcalfe, above note 71, p. 7.

108 UNSC Res. 1916, 19 March 2010, para. 5.

109 Charity & Security Network, *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States*, June 2012, p. 50.

110 Robyn Dixon, “U.S. Policy Seen as Factor in Somalia Famine Deaths”, *Los Angeles Times*, 2 May 2013, available at: <http://articles.latimes.com/2013/may/02/world/la-fg-somalia-famine-20130503>.

111 Charter of the United Nations Act 1945 (Cth) (UN Charter Act).

112 UNSC Res. 1373, 28 September 2001.

sanctions regimes, which may supplement UNSC sanctions.¹¹³ Both sets of sanction laws dictate the “consolidated list” of proscribed persons and entities, which at the time of writing contained the names of 3,091 individuals and entities that are subject to asset freezes and/or travel bans under the laws.¹¹⁴ Any breach of these sanction laws will trigger penalties of up to ten years’ imprisonment as well as substantial fines.¹¹⁵

Section 21 of the UN Charter Act makes it an offence to directly or indirectly make any assets available to proscribed persons or entities as listed by the foreign minister.¹¹⁶ Strict liability applies to this offence, meaning that to fall foul of this provision, there is no need for an individual to have intended to support terrorism – simply the act of providing an asset to a proscribed person or entity will suffice.¹¹⁷ The Supreme Court of Victoria has further interpreted this mental element, holding that “it is sufficient for the prosecution to show that any accused was aware of a substantial risk of proscription and that such a risk was unjustifiable”,¹¹⁸ thus essentially finding “recklessness” to be the relevant mental test for this offence.

This Supreme Court case, *R v. Vinayagamoorthy*, concerned three Tamil Australians who were being prosecuted under the UN Charter Act for providing resources to the LTTE.¹¹⁹ The defendants pleaded guilty to the charges, but maintained that the funds and materials provided were solely humanitarian in nature. In sentencing them, the Court accepted that their motivations were “to assist the Tamil community in Sri Lanka” and that “the only real vehicle to do so was by dealing with the LTTE”. Although satisfied that their general motivations had a “humanitarian bent”, the Court did not find their contributions to be “solely confined to humanitarian work”,¹²⁰ and thus handed down their sentences. However, the Court did take the humanitarian nature of their acts into consideration and recognized this to the extent that in “the interests of justice” they were released on recognizance release orders.¹²¹ The Court’s decision in this instance was borne not of a humanitarian exemption, as the UN Charter Act contains no such exemption, but rather from the Court’s own discretion in sentencing. While this decision brings some relief to humanitarian organizations that operate in this context, it is less than ideal that humanitarian agencies must simply hope that, if prosecuted, a Court would come to the same determination.

113 Australian Government, Transaction Reports and Analysis Centre, *Terrorism Financing in Australia 2014*, 2014, p. 11. See also Autonomous Sanctions Act 2011 (Cth).

114 As of 4 June 2015. Australian Government, Department of Foreign Affairs and Trade, *Australia and Sanctions: The Consolidated List*, 4 June 2015, available at: <http://dfat.gov.au/international-relations/security/sanctions/Pages/consolidated-list.aspx>.

115 Australian Government, Transaction Reports and Analysis Centre, above note 113, p. 11.

116 UN Charter Act, section 21.

117 *Ibid.*, section 21(2).

118 Supreme Court of Victoria, *Vinayagamoorthy*, above note 97.

119 *Ibid.*

120 *Ibid.*, para. 59.

121 *Ibid.*, paras 67, 69.

Contractual obligations

In addition to limiting the scope and nature of permissible activities and beneficiaries, many States have imposed contractual obligations on humanitarian organizations working in complex environments. The contracts effectively require the organization and/or its partners to cooperate with counterterrorism efforts.¹²² A recent study conducted by the Harvard Law School Counterterrorism and Humanitarian Engagement Project noted that some contracts go so far as to include statements adopting common counterterrorism postures by the donors and humanitarian organizations alike, noting for example that they are both “firmly committed to the international fight against terrorism”.¹²³ While these measures exist, in large part, to counter financing of terrorism, they place significant responsibilities on humanitarian actors¹²⁴ and threaten the neutrality and independence of humanitarian agencies. One example of the types of requirements placed on NGOs is USAID’s Partner Vetting System,¹²⁵ which requires “foreign assistance grant applicants to submit detailed personal information on leaders and staff of local partner charities to be shared with US intelligence agencies”.¹²⁶ This contractual requirement effectively turns humanitarian NGOs into intelligence gatherers,¹²⁷ in direct violation of the principles of neutrality and independence. What this means in practice is that humanitarian organizations are increasingly perceived as collectors of information for US intelligence agencies by those to whom they ought to be seen as neutral. There are concerns that this dynamic is severely hampering the efforts of humanitarian organizations to bring assistance to civilians residing in territory under the control of a DTO.¹²⁸ It is also interesting that nearly all of the humanitarian organizations which took part in the Counterterrorism and Humanitarian Engagement Project noted that they drew “a ‘red line’ at screening the ultimate beneficiaries”.¹²⁹

Australia has also incorporated counterterrorism measures into contractual agreements with humanitarian agencies. Further to the allegations described above, made by Shurat HaDin against World Vision Australia and AusAID,¹³⁰ allegations were also made against the broader Australia Middle East NGO Cooperation Agreement (AMENCA), which is a \$35.4 million programme supporting

122 K. Mackintosh, above note 102, p. 510.

123 Counterterrorism and Humanitarian Engagement Project, *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations*, May 2014, p. 3 and Annex 1D.

124 *Ibid.*, p. 10.

125 Counterterrorism and Humanitarian Engagement Project, *Partner Vetting in Humanitarian Assistance: An Overview of Pilot USAID and State Department Programs*, Research and Policy Paper, November 2013.

126 Charity & Security Network, above note 109, p. 15.

127 Counterterrorism and Humanitarian Engagement Project, above note 125, p. 4.

128 *Ibid.*, p. 15.

129 *Ibid.*, p. 41.

130 NGO Monitor, *World Vision*, 29 June 2014, available at: www.ngo-monitor.org/article/world_vision_international.

Australia's overall contribution to the Palestinian Territories.¹³¹ After the Australian government confirmed that the allegations were baseless, an independent review was conducted into the risk management mechanisms established in relation to counterterrorism, resulting in a number of observations surrounding the contractual obligations placed on Australian aid agencies in the humanitarian space.¹³² For instance, the assessment ascertained that, by way of a general guide, the Department of Foreign Affairs and Trade (DFAT) expects all development partners to abide by minimum due diligence standards in order to fulfil their contractual obligations in accordance with counterterrorism requirements¹³³ and to "use their 'best endeavours' to comply with Australian law", and requires "that the other party inform DFAT immediately if, during the course of the agreement, any link whatsoever to a proscribed person or entity is discovered".¹³⁴

The independent assessment also reviewed all agreements between the AMENCA NGO partners and those NGOs' implementing partners, determining that each agreement included a clause committing the partner NGO to counterterrorism.¹³⁵ One agreement even makes reference to anti-terror laws of the partner's own country, the reach of UNSC Resolution 1373, and other international anti-terrorism conventions. In 2013, DFAT then introduced a series of contractual amendments, including a spot check system, designed to check up on the due diligence and financials of partner NGOs. This mechanism includes a system in which second-tier partners carry out regular checks of names of individuals and organizations against the DFAT Consolidated List.¹³⁶ This particular requirement could lead humanitarian organizations partnering with DFAT to be perceived as collecting intelligence information in direct contravention to the principles of neutrality and independence. In addition, these requirements could be jeopardizing the humanitarian principles by disallowing the distribution of aid and assistance when funding might potentially reach those on the consolidated list. Specifically, this threatens the provision of impartial humanitarian assistance.

It is noteworthy that not all States are requiring counterterrorism measures in grant and partnership contracts. While the United States, Canada, Australia and the UK have robust counterterrorism-related donor requirements, the contracts developed by other States, such as Denmark, Norway, Sweden and Switzerland,

131 Department of Foreign Affairs and Trade, *Risk Management Review of the Australia-Middle East NGO Cooperation Agreement*, Final Report, May 2014, p. 2.

132 *Ibid.*

133 These requirements include "to know the persons or organisations that are being directly assisted; to make sure that people or organisations being directly assisted are not on either of the lists before assistance is provided; to make sure that directly funded persons or organisations are aware of and obliged to comply with these laws; to make sure that directly funded persons or organisations in turn are obliged to make sure that their distribution of the funds or support is made on the same basis." Department of Foreign Affairs and Trade, above note 131, p. 7.

134 *Ibid.*, p. 7.

135 *Ibid.*, p. 8.

136 *Ibid.*, p. 9.

did not include any counterterrorism-related measures.¹³⁷ This raises questions as to the effectiveness of such contractual measures in the mitigation of terrorism risk and whether the deep compromise of humanitarian principles imposed by such contractual requirements results in measurable security gains.

The effects of legislation, sanctions and contracting on effective and principled provision of aid

Some of the global counterterrorism measures described above have had tangible negative impacts on the capacity of humanitarian NGOs to undertake principled humanitarian action.¹³⁸ Three particular effects will be discussed below.

The effect on access to persons and communities in need

First, these measures can affect how humanitarian actors are perceived and therefore their ability to gain access to communities in need. Humanitarian organizations may no longer be viewed as being able to provide neutral, impartial and independent assistance, and thus their very presence may be perceived as a threat,¹³⁹ not only to their fellow humanitarian organizations but also to the humanitarian principles themselves. Consequently, they may be refused access and permission to provide life-saving assistance. If humanitarian organizations, and through them the system itself, are perceived to be biased or unable to provide principled assistance in one context, it reflects on all humanitarian action and threatens the perception of the capacity of humanitarian actors in all contexts.

The effect on neutrality

A second challenge is the dependence many humanitarians have on their neutrality, for security.¹⁴⁰ When a humanitarian actor's neutrality is compromised, for whatever reason, the risk of being seen to be involved in the conflict is significantly increased. This in turn risks humanitarian workers being perceived either as "the enemy" or as working for "the enemy". Trust is critical to gaining access to conflict-affected populations in need, and when trust is absent, it is very difficult for humanitarian actors to provide assistance. In the modern world, beset by social media, a perceived lack of neutrality in one country can affect how humanitarians are perceived elsewhere, thereby reducing the respect and protection afforded to aid workers everywhere. A recent study undertaken by the Feinstein Centre noted that "[n]eutrality and impartiality are not theoretical concepts or pie-in-the-sky constructs; they are essential ingredients for effective

137 Counterterrorism and Humanitarian Engagement Project, above note 125, p. 6.

138 K. Mackintosh and P. Duplat, above note 43.

139 Fiona Terry, "The International Committee of the Red Cross in Afghanistan: Reasserting the Neutrality of Humanitarian Action", *International Review of the Red Cross*, Vol. 93, No. 881, 2011.

140 *Ibid.*

humanitarian action”.¹⁴¹ The study found that in Iraq, “[n]eutrality ... is regarded by communities and most remaining humanitarian organizations as an essential protection against targeted attack”.¹⁴²

The overall effect on principled humanitarian action

Third, it is not alarmist to say that if trust in the humanitarian system is lost, and humanitarian assistance is no longer perceived to be impartial, neutral, independent and based purely on the needs of humanity, then humanitarian organizations may lose their ability to work in complex humanitarian emergencies and in areas of armed conflict. Should this happen, the humanitarian consequences would be grave. Exemptions like those provided for in the Australian Criminal Code for humanitarian “association” with a terrorist organization¹⁴³ will work towards strengthening the historic practice of principled humanitarian action. Unlike the United States’ limited “medicine and religious materials” exemption, in the Australian context, the laws seek somewhat to uphold the principles that humanitarian aid has always represented. The New Zealand exemption, as discussed earlier, goes well beyond that.

Indeed, some measures have effectively criminalized the capacity of humanitarian agencies to provide assistance on the basis of need alone, the core tenet of humanitarian action. In addition, contractual and other obligations between donors and humanitarian actors have served to institutionalize interdependence, thereby jeopardizing independent humanitarian action. The challenge for the future of effective humanitarian response, therefore, is to reconcile security concerns that require strong and robust counterterrorism measures with the humanitarian needs and concerns of civilian populations affected by the activity of DTOs and the legal and policy provisions that bind States and humanitarian actors alike, to allow for the provision of impartial humanitarian action.

In IHL, the idea that assisting people in the territory of the enemy may assist the enemy itself is dealt with by acknowledging the role of the State in withholding or suspending consent to provide humanitarian assistance based on security concerns.¹⁴⁴ The ICRC’s Customary Law Study recognizes that the right to humanitarian assistance has entered into customary international law, and notes that the refusal to consent to the provision of humanitarian assistance must not be arbitrary.¹⁴⁵ However, while counterterrorism legislation acknowledges that not all contact with a DTO is necessarily prohibited, identification of whether such action could be used by the DTO to “free up other resources within

141 Feinstein International Center, *Humanitarian Agenda 2015: Final Report: The State of the Humanitarian Enterprise*, Tufts University, Boston, MA, p. 9.

142 *Ibid.*

143 Criminal Code, div. 102.8(4)(c).

144 AP I, Art. 70; AP II, Art. 18.

145 ICRC Customary Law Study, above note 86, Rule 55.

the organisation that may be put to violent ends”¹⁴⁶ is a matter of concern for States and humanitarian organizations alike. In the *Holder* case, this theory – the “fungibility theory” – formed the basis of the rationale put forward in the Court’s decision, wherein money is seen as fungible, and “when foreign terrorist organisations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put”.¹⁴⁷ In practice, however, identifying where this may occur and the point at which action or inaction by humanitarian actors compromises humanitarian principles is enormously difficult.

Reflections on the way forward

How, then, is it possible to best ensure that human suffering is minimized, humanitarian assistance is provided consistent with the most basic precepts of humanity, and the tensions between counterterrorism measures and humanitarian action are addressed? In the first instance, it will be necessary for States to uphold their obligations under international law while enacting domestic counterterrorism legislation. In 2006, the UN General Assembly adopted the United Nations Global Counter-Terrorism Strategy.¹⁴⁸ While supporting and encouraging States to uphold their obligations to enact domestic legislation on counterterrorism in line with the demands of the UNSC, the resolution clearly calls on States to “ensure that any measures taken to combat terrorism comply with their obligations under international law, in particular human rights law, refugee law and international humanitarian law”.¹⁴⁹ *Inter alia*, these legal obligations include a requirement to respect and ensure respect for the provisions of the Geneva Conventions, including those relating to the provision of humanitarian assistance and the impartiality and independence of humanitarian action.¹⁵⁰

Secondly, it will be necessary to encourage and implement improved humanitarian exemption clauses that enable and facilitate humanitarian action wherever the need is greatest. For example, in November 2013 the Humanitarian Assistance Facilitation Act (HAFA) was developed in the United States in recognition of the limitations on humanitarian action during the Somali famine. The bill recognized that “the prohibitions contained in ... Executive orders and the Material Support Statutes discouraged and, in some instances, prohibited donors from contributing to aid efforts for all of Somalia”.¹⁵¹ If passed, it is intended that HAFA would

146 US Supreme Court, *Holder*, above note 72, p. 8.

147 *Ibid.*, p. 26.

148 UNGA Res. 60/288, 20 September 2006.

149 *Ibid.*, Plan of Action, IV(2).

150 Common Art. 1.

151 US House of Representatives, *H. R. 3526*, 113th Congress, 1st Session, Section 2(6), available at: www.gpo.gov/fdsys/pkg/BILLS-113hr3526ih/pdf/BILLS-113hr3526ih.pdf.

permit persons subject to the jurisdiction of the United States to enter into transactions with certain sanctioned foreign persons that are customary, necessary, and incidental to the donation or provision of goods or services to prevent or alleviate the suffering of civilian populations and for other purposes.¹⁵²

On 18 November 2013, the bill was referred to the Committee on Foreign Affairs and the Committee on the Judiciary for an unspecified period of time.¹⁵³ The bill has wide support, in particular from American Red Cross and sixty-six international humanitarian NGOs including Mercy Corps, Oxfam America and World Vision, which noted that “[w]ith HAFA, we can focus on doing what we are called to do: helping people survive and overcome adversity, no matter where in the world they live”.¹⁵⁴ Yet, the fact that the proposed legislation has not progressed since 2013 may indicate that there is little appetite for exemptions for humanitarian organizations.

In Australia, although exemptions for humanitarian assistance do exist, as noted earlier, there are still severe limitations and the contractual requirements placed on humanitarian organizations continue to threaten their independence and their ability to provide impartial humanitarian assistance to those in greatest need.

Third, humanitarian organizations, the UN and States need to think about how they are able to address security concerns while continuing to provide principled humanitarian assistance, and they will need to work together to achieve the necessary balance. There is much work to be done, both by the humanitarian sector and by States, in order to better understand, support and develop modalities of operation which ensure that the needs of humanity and security are satisfied.

Finally, it has been suggested that “both customary international law ... and international agreements, such as the Geneva Conventions and Protocols, should be read in light of these emerging international [counterterrorism] norms”.¹⁵⁵ However, if it is believed that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”,¹⁵⁶ then counterterrorism law should surely be written in light of customary international law.

The 50th anniversary of the Fundamental Principles of the International Red Cross and Red Crescent Movement and the 32nd International Conference of the Red Cross and Red Crescent in 2015, as well as the World Humanitarian

¹⁵² *Ibid.*

¹⁵³ Library of Congress, “H.R.3526 – Humanitarian Assistance Facilitation Act of 2013”, available at: www.congress.gov/bill/113th-congress/house-bill/3526.

¹⁵⁴ InterAction, *Statement of 66 Organizations in Support of the Humanitarian Assistance Facilitation Act of 2013*, available at: www.interaction.org/document/statement-66-organizations-support-humanitarian-assistance-facilitation-act-2013.

¹⁵⁵ Peter Margulies, “Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid”, *Suffolk Transnational Law Review*, Vol. 34, No. 3, 2011, p. 561.

¹⁵⁶ UNGA, Universal Declaration of Human Rights, 10 December 1948, preamble, para. 1.

Summit in 2016, present timely and unique opportunities to reaffirm the humanitarian principles and bring States, the UN and humanitarian bodies together to work through some of these complex and important issues. It is only if States, the UN and humanitarian agencies genuinely commit to addressing these threats to principled humanitarian action that these critical issues can be resolved. There is no doubt that security and counterterrorism are complex and important issues that must be addressed. However, to pursue counterterrorism measures without fully considering the humanitarian consequences and the capacity for humanitarian assistance to be provided in a timely, effective and principled fashion is to misjudge the critical balance between security and humanity. Adopting appropriate and considered legislation is essential to recovering this balance, ensuring that States are fulfilling their international legal obligations and ensuring that principled humanitarian assistance can continue to reach those most in need.

