Research Paper

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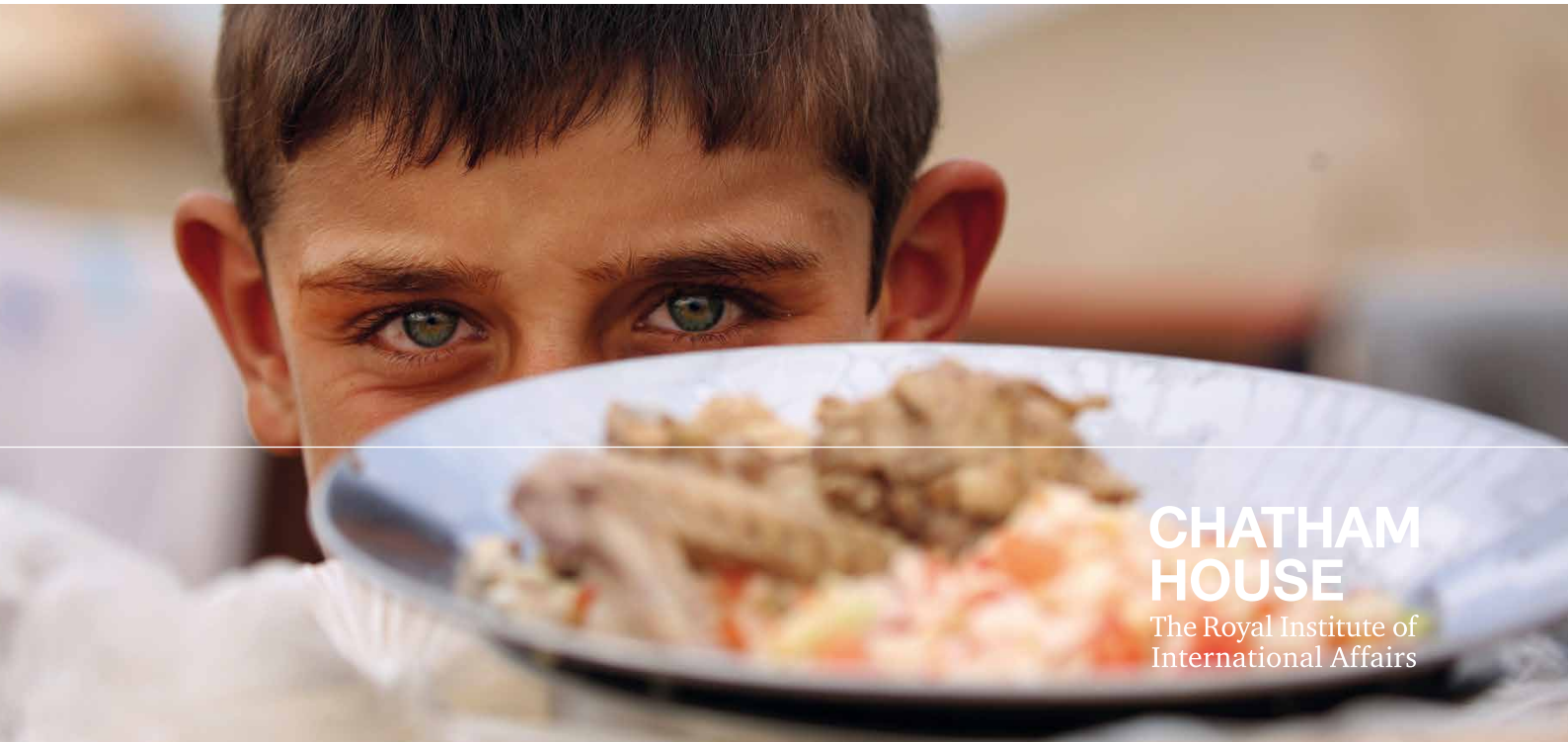
Humanitarian Action and Non-state Armed Groups

The UK Regulatory Environment



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Summary

- In delivering assistance to civilians in areas controlled by non-state armed groups (NSAGs), humanitarian actors sometimes have no choice but to make payments or provide incidental benefits to NSAGs.
- Such payments or benefits may breach EU or UK sanctions regulations. Only one sanctions regime (Somalia) includes an exemption for humanitarian activity. Some sanctions regimes permit the licensing of humanitarian activity; however the UK licensing system is opaque and may not be effective. To facilitate humanitarian activity, the UK government should seek humanitarian exemptions in multilateral sanctions regimes, and should simplify and expedite its domestic licensing system.
- In making payments or providing benefits to NSAGs, humanitarian actors may also be committing criminal offences under UK counterterrorism legislation. There have been no recent UK prosecutions of genuine humanitarian actors, and the government cites prosecutorial discretion in concluding that there is no need for further guidance or change of law. However, prosecutorial discretion is insufficient comfort for humanitarian actors anxious to avoid breaking the law, and the wide offences have a 'chilling effect'. Moreover, Department for International Development (DFID) partnership agreements require that humanitarian actors act in strict compliance with the law.
- Two parliamentary committees have recommended that the UK government explore the possibility of introducing exceptions to counterterrorism legislation for humanitarian activities. The government has dismissed these recommendations on the basis that legislative change would create a loophole open to exploitation. The recommendations should be explored further, taking account of overseas legislation and international instruments. The UK government could also consider clarifying how prosecutorial discretion will be exercised, and/or providing speedy guidance to humanitarian actors on notification of specific proposed activities, as the Office of Foreign Assets Control (OFAC) does in the US.
- UK legislation and guidance is reducing the appetite of banks to hold funds or engage in transactions for humanitarian actors who deal with NSAGs, with significant impact on humanitarian actors' ability to operate effectively. The government should consider assertive steps to tackle this challenge, and should encourage international dialogue.
- Because the challenges concerning humanitarian assistance in areas controlled by NSAGs arise from conflicting UK government counterterrorism and humanitarian priorities, several government departments are responsible for relevant aspects of policy. In recognition of this, efforts are in progress to develop a whole-of-government approach. The government is also establishing a cross-sectoral working group with the NGO community and banking sector to improve mutual understanding.
- These developments are welcome, but the UK government should consider further steps to ensure a clear, unified approach to reconciling its counterterrorism and humanitarian priorities. While maintaining the effectiveness of sanctions and counterterrorism legislation against true offenders, the government should ensure that impediments to the legitimate delivery of aid are minimized.

Introduction

In the UK, humanitarian actors' engagement with non-state armed groups (NSAGs) lies on the fault line between two competing government priorities: support for humanitarian activity and countering terrorist financing. At times, measures aimed at combating terrorist financing have not taken sufficient account of humanitarian activity, although around 20 per cent (£1.2 billion)[1] of UK government bilateral overseas development assistance is delivered through humanitarian actors (defined here as UK-based NGOs providing humanitarian relief overseas), and the government actively promotes humanitarian relief, for example as part of the response to the crisis in Syria.[2]

This paper outlines elements of the UK regulatory framework that do or could adversely affect humanitarian action in areas controlled by NSAGs. The first section examines the potential impact of UK sanctions and counterterrorism legislation, and Charity Commission regulation, on the activities of humanitarian actors operating overseas. It also notes, but does not discuss in detail, the possible impact of other states' legislative regimes on UK-based actors. The following two sections address, respectively, the impact of Department for International Development (DFID) funding agreements and banking regulation. The final section outlines initiatives being undertaken by the UK government to address concerns about the current framework and challenges yet to be tackled, and considers proposals for further action.

UK legislation and regulation that can adversely affect humanitarian action overseas

EU and UK sanctions legislation

EU and UK sanctions legislation may make it an offence for humanitarian actors to make payments to designated entities or to hand over any relief goods or equipment to them, even if they have no choice but to do so.

UN Security Council sanctions usually require UN member states to ensure that neither their nationals nor people or organizations located in their territory make available any funds, financial assets or economic resources to, or for the benefit of, designated persons or entities.[3] In the EU, Security Council sanctions are implemented through EU regulations; and the EU may also impose additional restrictive measures, including asset-freezing measures, either to reinforce Security Council measures or autonomously. As at October 2016 the EU had restrictive measures in force (of widely varying scope) in respect of persons and entities listed as terrorist;[4] the Taliban;[5] Al Qaeda and ISIL (Da'esh);[6] and named prominent individuals, entities or government actors from around 30 states.[7]

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[1] Department for International Development (2016), Civil Society Partnership Review – FAQs, https://www.gov.uk/government/publications/civil-society-partnership-review/civil-society-partnership-review-faqs#how-much-does-dfid-currently-spend-through-csos (accessed 13 Jan. 2017).
[2] Supporting Syria Conference, February 2016.
[3] For example, UN Security Council Resolution 1267 (1999): 'Decides further that … all States shall … (b) Freeze funds and other financial resources … as designated by the Committee … and ensure that neither they nor any other funds or financial resources so designated are made available … to or for the benefit of the Taliban …' See Gillard, E. (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*, Research Paper, London: Royal Institute of International Affairs.
[4] EC Regulation 2580/2001, implementing UNSC Resolution 1373/2001.
[5] EU Regulation 753/2011.
[6] EC Regulation 881/2002, EU Regulation 2016/1686.
[7] Consolidated list of EU sanctions in force: https://eeas.europa.eu/sites/eeas/files/restrictive_measures-2016-10-11-clean.pdf (accessed 13 Jan. 2017). *Note that renderings of names of entities in this paper follow the usage in pertinent documentation and may thus differ according to context; renderings may also differ from those in other papers in the series*.

It is not only the asset-freezing provisions of sanctions regulations that may impact on the work of humanitarian actors. For example, the EU's Syria sanctions[8] include broad prohibitions on dealings with the Syrian regime and actors within Syria. Until December 2016 the sanctions measures included a prohibition on the purchase of crude oil or petroleum products in Syria,[9] a restriction that could significantly impede or even prevent some day-to-day operations by humanitarian actors. This prohibition has now been revoked for humanitarian actors that receive public funding from the EU or member states to provide humanitarian relief to civilians in Syria.[10]

The EU regulations currently have direct legal effect in the UK, and the UK makes statutory instruments[11] to provide for the penalties for any breaches of EU sanctions. For example, the Al-Qaida (Asset-Freezing) Regulations 2011 put in place criminal penalties for breach of EU financial sanctions against that organization.

In addition to directly applicable EU regulations, UK legislation establishes asset-freezing regimes that may impact on humanitarian interaction with NSAGs. As these regimes are narrowly targeted, however, they are only rarely likely to affect the work of humanitarian actors. First, under Part II of the Anti-Terrorism, Crime and Security Act 2001 (ATCSA 2001), the Treasury may prohibit UK-based individuals or entities from making funds available to a named overseas government or an overseas resident whom the Treasury reasonably believes has taken, or is likely to take, action constituting a threat to the life and property of UK citizens or residents, or action to the detriment of the UK economy.[12] Second, the Terrorist Asset-Freezing etc. Act 2010 (TAFA 2010), which implements UN Security Council Resolution 1373 (2001), makes it an offence for UK-based individuals or entities to make funds available to, or for the benefit of, a person or group designated as terrorist either by EU Regulation or by HM Treasury.[13] Making funds available for a benign purpose (such as to enable delivery of humanitarian aid) is no defence, but the risk of prosecution is tempered by the requirement of Treasury/Director of Public Prosecutions (ATCSA[14]) or Attorney General (TAFA[15]) consent to prosecutions. If an offence is committed by an organization such as a charity, the directors or trustees of the organization, in addition to the organization itself, will be guilty of the offence if it was committed with their knowledge or is attributable to their neglect.[16]

The Treasury's Office of Financial Sanctions Implementation (OFSI) maintains a consolidated list of financial sanctions targets, available online. It also maintains online guidance on financial sanctions.[17]

[8] Council Regulation (EU) No 36/2012 and 509/2012.
[9] Council Regulation (EU) No 36/2012 Art 6(b).
[10] Council Regulation (EU) No 2016/2137.
[11] Made under section 2(2) European Communities Act 1972.
[12] Section 4 ATCSA 2001.
[13] Sections 12 & 13 TAFA 2010.
[14] ATCSA 2001 Schedule 3 para 8(2).
[15] TAFA 2010 section 37.
[16] TAFA 2010 section 34. This may also be the case in respect of an ATCSA freezing order depending on the provisions of the order (ATCSA Schedule 3 para 9).
[17] Office of Financial Sanctions Implementation, HM Treasury (2016), *Financial Sanctions: Guidance*, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/513838/OFSI_Financial_Sanctions_-_Guidance_-_December_2016_Final.pdf (accessed 13 Jan. 2017).

Exemptions and licences

The EU's Somalia sanctions mirror the humanitarian exemption in the UN regime that they implement.[18] Some other EU sanctions, such as EU's Syria and Libya sanctions, allow member-state authorities to license the release of funds for humanitarian purposes.[19] In addition, both the UK asset-freezing regimes discussed above include a general power to issue licences permitting activity otherwise caught by the prohibition.[20]

In the UK, as in other states, the operation of the licensing system is opaque. Paradigm licences are for transactions that help meet the basic needs of a designated person: for example, the general licences issued under the UK asset-freezing regimes enable the provision of insurance, payment of legal fees and handling of prison funds of designated individuals.[21] While the OFSI Guidance explains the process for obtaining a licence, it does not set out the criteria by which licence applications will be assessed. There is no guidance for any actors, such as humanitarian actors, who may wish to transfer funds in situations where risk may have to be managed rather than eliminated; nor are there published guidelines for government decision-makers on how applications for licences for humanitarian purposes should be assessed. There are no publicly available statistics on how many licences for humanitarian purposes are sought or granted; nor are examples of licences granted to humanitarian actors publicly available. One humanitarian actor applied for a licence to purchase fuel in Syria to enable it to operate sewage facilities; the licence was delayed and eventually denied.[22]

Humanitarian actors may be reluctant to apply for a licence, either because of the risk that the application will be denied, or because of the risk that the granting of a licence in itself generates a perception among those the licence-holder deals with – including the government and banks – that the actor is operating at the limits of legality. Some humanitarian actors consider that the time taken to decide on an application makes the process a significant hindrance to their operations, and others are concerned that licences may be subject to onerous reporting conditions. There is therefore a significant risk that the current licensing regime discourages applications for licences to enable legitimate humanitarian activity, with the result that this activity either does not take place at all or takes place in breach of sanctions.

Proceedings for breach of sanctions legislation

There appear to have been no UK prosecutions against humanitarian actors for breach of sanctions. The Policing and Crime Bill currently before parliament would increase the range of tools available to enforce financial sanctions regimes, for example by making provision for prosecution to be deferred if agreement is reached, for targeted orders to prohibit specified activity, and for a new monetary penalties regime as an alternative to criminal prosecution. The bill would also increase the maximum penalty for breach of financial sanctions from two to seven years. These steps are viewed as a toughening of the UK's enforcement regime, as well as allowing for appropriate action to be taken in cases that merit more than a warning letter but less than a prosecution.

[18] Council Regulation (EU) No 356/2010, Article 4(1).
[19] Syria: Council Regulation (EU) No 36/2012, Article 16(f); Libya: Council Regulation (EU) 2016/44, Article 10.
[20] Section 17 TAFA 2010; Schedule 3, para 4 ATCSA 2001.
[21] A list of general licences under the 'Terrorism and Terrorist Financing' and 'Al Qaida' regimes (last updated 7 August 2013) is available at: https://www.gov.uk/government/publications/counter-financing-of-terrorism-general-licenses.
[22] As noted above on p. 3, the requirement for a licence in these circumstances was revoked in December 2016.

Counterterrorism legislation

UK counterterrorism legislation defines terrorism and terrorism-related offences broadly, and tempers that breadth by requiring the consent of the Attorney General or Director of Public Prosecutions to prosecutions for some offences. The breadth of the offences, with no exemptions for humanitarian activities, creates the possibility that meetings with NSAGs, fundraising for areas they control, and transfers of funds to NSAGs may be perceived to fall within their scope. The legislation also imposes rigorous reporting obligations concerning suspected offences.

For the purposes of all the offences, UK legislation adopts the same definition of terrorism.[23] This has three elements: the use or threat of serious violence (of all forms, including the creation of a serious risk to health and safety or serious interference with an electronic system); that is designed to influence a government or an international governmental organization or to intimidate the public (omitted if the violence involves use of firearms or explosives); and is for the purpose of advancing a political, religious, racial or ideological cause.

For the purposes of the Terrorism Act 2000 (TA 2000), action taken for the purposes of terrorism also includes action taken for the benefit of a proscribed organization – referring to organizations proscribed by the Home Secretary because they are concerned in terrorism.[24] As at December 2016 there were 71 proscribed international organizations,[25] including groups such as ISIL/Da'esh that control territory in which civilians are in need of humanitarian assistance.[26]

The territorial scope of terrorism is also broadly defined, in that constituent elements can take place within or outside the UK, and the 'government' and 'public' can be those of the UK, a part of the UK, or elsewhere. The offences cover activity in the UK and overseas, except that the meeting-related offence only concerns conduct that takes place within the UK. Incorporated charities, charity trustees, their employees and volunteers may all be prosecuted. However, even if an offence is committed overseas, an individual can only be arrested, charged and prosecuted if present in or extradited to the United Kingdom.

This broad definition of terrorism means that, in the words of the Independent Reviewer of Terrorism Legislation, cited by the Supreme Court, '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'.[27] Hence it is likely to include many NSAGs with which humanitarian actors interact.

Raising and providing funds to terrorists

Section 15 TA 2000 makes it an offence to raise funds or provide funds or other property intending or having reasonable cause to suspect that they may be used for the purposes of terrorism, as defined. Section 16 makes it an offence to use money or other property for the purposes of terrorism, or to possess money or other property and to intend that it be used, or have reasonable cause to suspect that it may be used, for the purposes of terrorism.

Humanitarian actors may therefore commit an offence if they raise funds for or transfer funds or other aid to a NSAG, suspecting that the NSAG may use the funds for activities that fall within the

[23] TA 2000 section 1.
[24] TA 2000 sections 1(5), 3.
[25] As well as 14 proscribed organizations in Northern Ireland.
[26] Home Office (2016), 'Proscribed Terrorist Organisations', https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/578385/201612_Proscription.pdf (accessed 13 Jan. 2017).
[27] *R v Gul* (2013) SC 64, para. 61.

UK definition of terrorism. This is the case even if the funds are incidental payments such as access fees, and even if humanitarian actors have no choice but to transfer the funds to the NSAG.

Meetings

Section 12 TA 2000 makes it an offence for anyone to arrange, manage or assist in arranging or managing a meeting that is to be addressed by a person who belongs to a proscribed organization, or which is to support or further the activities of that organization. However, this offence only applies in respect of conduct within the UK, and 'genuinely benign' meetings with proscribed groups are permitted.[28] UK government guidance states:

> A 'genuinely benign' meeting is interpreted as a meeting at which the terrorist activities of the group are not promoted or encouraged, for example, a meeting designed to encourage a designated group to engage in a peace process or facilitate delivery of humanitarian aid where this does not involve knowingly transferring assets to a proscribed organisation.[29]

Hence humanitarian actors operating overseas are unlikely to commit this offence.[30]

Reporting requirements

Section 19 TA 2000 requires reporting of belief or suspicion that a terrorist funding offence has been committed. Failure to report is a criminal offence.

This is potentially an onerous requirement for humanitarian actors. Because terrorism is so broadly defined, and includes non-UK activity, UK-based humanitarian actors and their employees have an obligation to report on suspicious activity not only on the part of their own organizations but also by their partners or associates overseas, even if those partners or associates have no connection with the UK. The Charity Commission, as discussed below, has recently published a regulatory alert to charities in order to raise awareness of reporting requirements and emphasize the possibility of prosecution for failure to report.[31]

Humanitarian actors have been nervous about reporting, including on diversion of their assets by proscribed organizations, given the risk of prosecution as well as reputational damage. Some consider the legal reporting requirement to be unreasonably broad.[32] The police and Charity Commission are working to build a more positive culture around reporting.[33]

Proceedings for breach of counterterrorism legislation

There have been no recent prosecutions of UK humanitarian actors under counterterrorism legislation. The Home Office/HM Treasury guidance states: 'The risk that an individual or a body of persons corporate or unincorporated will be prosecuted for a terrorism offence as a result of their involvement in humanitarian efforts or conflict resolution is low'.[34]

[28] Government's Explanatory Notes to section 12 TA 2000.
[29] Home Office and HM Treasury Office of Financial Sanctions Implementation (2016), 'For information note: operating within counter-terrorism legislation', https://www.gov.uk/government/publications/operating-within-counter-terrorism-legislation(accessed 13 Jan. 2017).
[30] It is possible that the legislation covers NGOs working in the UK to arrange for activities overseas, but seems unlikely given the permission for 'genuinely benign' meetings.
[31] Charity Commission: Terrorism Act alert, 30 September 2015.
[32] International Law Programme and International Security Department (2015), *UN Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action*, Meeting Summary, London: Royal Institute of International Affairs.
[33] Charity Commission: Terrorism Act alert, 30 September 2015.
[34] See footnote 29.

There have been a few prosecutions for fundraising for the purposes of terrorism, but these have been against rogue individuals rather than in respect of genuine humanitarian activity. For example, in *R v Irfan Naseer and others* (21 February 2013), three individuals were convicted of raising funds for terrorism after collecting £14,000 for a plotted attack in Birmingham while wearing vests and using the collection buckets of the charity Muslim Aid. A Muslim Aid volunteer was found guilty of assisting with the plot. And in *R v Ul-Haq* (10 February 2016), an individual was convicted of funding terrorism after seeking donations via Twitter supposedly to support humanitarian aid convoys to Syria.

In September 2015 the Charity Commission reported that the National Terrorist Financial Investigation Unit and the Crown Prosecution Service had decided it was not in the public interest to prosecute one charity that had failed to report an incident in a timely manner as required by section 19 TA 2000.[35]

Despite the lack of prosecutions, some NGOs report that the counterterrorism legislation has a significant impact on their operations. According to the Overseas Development Institute (ODI), several UK-based humanitarian actors have suspended operations in parts of Syria under control of Islamic State or other proscribed groups for fear of prosecution.[36] Leaders of humanitarian organizations gave some specific examples, for example concerning Somalia and Gaza, to a parliamentary committee in 2014.[37] However, there are few specific data available on impact, and ODI found that 'only a handful of [humanitarian actors] were able to provide detailed examples of how counter-terrorism measures had affected their work'.[38] Humanitarian actors, whose primary concern is to deliver aid to those most in need, may be reluctant to discuss the constraints they face for fear of alerting the UK authorities to potential offences. Accurately ascribing causation to counterterrorism legislation as opposed to other (legal, security, political) factors in complex operating environments may also be challenging.[39]

The Charity Commission: role and investigations

The Charity Commission registers and regulates all charities in England and Wales, including humanitarian actors. It provides services to help charities operate effectively and lawfully, publishes information about each charity, ensures charities meet their legal requirements and takes enforcement action when there is malpractice or misconduct. It has no criminal investigatory powers. The Charity Commission has published guidance for all charities on the UK's counterterrorism legislation.[40] Its Counter-terrorism Strategy recognizes the challenges facing charities working overseas:

> 4.4 … It would be profoundly undesirable if an unintended consequence of a counter-terrorism strategy were to make it impossible for legitimate overseas aid charities to be involved in providing aid, or make it impossible for any charity to provide aid in particular parts of the world …
>
> 4.5 … The commission has been working with government and the sector to clarify how humanitarian aid can continue in such areas while remaining within the law and it will continue to do so.[41]

Despite this strategic statement, the Charity Commission's guidance appears to indicate that charities should not operate where there is an unavoidable risk of inadvertently financing terrorism:

[35] Charity Commission: Terrorism Act Alert, 30 September 2015.
[36] Metcalfe-Hough, V. Keatinge, T. and Pantuliano, S. (2015), *UK humanitarian aid in the age of counter-terrorism: perceptions and reality*, HPG Working Paper, London: Overseas Development Institute, p. 5.
[37] Oral evidence to Joint Committee on the Draft Protection of Charities Bill, discussed below.
[38] Metcalfe-Hough et al. (2015), *UK humanitarian aid in the age of counter-terrorism*, p. 34.
[39] Mackintosh, K. and Duplat, P. (2013) *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action*, p. 71.
[40] Charity Commission, *Compliance Toolkit: Protecting charities from harm*, Chapter 1: Charities and Terrorism.
[41] Charity Commission, *Counter-terrorism Strategy*, revised September 2015.

> Charities working internationally must ensure their [financial abuse] risk assessments take into account any relevant circumstances arising in their particular country or region of operation … At the extreme, where the risks are considered too high, the appropriate decision may be to stop working in that region, either temporarily or permanently.[42]

The Charity Commission monitors use of charitable funds to ensure, among other things, that they are not used for terrorism. For example, in 2014 it announced statutory inquiries into five charities set up to provide humanitarian assistance in Syria, with a view to establishing the end use of their funds. It has not yet announced the conclusion of those inquiries.

Impact of overseas law

Just as the UK's legislation has extraterritorial effect, so other states' regulation with extraterritorial reach can affect the operations of UK-based humanitarian actors and banks. In the US, the scope of liability is broadened by the fact that in addition to criminal prosecutions, civil actions may be brought by those injured by an act of terrorism.[43] To give one example, National Westminster Bank plc (NatWest), a UK bank, is facing civil proceedings in the US brought by victims of attacks attributed to Hamas.[44] Their complaint is that between 1996 and 2007 NatWest provided banking services and maintained accounts for the UK-registered charity Interpal, which the US Treasury designated a Specially Designated Global Terrorist (SDGT) in 2003 on account of alleged links with Hamas. The Financial Sanctions Unit of the Bank of England reviewed the charity at NatWest's request in view of the SDGT designation, and assured NatWest that it need not close the accounts it provided. In 2006 a district judge of the Eastern District of New York largely denied NatWest's motion to dismiss the complaint, on the basis that the court should not decline to apply US law just because UK law takes a more lenient approach.[45] Proceedings are now continuing on the basis that US law applies, and full trial is awaited. Cases such as this are likely to have contributed to banks' impetus to de-risk (see below).

DFID funding agreements

DFID spends around 20 per cent (£1.2 billion) of its bilateral budget through civil society organizations.[46] Its partner agreements require humanitarian actors to have appropriate policies and processes in place to comply with UK counterterrorism legislation and to minimize the potential for inadvertently funding or transferring assets to organizations that UK law may perceive as terrorist. If breach of a funding agreement is suspected, further funding may be suspended pending investigation and ultimately may be withdrawn.

DFID's Due Diligence Guide[47] sets out its due diligence expectations of its funding partners. The Due Diligence Framework it establishes includes specific additional due diligence requirements applicable when DFID is funding aid in environments in which terrorist organizations operate. DFID officials must then assess, for example, how the proposed partner ensures compliance with laws and

[42] Charity Commission, *Compliance Toolkit*, Chapter 1, Module 7, 'Terrorist Financing', p. 3.
[43] See Doyle. C. (2016), *Terrorist Material Support: An Overview of 18 USC 2339A and 2339B*, Report for Congress, Congressional Research Service, https://www.fas.org/sgp/crs/natsec/R41333.pdf (accessed 13 Jan. 2017).
[44] *Weiss v National Westminster Bank plc,* US District Court for the Eastern District of New York.
[45] 453 F. Supp.2d 609 (2006).
[46] Department for International Development (2016), Guidance: Civil Society Partnership Review – FAQs, https://www.gov.uk/government/publications/civil-society-partnership-review/civil-society-partnership-review-faqs#how-much-does-dfid-currently-spend-through-csos (accessed 13 Jan. 2017).
[47] Department for International Development (undated), Due Diligence Guide, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/365186/Due-Diligence-framework.pdf (accessed 13 Jan. 2017).

regulations; how it manages risk in the context of its work; how the programme will be managed; whether there is a risk of funds being diverted; and how the partner informs its own local partners of the requirements of UK counterterrorism legislation.

There is some ambiguity in the guidance about the level of risk of breach of counterterrorism legislation that DFID will tolerate. On the one hand, the Due Diligence Guide takes a risk-based approach, stating that: 'The overarching principle is that, before working with any partner, we have a reasonable level of assurance that DFID aid will be correctly applied to achieve the desired objectives …'[48] On the other, the guidance on counterterrorism financing appears less tolerant of risk: 'If there was to be a proven case of aid funds being associated with terrorist activity, not only would aid not reach those in need, this could contravene counter-terrorism laws. DFID's reputation would also be adversely affected and our ability to continue working in specific areas or with some governments compromised.'[49] There is no discussion of, for example, any circumstances in which incidental or forced payments such as access fees may be tolerated.

Among humanitarian actors, there is some concern that partnership agreements for delivery of aid in areas controlled by NSAGs, such as parts of Syria or Gaza, require them to bear undue risk of committing criminal offences without government provision of any exemptions or guidance as to the limits of steps they are expected to take. They point out the contrast with more extensive government guidance on appropriate measures to comply with anti-bribery legislation.[50]

The banking sector

UK legislation and guidance is reducing the appetite of banks to hold funds or engage in transactions for humanitarian actors who deal with NSAGs. Section 17 TA 2000 makes it an offence to become concerned in any arrangement as a result of which money or property is made available to another, knowing or having reasonable cause to suspect that it will, or may be, used for the purposes of terrorism. It also creates an offence of money laundering in respect of terrorist property. Sections 11–15 TAFA 2010 constitute offences of making funds or financial services available, directly or indirectly, to or for the benefit of terrorism with knowledge or reasonable cause to suspect that this is the case.

Sanctions legislation requires banks to freeze any funds or economic resources of a designated person, and creates offences of making funds or economic resources available to or for the benefit of a designated person. Unless an exception has been licensed, banks must not provide financial services directly or indirectly for the benefit of a designated person. Banks must provide the Treasury with information to facilitate compliance with the asset freeze, for example if they know or have reasonable cause to suspect that a person has breached the terms of sanctions.

The Financial Conduct Authority (FCA), an independent public body accountable to the Treasury and parliament, regulates financial services and markets in the UK. Its guidance to banks on preventing financial crime[51] encourages a risk-averse approach with respect to all forms of financial crime, including terrorist financing and money laundering, but does not refer specifically to humanitarian actors.

[48] Ibid., p 3.
[49] Ibid., p. 24.
[50] See Ministry of Justice (2012), *The Bribery Act 2010: Quick Start Guide*, and *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing*, and related videos, https://www.gov.uk/government/publications/bribery-act-2010-guidance.
[51] Financial Conduct Authority (2015), *Financial Crime: A Guide for Firms,* London: Financial Conduct Authority.

There is a widespread perception that banks are becoming more risk-averse, and consequently are closing humanitarian actors' bank accounts or declining to transfer funds to conflict-affected areas.[52] There have been many reports of charity bank accounts being closed, or of charities being unable to open accounts. Some charities, particularly smaller ones, are forced to operate without bank accounts, and cash transactions are becoming more prevalent.[53] A recent study for the FCA[54] noted that it was not possible to quantify the number of charities affected, but there was 'a fear [in the NGO sector] that an avalanche of derisking in the not too distant future that might affect hundreds of charities', and that the threat is 'existential' to small charities.[55] In March 2016 12 UK-based humanitarian actors wrote an open letter to the prime minister expressing concern that the risk-averse approach being adopted by banks was 'slowing down or blocking the flow of funds to Syria and neighbouring countries, hindering efforts to help the people most affected by armed violence'.[56]

In addition, the costs of legal advice on, and due diligence to comply with, sanctions and other regulatory regimes in order to maintain bank accounts have become prohibitively expensive for some humanitarian actors.[57] Even when banking services are maintained, specific transfers – to Syria for example – may come under scrutiny from banks and require additional justification, making banking processes increasingly cumbersome.

There is a growing awareness of the impact of the current legislation within government and the banking industry.[58] However, there is currently no regulatory or financial incentive for banks to balance risk with the public policy interest in making their services available to humanitarian actors.

UK government initiatives and outstanding issues

Several government departments are responsible for aspects of policy that impact on humanitarian engagement with NSAGs. The Home Office and HM Treasury have the policy lead for prevention and disruption of terrorist financing and for sanctions implementation. HM Treasury also leads on bank regulation. In contrast, DFID is responsible for humanitarian aid policy. As regulator of all UK-registered charities, the Charity Commission also plays a significant role. Clashing government priorities have resulted in a lack of effective government ownership or consistent messaging.[59] Efforts are in progress to develop a whole-of-government approach; there is an urgent need to expedite this and so to take account of and reconcile competing priorities and activities.

The UK government is engaging in dialogue with the NGO community and banking sector on these issues. It is now establishing a cross-sectoral working group, to be chaired by the Home Office, with key government departments, humanitarian actors and the banking sector to address the impact of counterterrorism and other legislation on the funding and delivery of humanitarian assistance, as well as on peacebuilding and development action. In establishing the group, the government has two main

[52] For example, John Howell & Co Ltd for the Financial Conduct Authority (2016), *Drivers & Impacts of Derisking*, February 2016.
[53] For example Keatinge, T. (2014), *Uncharitable Behaviour*, London: Demos.
[54] John Howell & Co Ltd (2016), *Drivers & Impacts of Derisking*.
[55] Ibid., p. 59.
[56] Letter to prime minister David Cameron from Islamic Relief and 11 other aid agencies, 18 March 2016: http://www.islamic-relief.org.uk/news/letter-to-prime-minister-warns-that-banks-could-create-aid-vacuums/.
[57] Some humanitarian actors now subscribe to commercial due diligence services such as Thomson Reuters World-Check. DFID has recently announced its intention to revise its approach to reimbursing due diligence costs. See DFID, *Civil Society Partnership Review*, November 2016, p. 13, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/565368/Civil-Society-Partnership-Review-3Nov2016.pdf.
[58] See for example Sir David Walker's Keynote Address to Queen Mary University of London Conference on banking conduct and culture, 4 May 2016, reproduced at http://www.bankingstandardsboard.org.uk/bsb-blog-sir-david-walker-on-banking-conduct-and-culture/.
[59] International Law Programme and International Security Department (2015), *UN Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action.*

aims: to develop an improved understanding of the realities of operating within conflict zones and the due diligence activity undertaken by humanitarian and peacebuilding actors and banks; and to provide the NGO sector with a greater understanding of how government interprets and seeks to implement the legislation. There is a stated government determination to make the working group effective, although some scepticism among NGOs as to how much it will actually ameliorate the challenges they face. It has not yet formally met.

DFID: humanitarian assistance

DFID is anxious to ensure that humanitarian actors can continue to operate and to assuage their concerns that legislation may impede legitimate humanitarian activity. Its key vehicle is dialogue between all relevant actors: hence its support for establishment of the cross-sectoral working group discussed above. In order to ensure frank dialogue, and to bypass NGO reluctance to discuss actual situations, DFID could help the government to work through case studies in order to clarify the challenges that humanitarian actors face on the ground, and to help the latter understand the impact of the law in specific, real-life situations. It could also encourage international dialogue.

Home Office: counterterrorism legislation

The Home Office, with OFSI at HM Treasury as co-author, maintains public guidance on operating within counterterrorism legislation (the HO/OFSI Guidance) for humanitarian actors.[60] First published in November 2015 and updated on 27 June 2016, the HO/OFSI Guidance states that:

> [I]n the government's assessment existing terrorism (or other) legislation does not prevent organisations, including humanitarian actors, from operating overseas, including in areas where terrorist groups operate … It remains the responsibility of humanitarian actors or other parties to ensure that their activity complies with UK law and to take reasonable steps to reduce the risk of non-compliance.

The HO/OFSI Guidance emphasizes that any potential prosecution would have to overcome a number of hurdles before a decision to prosecute were made, including an assessment by the Crown Prosecution Service as to whether prosecution is required in the public interest and, in respect of some offences, the Attorney General's decision as to whether prosecution should proceed in the light of sufficiency of evidence and the public interest in bringing proceedings. In this respect, it concludes:

> There is no evidence that prosecutions for terrorism offences are being pursued against staff of humanitarian actors as a result of their humanitarian or conflict resolution work and, therefore, no need to create any separate guidance or change of law that would see such organisations being treated differently.

However, the combination of broad offences and emphasis on prosecutorial discretion creates damaging uncertainty, as the UK Independent Reviewer of Terrorism Legislation has stressed.[61] First, it implies an acknowledgment that the law criminalizes legitimate activity (i.e. that there are likely to be circumstances, more than for other offences, in which offences may have been committed but prosecution would not be in the public interest). This is problematic: charitable trustees strive to avoid committing offences, not just to minimize the risk of prosecution. Moreover, broadly drawn offences may have a 'chilling effect' on activity that is not criminal, for fear of the risk of offending; and may disproportionately raise charities' costs – in obtaining advice, in complying with due diligence

[60] See footnote 29.
[61] David Anderson QC, *The Terrorism Acts in 2013*, 9.31(a).

requirements, and in changing their own working methods – as they strive to comply.[62] For all these reasons, the impact of the offences may be to stymie the delivery of humanitarian relief to areas under the control of NSAGs.[63]

As to whether the law should be changed, the HO/OFSI Guidance states:

> We assess that introducing a specific exemption for humanitarian and/or conflict resolution work would create a loophole that could be exploited by unscrupulous individuals and leave NGOs vulnerable to abuse.

This statement responds to the recommendation of the parliamentary Joint Committee on the Draft Protection of Charities Bill,[64] that the UK government explore the proposal of introducing exceptions to counterterrorism legislation for humanitarian activities.[65] However, no explanation is given of the basis for the HO/OFSI assessment, nor in particular why the risk of exploitation could not be minimized by inclusion of a suitably worded intention requirement. A similar recommendation has since been made by the International Development Committee.[66]

Both these parliamentary committees cited Australian law precedents, and the first also cited New Zealand legislation. The HO/OFSI Guidance states: 'We have looked at the legislative concessions made by another country but consider that these would not translate to the UK given our international obligations.' It does not state which country or obligations it is referring to. In fact, **Australian law** is of little assistance. It has a statutory exemption for the offence of association with proscribed organizations where 'the association is only for the purpose of providing aid of a humanitarian nature',[67] but there is no equivalent exemption from the offences of 'getting funds to, from or for a terrorist organisation'[68] or 'providing support to a terrorist organisation'.[69] The UK does not have an 'association' offence; and, as discussed above, its offence of meeting with members of designated entities only extends to meetings within the UK and does not cover 'genuinely benign' meetings. **New Zealand law** includes no express exception for humanitarian assistance.[70] However, its prohibitions on the financing of terrorism and on making property available to designated entities are only offences if committed 'without lawful justification or reasonable excuse'.[71] It is not clear whether humanitarian assistance would be activity for which there is 'reasonable excuse'. The prohibitions in the New Zealand legislation previously included an express exemption for humanitarian activity, but this was removed in 2007 owing to concerns that it might undermine the prosecution of offences by creating a defence in cases where there was an intention both to support terrorism and to provide relief.[72] Legislation in other jurisdictions may also merit scrutiny. For example, in **Switzerland** the terrorist financing offence excludes financing 'intended to support acts that do not violate the rules of international law on the conduct of armed conflicts'.[73] In the **US**, in 2013 three members of Congress introduced a draft Humanitarian Assistance Facilitation Act to

[62] The 'chilling effect' of the legislation is not limited to humanitarian activity, as the Supreme Court noted in *R v Gul* (2013) SC 64, para. 36.
[63] Metcalfe-Hough et al. (2015) gives examples of this impact.
[64] Joint Committee on the Draft Protection of Charities Bill, *Draft Protection of Charities Bill*, HL Paper 108, HC 103, February 2015, para 186.
[65] This statement essentially repeats the government's statement in its response to the Joint Committee's report: *Government Response to the Joint Committee on the Draft Protection of Charities Bill* (March 2015), p. 16.
[66] Letter from Stephen Twigg MP, Chair of International Development Committee, to Justine Greening MP, Secretary of State for International Development, 20 April 2016.
[67] Australian Criminal Code Act 1995 s102.8.
[68] Ibid., s102.6.
[69] Ibid., s102.7.
[70] Box 2 in the report of the Joint Committee on the Draft Protection of Charities Bill refers to an exception for humanitarian assistance, but the language quoted is for assistance for the benefit of a designated person rather than for civilian populations.
[71] New Zealand Terrorism Suppression Act 2002, sections 8 and 10.
[72] New Zealand Foreign Affairs, Defence and Trade Committee Review of the Terrorism Suppression Act 2002, November 2005.
[73] Art 260 quinquies(4) CC 311.0 Swiss Criminal Code of 21 December 1937.

facilitate the provision of goods or services to areas controlled by NSAGs; however, the legislation was not passed.[74]

The UK government should undertake a more detailed exploration of the possibility of legislative change, taking account of a range of overseas legislation including as described above. Additional, non-legislative changes might include the following.

The HO/OFSI Guidance could be amended to make clear to humanitarian actors the types of case in which prosecution would not usually be in the public interest; or the Director of Public Prosecutions could issue guidance.[75] The guidance published by the US Office of Foreign Assets Control (OFAC) in October 2014 notes that some humanitarian assistance may unwittingly end up in the hands of members of a designated group in unstable environments, and that 'such incidental benefits are not a focus for OFAC sanctions enforcement'.

Further, the government could provide informal, speedy guidance to humanitarian actors before they engage in humanitarian activity that risks a technical breach of the UK criminal law, in order to clarify the limits of legitimate activity and reduce the risk burden on these actors. The US OFAC guidance encourages a humanitarian actor to seek the advice of OFAC directly if confronted with a situation in which it 'learns that it must provide funds or material support directly or indirectly to a [designated] group that is necessary and incidental' in order to provide urgently needed humanitarian assistance.[76]

In considering changes to legislation or guidance, the UK government would need to take into account not only whether any change could be drafted narrowly enough to avoid exploitation, but also issues of principle (in particular whether necessary interaction with NSAGs ought to be criminal, being simultaneously both legitimate humanitarian activity and potentially interaction with groups that UK law would label as terrorist), and compliance with international obligations. By way of example of the latter, the offences in the 1999 Convention for the Suppression of Financing of Terrorism[77] allow for no exception for humanitarian activity, but require a higher mental element than does current UK legislation.[78]

HM Treasury: sanctions, banking

OFSI oversees the operation of sanctions from HM Treasury's perspective. Its Guidance on Financial Sanctions states:

> It is the clear intention of the international community … not to prevent the passage of humanitarian funds or goods. In many cases there will be exemptions or licensing grounds … and OFSI will treat these as a priority. Accordingly, financial institutions, NGOs and charities should be able to safely undertake humanitarian transactions.

[74] The bill did not proceed past the initial committee stage; it was not voted on.
[75] As proposed by the Joint Committee on the Draft Protection of Charities Bill in paragraph 47 of their report.
[76] US Department of the Treasury Office of Foreign Assets Control (2014), *Guidance Related to the Provision of Humanitarian Assistance by Not-For-Profit Non-Governmental Organizations*, paras 5 and 6.
[77] Gillard (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*.
[78] In the 1999 Convention, offences are more narrowly drawn than the UK offences in some respects, as they relate to providing assistance that facilitates the commission of terrorist acts, whereas UK funding offences relate to assistance for the 'purposes of terrorism'; and the former require intention or knowledge that funds will be used for an act of terrorism, whereas reasonable suspicion is sufficient for the UK offences.

> However, sanctions may still apply to certain payments even if they are related to humanitarian activity. For example, OFSI is not able to licence [sic] payments such as taxes or fees that are being paid to an organisation subject to a terrorist asset freeze, even if such a payment is necessary for an NGO or charity to operate within a conflict zone.[79]

As humanitarian actors may have no choice but to make incidental payments in order to deliver relief, including UK government-funded relief, in some areas controlled by NSAGs, it is difficult fully to reconcile these two statements.

The UK government should consider simplifying the procedure for humanitarian actors to obtain licences, by clarifying licensing policy and providing statistics and examples of licences issued. It should aim to make licensing decisions as quickly as possible, joining up its own process across government as needed, and to keep onerous licence conditions such as reporting requirements to a minimum. In return, humanitarian actors may need to commit to enhanced, clearly defined due diligence arrangements.

As regards both UN Security Council resolutions and EU regulations, the UK is of course in the position of co-legislator as well as implementer; were it to secure the inclusion of humanitarian exemptions in these instruments, it could incorporate these in its own legislation.[80] This would reduce the need for onerous licensing procedures.

On the provision of banking services to humanitarian actors, the HO/OFSI Guidance 'acknowledges the negative impact' of restrictions in the banking services offered to humanitarian actors, and states that it cannot compel banks or other financial institutions to offer accounts to particular customers. As the Independent Reviewer of Terrorism Legislation has reported, HM Treasury has taken steps to address the impact of bank de-risking through research and encouragement.[81] However, some are now arguing that governments will need to take more assertive steps both domestically and by coordinating internationally.[82] Further consideration should be given as to whether banks should be encouraged or required to take account of the public policy objective of ensuring services for humanitarian actors, in addition to risk and profitability. In parallel with domestic considerations, the government should encourage international dialogue with a view to ensuring effective correspondent banking services.

Charity Commission: charity guidance and regulation

The Charity Commission's first strategic priority is to protect charities from abuse or mismanagement. Some humanitarian actors are concerned that its growing role in counterterrorism and counter-extremism is hampering the support it is able to provide to humanitarian actors to improve due diligence and comply with governance obligations.[83]

The Charity Commission's guidance discusses the due diligence charities should undertake to reduce the risk of supporting a proscribed organization or working with a designated person. But it does not guide charities in situations in which they have no choice but to work with a NSAG in order to deliver humanitarian relief, save for emphasizing the need not to commit criminal offences. The Commission

[79] HM Treasury Guidance on Financial Sanctions (see footnote 17), section 9.6.
[80] See Gillard (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*.
[81] David Anderson QC (2015), *Fourth Report on the Operation of the Terrorist Asset-Freezing Etc Act 2010*, paras 4.14–4.18.
[82] Ibid., para. 4.17; Durner, T. and Shetret, L. (2015), *Understanding Bank De-risking and its Effects on Financial Inclusion*, Research Report, Oxford: Oxfam GB for Oxfam International.
[83] Metcalfe-Hough et al. (2015), *UK humanitarian aid in the age of counter-terrorism*, p. 8.

should consider reviewing its existing guidance, with the aim of harmonizing this with the more recent HO/OFSI Guidance and adding further practical guidance to assist charities. It should engage in further dialogue with charities, for example through participating in the cross-sectoral working group described above.

Parliamentary oversight

Although these issues have now been aired by two parliamentary committees, in each case they have been addressed as an adjunct to work on another topic. The International Development Committee should consider an enquiry focused on the legal and regulatory impediments to humanitarian activity in territory under the control of non-state actors.

Conclusion

Conflicts between competing priorities have made the provision of relief in areas controlled by NSAGs a legal minefield for humanitarian actors: their mandate and mission are to provide aid, but they risk committing criminal offences in doing so. The absence of prosecutions does not obviate that risk or attendant 'chilling effect'. The UK government needs to adopt a clear, unified approach to reconciling its humanitarian and counterterrorism priorities. The planned cross-sectoral working group presents an opportunity to begin this work. The government should review the counterterrorism legal framework and the sanctions licensing regime, with a view to possible adjustment to ensure that impediments to the legitimate delivery of aid are minimized while the effectiveness of sanctions and counterterrorism legislation against true offenders is maintained. The government should also consider further, and discuss internationally, how best to tackle banks' reduction and withdrawal of services from humanitarian actors.

At the same time, the expectations placed on humanitarian actors with respect to due diligence and decision-making processes should be reviewed, in consultation with those actors, in order to provide clarity on the extent and limits of reasonable expectations. In this way, humanitarian actors can be involved in developing a common response to these challenges and can assume reasonable, realistic levels of risk.

While this paper has focused on the UK regulatory framework, humanitarian actors based in other states are faced with similar challenges. All are likely to be affected simultaneously by the regulatory and financial services environments of more than one state. International measures to be made effective at national level, such as the inclusion of limited exemption clauses in international sanctions regimes and counterterrorism measures, may help to ensure that legitimate humanitarian activities do not violate international or domestic law, and to simplify the regulatory environment for humanitarian actors.[84] Above all, it is clear that international dialogue is needed to find common responses to these pressing challenges.

[84] See Gillard (2017), *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*.

About the author

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About the Chatham House Humanitarian Engagement with Non-state Armed Groups project

Chatham House has undertaken a study of certain factors that contribute to facilitating engagement with non-state armed groups (NSAGs) for humanitarian purposes. The initiative is intended to generate both political support and practical policy options in order to increase the effectiveness of humanitarian action in areas of conflict through improving engagement and interaction with NSAGs.

This paper is one in a series of three that consider different aspects of the regulatory framework relevant to humanitarian action and NSAGs:

- *Humanitarian Action and Non-state Armed Groups: The International Legal Framework*
- *Humanitarian Action and Non-state Armed Groups: The UK Regulatory Environment*
- *Humanitarian Action and Non-state Armed Groups: The Impact of UK Banking Restrictions on NGOs*

In 2016 Chatham House published a series of five papers as part of this study.

- *Towards a Principled Approach to Engagement with Non-state Armed Groups for Humanitarian Purposes*, Michael Keating and Patricia Lewis
- *Engaging Non-state Armed Groups for Humanitarian Purposes: Experience, Constraints and Ways Forward*, Andrew MacLeod
- *Engaging Armed Actors in Conflict Mediation: Consolidating Government and Non-governmental Approaches*, Claudia Hofmann
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Cover image: An Iraqi refugee boy, who fled the city of Mosul because of fighting between government forces and ISIS, at the UN-run al-Hol refugee camp in Syria's Hasakeh governorate on 5 December 2016.

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