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The Challenges of Delivering International Humanitarian Aid in a Post-9/11 Global Framework

CATHERINE GONZALEZ[†]

INTRODUCTION

International humanitarian aid organizations face multiple challenges in delivering assistance to at-risk locations throughout the world. The September 11, 2001 terrorist attacks on the United States increased that burden by generating more restrictive legislation that has ultimately inhibited non-governmental humanitarian aid organizations from delivering the necessary aid to people living in war-torn and poverty-stricken regions. Fear of being prosecuted under such laws, for even an inadvertent diversion of resources to a foreign terrorist organization (FTO), has been the driving force behind the decline in the presence of humanitarian aid organizations in areas such as Somalia.¹ The reticence to engage in areas where FTOs operate is significant because of the fundamental role private humanitarian organizations play in international aid delivery—they are now the primary agencies implementing international humanitarian aid programs, and often the impetus behind such efforts.² Further, terrorism support laws risk co-opting humanitarian

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1. See SARA PANTULIANO ET AL., OVERSEAS DEV. INST., COUNTER-TERRORISM AND HUMANITARIAN ACTION: TENSIONS, IMPACT, AND WAYS FORWARD 11 (2011). See generally Kate Mackintosh, Holder v. Humanitarian Law Project: *Implications for Humanitarian Action: A View From Médecins Sans Frontières*, 34 SUFFOLK TRANSNAT'L L. REV. 507 (2011) (discussing the unforeseen impact that criminal law provisions prohibiting material support to terrorists have had on the operations of humanitarian organizations).

2. Abby Stoddard, *Humanitarian NGOs: Challenges and Trends*, in HPG Report 14, HUMANITARIAN ACTION AND THE GLOBAL WAR ON TERROR 25 (Joanna Macrae & Adele

aid by preventing aid agencies from giving aid equally, and thereby endangering the neutrality of aid agencies.³ Although measures that prevent the flow of aid to FTOs are a legitimate aspect of domestic and international counter-terrorism strategies, it is evident that as terrorist support laws become more stringent, humanitarian relief efforts suffer in turn.⁴

This Comment discusses the problems that counter-terrorism laws pose to the delivery of humanitarian aid, an aspect of the counter-terrorism discussion that is often overlooked. Part I provides an overview of the legal framework of international and domestic counter-terrorism measures. Specifically, the domestic laws of the United States, United Kingdom, Australia, and Canada⁵ are explored from a comparative perspective with a focus on the requisite intent for criminal liability under the various statutes proscribing support for terrorist organizations. The survey illustrates that . . . Part II uses Somalia as a case study to exemplify the detrimental impact that

Harner eds., July 2003). It has been estimated that humanitarian NGOs receive a quarter of governmental humanitarian spending. *Id.*

3. See KATE MACKINTOSH, OVERSEAS DEV. INST., THE PRINCIPLES OF HUMANITARIAN ACTION IN INTERNATIONAL HUMANITARIAN LAW 8–9 (2000) (explaining that non-discrimination and neutrality are key principles in the governance of humanitarian aid efforts); Priya Shetty, *How Important is Neutrality to Humanitarian Aid Agencies?* 370 LANCET 377 (2007) (discussing the importance of neutrality to humanitarian delivery, and how it has been undermined by the global war on terror, particularly by Bush's "with us or against us" doctrine).

4. The chilling effects of these laws have been far-reaching, causing criticism beyond the field of humanitarian aid delivery. See, e.g., Michael Price, Robert A. Rubinstein & David H. Price, 'Material Support' U.S. Anti-Terrorism Law Threatens Human Rights and Academic Freedom, 28 ANTHROPOLOGY TODAY 3, 4 (2012) ("[T]he opacity of the law, paired with its potential sweeping scope, makes it almost impossible for anthropologists to determine what conduct is permissible.").

5. As explained in Part I.B.a, U.S. laws pose the greatest risk to humanitarian efforts. The United Kingdom, and Australia were chosen for comparison because, like the United States, they are major donor countries with common law legal systems. Their prohibitions on the funding of terrorism present a range of approaches to the requisite mens rea, with the United States requiring only knowledge of terrorist activity by the fundee, the United Kingdom requiring a form of objective recklessness as to the use of funds for terrorism, and Australia requiring at least subjective recklessness as to use. See *infra* Part I.B. The foreign rules selected for analysis serve functions equivalent to that of U.S. provisions, namely preventing terrorist organizations from receiving funding. This selection is in accordance with the functionalist approach. See generally Ralf Michaels, *The Functional Method of Comparative Law*, in OXFORD HANDBOOK OF COMPARATIVE LAW 339 (Mathias Reiman & Reinhard Zimmerman eds., 2006). In making a functional comparison it is necessary judge the success of the laws compared by reference to a factor other than function by which they were selected. *Id.* In this Comment, that factor is the effect of the laws on the ability of humanitarian aid organizations to give aid where needed, without excessive fear of legal reprisals in their home countries.

counter-terrorism measures can have on the delivery of humanitarian aid. Part III considers possible responses.

I. AN OVERVIEW OF MULTILATERAL AND DOMESTIC COUNTER-TERRORISM MEASURES

Counter-terrorism laws that impact the delivery of international humanitarian aid exist at both an international and domestic level.⁶ To illustrate the web of regulations that humanitarian aid organizations must navigate in this context, the international and domestic counter-terrorism laws that bear on aid delivery are surveyed below. Among domestic counter-terrorism laws, the U.S. material support statute is given particular attention due to the legal implications that stem from its strict construction and extraterritorial application.

A. *Multilateral Counter-terrorism Regimes*

On September 28, 2001, the UN Security Council unanimously adopted Resolution 1373 pursuant to Chapter VII of the UN Charter.⁷ Under Resolution 1373, all UN member states are prohibited from providing support to groups designated as terrorist organizations.⁸ Additionally, the resolution establishes certain counter-terrorism measures that member states must implement in their own jurisdictions.⁹ The measures include prohibiting the funding of terrorist activity and “criminaliz[ing] the willful provision . . . , by any mean, directly or indirectly, of funds by their nationals or in their territories with the intention that the funds should be used, or in the knowledge that they are to be used, in order to carry out terrorist acts.”¹⁰ Further, UN member states are obligated to ensure that “any person who participates . . . in supporting terrorist acts is brought to justice.”¹¹ The UN established the Counter-terrorism Committee, consisting of all of the members of the Security Council, to monitor

6. For a discussion of how restrictions on the flow of humanitarian aid can be counterproductive to terrorism prevention strategies, see Alope Chakravarty, *Feeding Humanity, Starving Terror: The Utility of Aid in a Comprehensive Anti-terrorism Financing Strategy*, 32 W. NEW. ENG. L. REV. 295, 295–96 (2010).

7. S.C. Res. 1373 U.N. Doc. S/RES/1373 (Sept. 28, 2001). Because Resolution 1373 was adopted pursuant to Chapter VII of the United Nations Charter, it is binding on all member states. See U.N. Charter art. 25.

8. S.C. Res. 1373 U.N. Doc. S/RES/1373 (Sept. 28, 2001).

9. *Id.*

10. *Id.*

11. *Id.* ¶ 2(e).

the implementation of Resolution 1373.¹² Through targeted sanctions regimes, the Security Council pursues specific actors.¹³

B. *Domestic Counter-terrorism Regimes*

1. The United States

a. *Economic Sanctions Regime*

The International Emergency Economic Powers Act of 1977 (IEEPA) allows the President to institute a wide range of restrictions on economic activity in response to “any unusual and extraordinary threat . . . if the President declares a national emergency with respect to such threat.”¹⁴ Shortly following the events of September 11, President Bush used his powers under IEEPA to issue Executive Order 13224, “Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism,” which prohibits transactions with individuals and entities that have been listed as Specially Designated Nationals (SDNs).¹⁵ The IEEPA allows the government to impose both criminal and civil penalties for a violation of any license, order, regulation, or prohibition issued pursuant to it.¹⁶ Notably, section 4 of Executive Order 13224 overrode the humanitarian exception previously provided by §

12. *Id.*

13. See S.C. Res. 1267 U.N. Doc. S/RES/1267 (Oct. 15, 2001) (targeting al-Qaeda and the Taliban and affiliated individuals and entities).

14. 50 U.S.C. § 1701(a) (2006). Specifically, under IEEPA, the President may—

(A) investigate, regulate, or prohibit—

(i) any transactions in foreign exchange,

(ii) transfers of credit or payments between, by, through, or to any banking institution, to the extent that such transfers or payments involve any interest of any foreign country or a national thereof,

(iii) the importing or exporting of currency or securities, by any person, or with respect to any property, subject to the jurisdiction of the United States;

(B) investigate, block during the pendency of an investigation, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.

Id. § 1702(a)(1).

15. Exec. Order No. 13,224, 3 C.F.R. 786 (2001).

16. 50 U.S.C. § 1705 (2006).

1702(b)(2) of the IEEPA¹⁷ on the basis that donations to persons subject to the order would impair the President's ability to deal with the national emergency and endanger the Armed Forces.¹⁸

The Treasury Department's Office of Foreign Assets Control (OFAC) is responsible the administration of the economic sanctions program. OFAC may grant general or specific licenses to private parties, which authorize them to engage in transactions that would otherwise be prohibited.¹⁹ However, the processing can be difficult and time consuming,²⁰ which is particularly problematic for the provision of emergency and disaster relief. Additionally, OFAC has broad discretion in considering license applications. Licenses are not always granted to the humanitarian aid organizations that seek them, as discussed below.

b. Criminal Laws

Alongside the sanctions regime are criminal laws prohibiting terrorist activities. 18 U.S.C. § 2339B was enacted as part of the Anti-terrorism and Effective Death Penalty Act of 1996 (AEDPA),²¹ and subsequently amended following the attacks of September 11 with the implementation of the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT Act). According the House Committee Report, one of the reasons § 2339B was enacted was in recognition of

the fungibility of financial resources and other types of material support. Allowing and individual to supply

17. 50 U.S.C. § 1702(b)(2) (2006). Under § 1702(b)(2) of IEEPA, the President does not have the authority to "regulate or prohibit, directly or indirectly . . . donations, by persons subject to the jurisdiction of the United States, of articles, such as food, clothing, and medicine, intended to be used to relieve human suffering, except to the extent that the President determines that such donations (A) would seriously impair his ability to deal with any national emergency declared under [50 U.S.C. § 1701 (2006)] . . . or (C) would endanger Armed Forces of the United States which are engaged in hostilities or are in a situation where imminent involvement in hostilities is clearly indicated by the circumstances." *Id.*

18. Exec. Order No. 13,224, 3 C.F.R. 786 (2001).

19. 31 C.F.R. 501.801(a)-(b). See generally *OFAC Frequently Asked Questions and Answers*, U.S. DEPARTMENT OF THE TREASURY, <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#60> (last visited Sept. 15, 2012).

20. See *Hearing on Responding to Draught and Famine in the Horn of Africa Before the Subcomm. on African Affairs, S. Comm. on Foreign Relations*, 112th Cong. 35, at 11 (2011) (statement of Jeremy Konyndyk, Director of Policy and Advocacy, Mercy Corps).

21. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1250 (1996)

funds, goods, or services to an organization, or to any of its subgroups that draw significant funding from the main organization's treasury, helps defray the cost to the terrorist organization of running the ostensibly legitimate activities. This in turn frees an equal sum that can be spent on terrorist activities.²²

Under § 2339B, it a crime to “knowingly provide[] material support or resources to a foreign terrorist organization, or attempt[] or conspire[] to do so”²³ In order to violate the statute one “must have knowledge that the organization is a designated terrorist organization . . . that the organization has engaged or engages in terrorist activity . . . or that the organization has engaged or engages in acts of terrorism”²⁴

The definition of “material support or resources” is adopted from § 2339A, which defines the term as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safe houses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel . . . and transportation”²⁵ Medicine and religious materials are explicitly excluded from the definition of “material support or resources.”²⁶ Violation of § 2239B

22. H.R. REP. NO. 104-383, at 81 (1995).

23. 18 U.S.C. § 2339B(a)(1) (2006). Defendants charged with providing material support to a foreign terrorist organization have not been successful in attempts to challenge the status of the organization at issue as an FTO. *See, e.g.*, U.S. v. Hammoud, 381 F.3d 316, 331 (4th Cir. 2004), *vacated*, 125 S. Ct. 1051 (2005); U.S. v. Marzook, 383 F. Supp. 2d 1056, 1071–72 (N.D. Ill. 2005).

24. 18 U.S.C. § 2339B(a)(1) (2006). Under § 2339B, the term “terrorist organization” means “an organization designated as a terrorist organization under section 219 of the Immigration and Nationality Act.” 18 U.S.C. § 2339B(g)(6) (2006). 8 U.S.C. § 1189 delineates the procedures by which an organization is designated as a terrorist organization.

25. 18 U.S.C. § 2339A(b)(1) (2006).

26. *Id.* As one commentator has pointed out, the limited exemption for medicine and religious materials means that “it is legal to give someone a pill, but illegal to provide clean water for swallowing it.” *Material Support and the Need for NGO Access to Civilians in Need*, CHARITY AND SECURITY NETWORK (July 7, 2010), http://www.charityandsecurity.org/analysis/material_support_law. Further, the Second Circuit has held that the provision exempting medicine in § 2339A(b)(1) applies to the provision of medicine, but not the practice of medicine. U.S. v. Farhane, 634 F.3d 127, 143 (2d Cir. 2011) (reasoning that “‘providing medicine’ is how common usage refers to the prescription of a substance or preparation to treat a patient . . . [b]y contrast, ‘practicing medicine’ is how common usage describes . . . employing the art or science of medicine to treat a patient.”) Thus, an organization such as Doctors Without Borders could legally provide antibiotics, but not perform a surgery.

is punishable by fine and/or imprisonment for up to fifteen years, and if the death of any person results, an individual may be imprisoned for any term of years or for life.²⁷ The statute has broad extraterritorial reach.²⁸ An individual who has engaged in one of the proscribed activities can be charged under § 2339B if that person is brought into or found in the United States, regardless of whether he or she is an U.S. national.²⁹

c. Holder v. Humanitarian Law Project

In 2010, the U.S. Supreme Court rejected constitutional challenges to § 2339B in *Holder v. Humanitarian Law Project (HLP)*.³⁰ Plaintiffs sought to provide aid to the Kurdistan Worker's Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), which were both designated by the Secretary of State as FTOs in 1997.³¹ Namely, the plaintiffs wanted provide aid in the form of training on how to use humanitarian and international law to resolve disputes peacefully, petition representative bodies such as the United Nations for relief, and engage in political advocacy on behalf of the

27. 18 U.S.C. § 2339B(a)(1) (2006).

28. 18 U.S.C. § 2339B(d) (2006).

29. Section 2339B(d) provides for jurisdiction over the offenses listed § 2339B(a) where:

A. an offender is a national of the United States (as defined in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(22))) or an alien lawfully admitted for permanent residence in the United States (as defined in section 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. 1101 (a)(20)));

B. an offender is a stateless person whose habitual residence is in the United States;

C. after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

D. the offense occurs in whole or in part within the United States;

E. the offense occurs in or affects interstate or foreign commerce; or

F. an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

Id. § 2339B(d)(1)(A)–(F).

30. 130 S. Ct. 2705 (2010). The plaintiffs presented three main challenges to the material support statute, arguing that it was (1) impermissibly vague and therefore violated the Due Process Clause of the Fifth Amendment; (2) violated plaintiffs' freedom of speech under the First Amendment; and (3) violated plaintiffs' freedom of association under the First Amendment. *Id.* at 2716.

31. *Id.* at 2713. The challenge was brought as a pre-enforcement review of 18 U.S.C. § 2339B.

organizations' members.³² The Court ultimately found these activities to fall within the scope of the terms "training" and "expert advice or assistance" in § 2339B.³³ Beyond these enumerated activities, the Court did not indicate what other humanitarian activities would violate § 2339B because they were not at issue in the case. However, it was the government's position in oral argument that even legitimate humanitarian aid to victims of a natural disaster would be a crime if a humanitarian NGO engaged with a FTO in the process.³⁴

More significantly for the purposes of this discussion, the Supreme Court found that intent to support a terrorist group is not required for criminal liability under § 2339B.³⁵ According to the majority, the requisite mens rea under § 2339B is "knowledge about the organization's connection to terrorism, not specific intent to further the organization's terrorist activities."³⁶ In contrast, the dissent advocated for a different construction, wherein criminal liability would arise only "when the defendant knows or intends that those activities will assist the organization's unlawful terrorist actions."³⁷ The majority's opinion was ultimately shaped by

32. *Id.* at 2720–21.

33. *Id.* at 2720. The *HLP* case has sparked significant debate over its implications for free speech. Some commentators view *HLP* as a case of twenty-first century McCarthyism. *See, e.g.*, David Cole, *The New McCarthyism; Repeating History in the War on Terrorism* 38 HARV. C.R.-C.L. L. REV. 1 (2003) (likening the approach to the war on terror to McCarthyism, and citing the then-pending *HLP* case as an example of how the material support statute imposes guilt by association); Marjorie Heins, *The Supreme Court and Political Speech in the 21st Century: The Implications of Holder v. Humanitarian Law Project*, 76 ALBANY L. REV. 561 (2013) (posing the question, "Was the *Holder* decision a prelude to Supreme Court acquiescence in another era of political repression comparable to the heresy hunts of the 1950s[?]"). *But see* Peter Margulies, *Advising Terrorism: Material Support, Safe Harbors, and Freedom of Speech*, 63 HASTINGS L. J. 455 (2012) (defending the *HLP* decision). Others attempt to explain the decision consistent with other recent free speech decisions. *See, e.g.*, Patricia Millet et al., *Mixed Signals: The Roberts Court and Free Speech in the 2009 Term*, 5 CHARLESTON L. REV. 1, 20–23 (2009); Deborah Hellman, *Money Talks But It Isn't Speech*, 95 MINN. L. REV. 953, 971–73 (2011) (attempting to reconcile *HLP* with jurisprudence on monetary donations as First Amendment speech).

34. *See* Transcript of Oral Argument, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010) (No. 08-1498) (discussing how NGO provision of humanitarian aid through an FTO following a tsunami could constitute a crime).

35. *Humanitarian Law Project*, 130 S. Ct. at 2717.

36. *Id.* To highlight the implication of such an interpretation, David Cole, who argued the case for the plaintiffs, pointed out that under the majority's opinion, "when President Jimmy Carter did election monitoring in Lebanon, and met with all of the parties to the election—including Hezbollah, a designated 'terrorist group'—to provide them with his advice on what constitutes a fair election, he was committing the crime of providing 'material support,' in the form of 'expert advice.'" *Advocacy Is Not a Gun*, N.Y. TIMES, (Jun. 21, 2010), <http://roomfordebate.blogs.nytimes.com/2010/06/21/what-counts-as-abetting-terrorists/>.

37. *Humanitarian Law Project*, 130 S. Ct. at 2740 (Breyer, J., dissenting).

deference to the determination of Congress and the Executive that “providing material support to a terrorist organization—even seemingly benign support—bolsters the terrorist activities of that organization.”³⁸

As a consequence of this holding, a threat of criminal liability exists regardless of whether the support to a terrorist organization flows inadvertently through humanitarian actors, or it is derived from individuals intentionally supporting terrorist activities.³⁹ All a prosecutor must show to establish intent is that the person knew the group was listed as a terrorist organization or had engaged in act of terrorism.⁴⁰ The holding is significant in light of the realities of delivering humanitarian aid—humanitarian actors often operate in areas controlled by FTOs and the risk of the diversion of some amount of aid is high.⁴¹ Often it is necessary for humanitarian aid organization to have a limited amount of engagement with a FTO in order to access civilians in need.⁴²

38. *Id.* at 2728 (majority opinion). It is acknowledged, of course, that the manipulation of humanitarian aid is a true problem for charitable operations. There have long been concerns about the diversion and misuse of humanitarian assistance to aid both terrorist groups and warring factions. See Peter Margulies, *Accountable Altruism: The Impact of the Federal Material Support Statute on Humanitarian Aid*, 34 SUFFOLK TRANSNAT'L L. REV. 539, 549 (2011); see also *Typologies and Open Source Reporting on Terrorist Abuse of Charitable Operations in Post-earthquake Pakistan and China*, U.S. DEP'T OF TREASURY (discussing forms of terrorist abuse of charities), http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/charities_post-earthquake.pdf. Thus, a real risk exists that humanitarian assistance may never reach its intended beneficiaries.

39. *Humanitarian Law Project*, 130 S. Ct. at 2717–18. Section 2239B has been used to prosecute charitable organizations based in the United States, most notably in the case of *U.S. v. El-Mezain*, 664 F.3d 467 (5th Cir. 2011). The case concerned the Holy Land Foundation (HLF), which held itself out as the largest Muslim charitable organization in the United States. *Id.* at 485. In *El-Mezain*, HLF and its directors were convicted of providing funds to Hamas. *Id.* However, *El-Mezain* is not unambiguously one of anti-terrorism laws hindering aid efforts: HLF was alleged to operate substantially at the direction of Hamas. *Id.* at 485–89. As discussed, this was not true in the case of Humanitarian Law Project. For a discussion of how counter-terrorism laws have impacted Muslim charitable giving, see AM. CIVIL LIBERTIES UNION, *BLOCKING FAITH, FREEZING CHARITY: CHILLING MUSLIM CHARITABLE GIVING IN THE 'WAR ON TERRORISM FINANCING'* (2009).

40. *Humanitarian Action Under Scrutiny: Criminalizing Humanitarian Engagement 3* (Harvard Univ. Program on Humanitarian Policy and Conflict Research, Working Paper, 2011), available at <http://c0186748.cdn1.cloudfiles.rackspacecloud.com/HPCR%20CHE%202011.pdf>.

41. See *infra* Part II.

42. For instance, Hamas has been designated as a terrorist organization by many countries, including the United States and those of the European Union. However, the interior ministry in Gaza requires an NGO registration fee, and paying such a fee could be considered “material support” to Hamas. Mark Tran, *Counter-Terrorism Laws Taking Their Toll on Humanitarian Action*, THE GUARDIAN, Oct. 17, 2011, <http://www.guardian.co.uk/glo>

2. United Kingdom

Unlike U.S. provisions, the United Kingdom's Terrorism Act of 2000 was enacted prior to the September 11 attacks, and was primarily a consolidation of existing legislation established to address domestic terrorism in Northern Ireland.⁴³ Under the Act, Criminal liability will be imposed if a person "invites support for a proscribed organization, and the support is not, or is not restricted to, the provision of money or other property"⁴⁴ Additionally, "a person commits an offense if he arranges, manages or assists in arranging or managing a meeting which he knows is . . . to support a proscribed organization" or "addresses a meeting and the purpose of his address is to encourage support for a proscribed organization or to further its activities."⁴⁵ One who is found guilty of supporting a listed organization faces fines and up to a ten years imprisonment.⁴⁶ Additionally, criminal liability will be imposed if a person "provides money or other property, and knows or has reasonable cause to suspect that it will or may be used for the purposes of terrorism."⁴⁷ The law has extraterritorial effect, providing for jurisdiction where "a person does anything outside of the United Kingdom," and would have constituted a terrorist financing offense had it been conducted in the United Kingdom.⁴⁸ One who is found guilty of such an offense may face up to fourteen years imprisonment and a fine.⁴⁹

3. Australia

In Australia, one may not intentionally provide training to terrorist organizations, make funds available, or provide other support or resources to help the organization engage in a terrorist activity.⁵⁰ Although the act of providing or receiving training must be

bal-development/2011/oct/17/counter-terrorism-laws-impact-humanitarian-action.

43. Terrorism Act, 2000, c. 11, *Explanatory Notes*, ¶3-8 (U.K.).

44. Terrorism Act, 2000, c. 11, § 12(1) (U.K.).

45. *Id.* § 12(2)-(3).

46. *Id.* § 12(6).

47. *Id.* § 15(3). The mens rea is akin to objective recklessness. CLIVE WALKER, BLACKSTONE'S GUIDE TO THE ANTI-TERRORISM LEGISLATION 69 (2002) ("[T]he mens rea for [terrorist property] offences . . . requires, as alternatives, knowledge as to purposes or merely reasonable (rather than subjective) awareness"). Providing funds to a proscribed organization does not automatically fulfill this requirement. *Id.* ("[T]here is no specific reference in s. 15 . . . to benefit to proscribed organisations whether for terrorist purposes or not and the burden of proof . . . remains on the prosecution.").

48. *Id.* § 63(1).

49. Terrorism Act, 2000, c. 11 § 2 (U.K.).

50. *Criminal Code Act 1995*, sch 1, s 102.5-7 (Austl.) (as amended).

intentional, Australian law merely requires that one be “reckless” as to whether the support will contribute to terrorist activities.⁵¹ Under Australian criminal law, “recklessness” requires foresight of a substantial risk and taking the risk must be unjustifiable in the circumstances.⁵² Additionally, one cannot intentionally associate with a terrorist organization where the association provides support to the terrorist organization and aids in its continued existence.⁵³ However, an exemption exists if the association is humanitarian in nature.⁵⁴ No similar exemption exists for providing support. All of these offenses are subject to broad extraterritorial jurisdiction, which extends “(a) whether or not the conduct constituting the alleged offence occurs in Australia; and (b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.”⁵⁵

4. Canada

Under the Canadian Criminal Code, it is an offense for an individual to “knowingly participat[e] in or contribut[e] to, directly or indirectly, any activity of a terrorist group for the purpose of enhancing the ability of any terrorist group to facilitate or carry out a terrorist activity.”⁵⁶ The offense carries a maximum sentence of ten years imprisonment.⁵⁷ The law defines “participating or contributing” to include “providing, receiving or recruiting a person to receive training [and] providing or offering to provide a skill or an expertise for the benefit of, at the direction of or in association with a terrorist group,” among other things.⁵⁸ However, these activities are only considered an offense if undertaken with the *purpose* of enhancing the ability of the proscribed group to engage in terrorist activity.⁵⁹ Facilitating a terrorist activity is a more serious offense, and carries a maximum sentence of fourteen years.⁶⁰ To be found guilty, an individual need not be aware that his actions have facilitated a

51. *Criminal Code Act 1995*, sch 1, s 103.1 (Austl.) (as amended).

52. *Id.* s 5.4(2).

53. *Criminal Code Act 1995*, sch 1, s 102.7 (Austl.) (as amended).

54. *Criminal Code Act 1995*, sch 1, s 102.8(4)(c) (Austl.) (as amended).

55. *Criminal Code Act 1995*, sch 1, s 103.3 (Austl.) (providing that extended extraterritorial jurisdiction of section 15.4 applies to offenses under the division).

56. *Criminal Code*, R.S.C 1985, c. C-46 § 83.18 (2001) (Can.).

57. *Id.*

58. *Id.*

59. *See id.* §§ 83.02–83.04.

60. *Id.* § 83.19.

terrorist activity.⁶¹ Moreover, the particular terrorist activity need not be “foreseen or planned at the time it was facilitated.”⁶²

C. Counter-terrorism Measures in Donor Contracts and Agreements

Many states and inter-governmental funding bodies have inserted counter-terrorism clauses into donor contracts and agreements.⁶³ Funding bodies have introduced such clauses with an eye to assuring compliance with counter-terrorism laws and policy objectives.⁶⁴ U.S. Agency for International Development (USAID) began including a clause in grant agreements that reminded applicants of the ban on transactions with individuals and organizations associated with terrorism in March 2002.⁶⁵ USAID now also requires that grant applicants certify that they have not provided, within the previous ten years, and will not knowingly provide “material support or resources” to a proscribed individual or entity.⁶⁶ For the purposes of the certification, the term “material support or resources” has the same definition for that term under 18 U.S.C. § 2339A(b).⁶⁷ If a recipient organization learns that it has provided material support or resources to a proscribed individual or entity, it must notify USAID immediately, and USAID may unilaterally terminate the agreement.⁶⁸ According to USAID, even USAID employees may be liable under 18 U.S.C. § 2339A, § 2339B, and § 2339C if they knowingly provide assistance to an organization that then provides material support or resources to a proscribed organization.⁶⁹ Australian Aid (AusAID), the overseas aid program of the Australian government, requires that recipients use their “best endeavors” to make sure that funds do not go to support any entity

61. *Id.*

62. *Id.*

63. PANTULIANO ET AL., *supra* note 1, at 5.

64. *Id.*

65. U.S. AGENCY FOR INT’L DEV., ACQUISITION & ASSISTANCE POLICY DIRECTIVE 02-04 (2002), *available at* http://transition.usaid.gov/business/business_opportunities/cib/pdf/aapd02_04.pdf.

66. U.S. AGENCY FOR INT’L DEV., ACQUISITION & ASSISTANCE POLICY DIRECTIVE 04-14 (Sept. 24, 2004), *available at* http://transition.usaid.gov/business/business_opportunities/cib/pdf/aapd04_14.pdf.

67. *Id.*

68. *Id.*

69. *Id.*

associated with terrorist, directly or indirectly.⁷⁰ Moreover, recipients are obligated to inform AusAID immediately if “any link whatsoever to a proscribed person or entity is discovered.”⁷¹ The U.K. Department for International Development (DiFID) similarly retains the ability to terminate procurement contracts with overseas suppliers for violation of *any* terrorism law of *any* country.⁷² DiFID also restricts funding to NGOs based on “links” to terrorist groups.⁷³ The obligations imposed by these contracts exist independently of the laws of the respective governments.

II. SOMALIA EXEMPLIFIES THE CHALLENGES TO THAT COUNTER-TERRORISM LAWS POSE TO HUMANITARIAN AID DELIVERY

Somalia illustrates the problems that counter-terrorism laws pose for the delivery of humanitarian aid. Al-Shabab, a designated terrorist organization, controls much of southern Somalia. Somalia poses a unique challenge for humanitarian aid organizations in light of counter-terrorism laws; the difficulty of delivering support to Somalia without some of the aid being diverted to al-Shabab has long been recognized.⁷⁴ A UN monitoring report indicated that al-Shabab extracts between \$70 million and \$100 million a year in “taxes” from relief groups.⁷⁵ The lawlessness, corruption, and conflict in Somalia make aid particularly vulnerable to diversion because international relief organizations typically utilize local subcontractors to deliver

70. *Guidelines for Strengthening Counter-Terrorism Measures in the Australian Aid Program*, AUSAID, 6 (Sept. 2004), http://www.aid.gov.au/Publications/Documents/ctm_guidelines.pdf.

71. *Id.* at 3.

72. Dept. Int. Dev., Standard Services Contract – Section 4 Special Conditions, clause 15.4, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/143999/contract-section4.doc visited 6/20/2013.

73. See, e.g., Global Poverty Action Fund, Community Partnership Window Guidelines for Applicants, ¶ 6.2 (May 28, 2013), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/205906/GPAF-CP2-Guidelines-28May2.pdf (“We also cannot consider applications from any organization which . . . Is linked to any terrorist organisations.”); Dept. Int. Dev., Global Poverty Action Fund Impact Window Guidelines for Applicants, ¶ 7.8, May 28, 2013, available https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/88397/glob-pov-act-fnd-impact-gnt-guide-appls-merged.pdf visited 6/20/2013 (same).

74. Mackintosh, *supra* note 1, at 513 (citing Ken Menkhaus, *Stabilisation and Humanitarian Access in a Collapsed State: the Somali Case*, 34 DISASTERS 320 (2010)).

75. See Paul Richter, *U.S. Eases Aid Restrictions Amid Somalia Famine*, LA TIMES, Aug. 3, 2011, at A6.

materials.⁷⁶ Because of this, counter-terrorism laws have had a very palpable effect on the delivery of aid to Somalia—observers state that funding declined by half between 2008 and 2011, mainly as a result of a drop in American contributions stemming from U.S. legislation.⁷⁷

The sanctions imposed on Somalia date back to 1992, when the Security Council implemented Resolution 733.⁷⁸ In 2008, the Security Council passed Resolution 1844, which added targeted sanctions against specific individuals and entities.⁷⁹ The resolution required UN member states to prevent resources from being made available to a listed individual or entity by making provision of such resources a violation of national law.⁸⁰ However, on March 19, 2010, the Security Council passed Resolution 1916, which suspended the application of Resolution 1844 “to the payment of funds, other than financial assets or resources necessary to ensure the timely delivery of urgently need humanitarian assistance in Somalia” for a period of twelve months.⁸¹ Resolution 1972, adopted on March 17, 2011, renewed the exemption for an additional sixteen months.⁸² While these Resolutions would seem to significantly assist in the delivery of humanitarian aid to Somalia, the exemption only applies to “the United Nations, its specialized agencies or programmes, humanitarian organizations having observer status with the United Nations General Assembly that provide humanitarian assistance, or their implementing partners.”⁸³ Therefore, independent organizations do not benefit from the exemption and thus remain exposed to the threat of criminal liability.⁸⁴

Moreover, it has been difficult to obtain OFAC licenses to operate in Somalia. U.S. officials have assured relief workers that they are not at risk of prosecution for delivering aid to Somali famine

76. U.N. Chairman of the Security Council Monitoring Group, July 18, 2011, U.N. Doc. S/2011/433, available at www.un.org/ga/search/view_doc.asp?symbol=S/2011/433.

77. Mark Tran, *supra* note 40.

78. S.C. Res. 733, U.N. Doc. S/RES/733 (Jan. 23, 1992).

79. S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008).

80. *Id.* However, unlike Resolution 1373, Resolution 1844 does not specifically require that this end be accomplished through the enactment of criminal laws. Compare S.C. Res. 1844, U.N. Doc. S/RES/1844 (Nov. 20, 2008) with S.C. Res. 1373¶ 1(b), U.N. Doc. S/RES/1373 (Sept. 28, 2001).

81. S.C. Res. 1916, ¶ 5, U.N. Doc. S/RES/1916 (Mar. 19, 2010).

82. S.C. Res. 1972, ¶ 4, U.N. Doc. S/RES/1972.

83. *Id.*; S.C. Res. 1916, ¶ 5, U.N. Doc. S/RES/1916 (Mar. 19, 2010).

84. Mackintosh, *supra* note 1, at 514.

victims, and even acknowledged that increased U.S. efforts to ease the famine will likely result in an increased diversion of resources to al-Shabab.⁸⁵ OFAC has stated that organizations may operate in Somalia without a license, and have made assurances that “incidental benefits” to al-Shabab, such as food and/or medicine, “are not a focus for OFAC sanctions enforcement.”⁸⁶ Likewise, OFAC has declared that payments that an humanitarian organization unintentionally makes to al-Shabaab, where the organization did not have reason to know it was dealing with al-Shabaab, “would not be a focus for OFAC sanctions enforcement.”⁸⁷ Verbal assurances and informal statements do not have the force of law, which relief workers could rely on to escape liability should a subsequent administration change its mind on the issue. The statements made by OFAC are not a firm guarantee that it will not act against an organization, and it will not prevent prosecution under the material support statute in the future.⁸⁸ As a result, humanitarian aid workers in Somalia remain vulnerable to liability for legitimate relief operations.

III. POSSIBLE RESPONSES

Within the international community, there has been a certain amount of concern about the impact of counter-terrorism measures on humanitarian relief efforts. A 2009 report by the UN Secretary-General seemed to aim certain language at domestic counter-terrorism laws deterring humanitarian efforts, stating “[a]t the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians—even those groups that are proscribed in some national legislation.” Shortly after the U.S. Supreme Court decided *HLP*, the Emergency Relief Coordinator/Under Secretary-General from Humanitarian Affairs articulated her increasing concern about “the growing body of national legislation and policies relating to humanitarian funding which limit humanitarian engagement with non-State armed groups that have been designated as terrorist organizations,” specifically citing the way that the United States had defined “material

85. Richter, *supra* note 69.

86. *Frequently Asked Questions Regarding Private Relief Efforts in Somalia*, OFFICE OF FOREIGN ASSETS CONTROL (Aug. 4, 2011), <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#som>.

87. *Id.*

88. See PANTULIANO ET AL., *supra* note 1, at 9.

support.”⁸⁹ The Under Secretary-General opined that “[m]easures of this sort can take us further, rather than nearer, our goal of protecting civilians.”⁹⁰ Nevertheless, three years after the *HLP* decision was handed down, a comprehensive solution to the problems posed by material support laws has yet to be reached.

What is to be done to resolve the problems that counter-terrorism laws have come to pose for the delivery of humanitarian aid? This inquiry presents two issues: (1) what the law ought to be, and (2) what the instrument of response ought to be. The most obvious solution would be to amend the domestic laws proscribing material support for terrorism. Such an amendment might incorporate an exception into domestic laws proscribing material support for terrorism for legitimate humanitarian activities, which would accommodate the realities of aid delivery operations. As an alternative to or in addition to this exception, material support laws could be amended to clarify or modify the requisite intent for criminal liability. A practical construction would be along the lines of that advocated by the *HLP* dissent—criminal liability would arise only “when the defendant *knows or intends* that those activities will assist the organization’s unlawful terrorist actions.”⁹¹ At a multilateral level, one solution may be to create a comprehensive treaty that deals with how humanitarian organizations are to approach operations in areas controlled by FTOs, particularly for situations where a limited amount of engagement with the FTO may be necessary. However, in the United States, where material support laws are especially restrictive, this would still present problems for the perspective of the doctrine of self-execution, a consideration of which is outside the scope of this Comment. Regardless of the vehicle, a solution that provides a level of predictability to humanitarian actors is necessary in order to ensure the continued delivery of aid to vulnerable civilian populations. It is possible to implement such a solution while maintaining counter-terrorism objectives. The provision of humanitarian relief and the implementation of counter-terrorism measures need not be mutually exclusive.

89. Emergency Relief Coordinator/Under Secretary-General from Humanitarian Affairs, Security Council Open Debate on the Protection of Civilians in Armed Conflict (Nov. 22, 2010), <http://ochanet.unocha.org/p/Documents/ERC%20POC%20Statement%2022Nov2010-Final-CheckedAD.pdf>.

90. *Id.*

91. *Humanitarian Law Project*, 130 S. Ct. at 2740 (Breyer, J., dissenting) (emphasis added).

CONCLUSION

As this Comment has demonstrated, material support laws pose a serious risk for humanitarian aid operations in areas where FTOs are present. The restrictive nature of such measures is confirmed by the U.S. Supreme Court's holding in *Holder v. Humanitarian Law Project*. Due to the broad extraterritorial reach of U.S. laws and the influence that the United States carries around the world leading counter-terrorism efforts, the impact of this decision is far-reaching. And, three years after the decision was rendered, the concerns remain unchanged. In response to fears of criminal liability for legitimate aid activities, humanitarian aid groups have scaled back their operations in areas where there is a high-risk of diversion by a FTO. Unfortunately, as in the case of Somalia, these are often the areas that need aid most.