

Counter-terrorism and the Regulation of Civil Society in the USA

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ABSTRACT

This article examines the impact of counter-terrorism measures on non-profit regulation in the USA, where some of the most interventionist legal and policy responses took hold soon after the brutal attacks of September 2001. It highlights the sternness of these measures by comparing the US approach to counter-terrorism and charity regulation with that of the UK. It suggests that the different institutional arrangements for charity regulation in the two countries account in part for different treatment and policy choices, with implications for civil society groups working domestically and overseas. The article particularly analyses the impact of legislation and policy on the American philanthropic sector, and the responses of civil society to measures enacted and undertaken in the USA. It argues that groups directly affected by the new legislation and hardened policy, especially Muslim charities and some civil liberties group, have openly resisted these measures, while mainstream non-profit sector and philanthropic institutions have often acquiesced in the introduction of new policies, 'guidelines' and legislation, opposing them only when they felt directly threatened.

INTRODUCTION

Counter-terrorism law and policy have had distinct impacts on non-profit and philanthropic organizations in democratic societies, particularly since the terrorist attacks in the USA in 2001. The enabling environment for counter-terrorism law and policy and its impact on civil society have been the subject of important work by Barnett Baron, Nancy Billica, Alan Fowler, Kay Guinane, Jude Howell, Jeremy Lind and their colleagues, Joe McMahon, David Moore, Kasturi Sen and other commentators,¹ including the current author (Sidel, 2006, 2007). They have also been the subject of useful work by organizations that have focused intensively on these issues, including

An earlier, comparative version of this article was awarded the ICNL-Cordaid Civil Liberties Prize in 2008 and published in the *International Journal of Not-for-Profit Law* (summer 2008). A longer treatment of these issues has recently appeared in Mark Sidel, *Regulation of the Voluntary Sector: Freedom and Security in an Era of Uncertainty* (Routledge, 2009). For this version, the author is grateful to the referee for helpful comments.

1. See Sidel (2008, 2009) for the full list of citations to these authors and their important work.

Cordaid (Netherlands), Interaction and the International Center for Not-for-Profit Law.² Many of the issues treated here are also discussed at greater length, or with a different perspective, in some of those cited works.

In the USA, a variety of issues arise in connection with counter-terrorism and non-profit organizations, such as the prosecution of several American Muslim charities on charges of ‘material support’ for terrorism, the effects of vetting measures on the work of US international development and humanitarian relief organizations, especially in conflict settings, the differentiated responses of various civil society actors to counter-terrorism and the approach of the government to different civil society groups. The US approach generally sidesteps charity regulators in favour of prosecutors, but even action by regulators has come under fire from the sector. The measures adopted in the USA since 9/11 and the responses of US civil society actors to these are significant not just for domestic reasons but also because the USA is a major aid donor in Africa, the Middle East and Central Asia. As the article demonstrates, counter-terrorist policies and legislation affect not only domestic civil society but also the work of US overseas development and humanitarian NGOs, particularly in conflict areas.

This article examines the impacts of counter-terrorism measures on charity regulation in the USA, where some of the harshest legal and policy responses took hold immediately after September 2001. It compares these effects with the approach to counter-terrorism adopted in the United Kingdom (UK). In doing so it suggests that the different institutional set-up for the regulation of charities in these two countries accounts in part for the harsher responses seen in the USA. The article then analyses the responses of civil society to these measures. It argues that groups directly affected by the new legislation — principally Muslim charities — and some civil liberties groups have openly resisted these measures, whilst the mainstream non-profit sector has in general acquiesced in the introduction of new policies, ‘guidelines’ and legislation, opposing these only when it perceived itself to be directly threatened.

THE USA: THE IMPACT ON MUSLIM CHARITIES

For the vast majority of American non-profits and foundations, the primary impact of counter-terrorism law and policy since September 11 has been the need for enhanced information gathering on partners, including checks against watch lists and collecting non-terror certifications; and risk-shifting of anti-terrorism burdens downward to grantee organizations or to local affiliates of federated groups. In general terms these have imposed a political and administrative burden but do not appear to have fundamentally changed the ways that these organizations work.

2. See Sidel (2008, 2009) for the full list of citations to the work of these organizations.

For a minority of American organizations, however, counter-terrorism law and policy has had a far greater effect, thus underlining the selectivity of the War on Terror security regime, the first theme of this cluster. Counter-terrorism legislation, policies and practices have required substantial shifts in operations, programmes and fundraising. US-based Muslim charities are central to this minority group. Some of the largest Muslim charities in the USA have been closed since 2001, their assets frozen, and in some cases the organizations and their leaders charged with 'material support' for terrorism because of suspicion of their links with partner organizations in conflict areas overseas. The impact has also been felt directly by American public charities and foundations that work or make grants overseas, for in this area new government policy has had some impact. However, the impacts have been felt most acutely by organizations working in conflict areas where extremist groups and militant organizations operate. In a broad sense, the American non-profit sector has sought to maintain the autonomy and vibrancy of the sector and of individual organizations while agreeing to and acceding in the government's interest in preventing non-profit organizations from being conduits in terrorist finance or otherwise supporting terrorist organizations or goals.

The regulatory impacts of counter-terrorism law and policy on American non-profit organizations go back to the 1993 bombing of the World Trade Center and earlier. These include legal provisions that allowed proscription of terrorist organizations and that barred 'material support' to terrorist organizations in the Anti-terrorism and Effective Death Penalty Act, adopted in 1996, which criminalized 'material support' for terrorist organizations, and the International Emergency Economic Powers Act (IEEPA), originally enacted in 1977, which also prohibited transactions determined to be inimical to the national security of the USA, including terrorist financing through charities.

After September 2001, these statutes were supplemented by Executive Order 13224 (October 2001), which eased the process of proscription and freezing of terrorist assets, and by several provisions of the Patriot Act (November 2001), which enabled seizure of assets of 'persons engaged in planning or perpetrating . . . terrorism', or 'acquired or maintained' for that purpose, or 'derived from [or] involved in terrorism'. The Patriot Act also expanded the 'material support' prohibition to further bar 'expert advice or assistance' to terrorist organizations, a bar that has been applied to charitable organizations and has been the subject of extensive litigation. A notable court case was brought by the US Department of Justice against the Humanitarian Law Project, which had programmes on human rights and conflict resolution training with the Liberation Tigers of Tamil Eelam (LTTE) and the Kurdistan Workers Party (PKK), both of which are listed as terrorist organizations by the US government (Guinane and Sazawal, 2009).

The US government's most important actions in this area have targeted a number of Muslim charities, initially the Benevolence International

Foundation, Global Relief Foundation, and the Holy Land Foundation for Relief and Development. Each was proscribed and its assets frozen in late 2001 or thereafter, on charges of violating the prohibition against providing ‘material support and resources’ to a foreign terrorist organization, as well as other violations that include money laundering and tax evasion. Other organizations were added to the proscription list and their assets frozen in the years that followed.

The long and controversial history of the ‘material support’ provisions and their use in prosecution cannot be fully covered in the space available here. As noted, their roots are in the pre-September 11 legislation, but their scope was expanded after September 11, including by adding ‘expert advice or assistance’ to the definition of ‘material support or resources’. Originally the material support provisions did not require proof of intention by a defendant for conviction — any activity within the scope of the material support provisions, whether intended to promote terrorism or not, would be actionable (Chesney, 2005; Cole, 2003; Crimm, 2004).

Since 2001 there has been extensive litigation on the scope, meaning and constitutionality of the material support provisions, sometimes with contradictory results. Congress attempted to fix some material support issues in the late 2004 revision to the Anti-terrorism and Effective Death Penalty Act and the Patriot Act by reformulating the scope of the ‘personnel’, ‘training’ and ‘expert advice or assistance’ provisions of the law, by imposing a knowing (*mens rea*) standard for conviction, and by exempting organizations whose support for a foreign terrorist organization had been approved by the US government (as in the case of certain NGO expenditures), among other amendments. Litigation has continued in the US federal courts on the scope and constitutionality of the ‘training’ and ‘expert advice or assistance’ provisions of the law, and on the procedures and explanations required for designation of terrorist organizations. In November 2008, for example, a federal judge in Oregon ruled that the Treasury Department had violated due process in its 2004 closing of Al Haramain Islamic Foundation in 2004. More specifically on ‘material support’ issues, he ruled that ‘[s]ince the term “material support” lacks standards for OFAC [Office of Foreign Assets Control] and the public to employ, the term is impermissibly vague both as applied and factually’.³

In the first major ‘material support’ prosecution in the USA, the trial of the Holy Land Foundation (HLF) and its leaders in 2006–2007, the defendants were acquitted on a number of the major material support-related charges. The jury was unable to agree on most of the charges against the Foundation and most of the executives, while acquitting Holy Land’s former chair on almost all of the charges against him. The American NGO OMB Watch, which has been critical of this prosecution and other US government

3. Al Haramain Islamic Foundation et al. v. US Department of the Treasury et al., Civil Case No 07-1155-K1 (Opinion and Order of 6 November 2008, King, J.).

actions against charities, attributed the government's mixed result to 'secret evidence that unraveled when subjected to scrutiny and the fact that none of the charities HLF was accused of funding are on government lists of terrorist organizations' (OMB Watch, 2007). In connection with the 2007 prosecution, lawyers from Muslim groups especially criticized the release by the government of a long list of 'co-conspirator' organizations that included many well-known and well-respected Muslim groups.

The government retried Holy Land and its executives, reducing the number of charges and simplifying the prosecution. A jury returned guilty verdicts in November 2008 on charges of material support for Hamas, a designated terrorist organization in the USA, on money laundering and other charges. OMB Watch noted that '[t]he convictions came even though the prosecution admitted that all funds went to local charities, called zakat committees, that are not on government watchlists' (OMB Watch, 2009). Shortly after the criminal verdict, a federal circuit court of appeals also upheld a US\$ 15 million civil verdict against Holy Land for indirect liability in the death of an American teenager killed by Hamas, to which Holy Land had provided funds (*Dallas News*, 2009).

Most recently, another Muslim charity named KindHearts for Charitable Humanitarian Development has challenged the US Treasury Department's 2006 order freezing its assets based on government charges that 'KindHearts officials and fund-raisers have coordinated with Hamas leaders and made contributions to Hamas affiliated organizations' (US Treasury, 2006). Represented by the American Civil Liberties Union, KindHearts challenged the freezing and seizure order. In October 2008 a federal judge issued a temporary restraining order that prevented the government from making KindHearts a designated terrorism organization without providing the organization with due process rights (ACLU, 2008a; OMB Watch 2008a, 2008b, 2008c).

In November 2008, a federal judge in Oregon ruled that the Treasury Department had violated due process in its 2004 closing of Al Haramain Islamic Foundation in 2004, and that the definition of 'material support' in the key US statute remains constitutionally vague. At the end of 2008, American non-profit umbrella groups and some large public charities were pressing the government to release frozen funds, with strict controls, so that those funds could be deployed for acceptable charitable activities.

This selective targeting of US-based Muslim charities is mirrored in other countries where Muslim communities are in a minority and have come under suspicion — Kenya being a case in point, as discussed in Jeremy Lind and Jude Howell's contribution to this cluster. However, as Alejandro Colas reveals in this cluster, the approach of the Spanish government to its minority Muslim communities and their associations has been considerably more measured. Furthermore, this suspicion of Muslim charities at home has also been reflected both in US government development assistance (and especially in the allocation of developmental funds to support for curriculum

reform in madrassas and for education in Muslim countries), and in US foreign policy, where the discursive linking of Islam with terrorism has contributed to suspicion of Muslims in other countries.

US-Based Charities Working Abroad: The Guidelines and the Reaction

In November 2002, the US Treasury Department took a broader action that more deeply concerned a wider range of the American philanthropic and non-profit sector, releasing the 'Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-based Charities' (US Treasury, 2002). The Guidelines provided a broad and detailed range of new provisions for charitable and philanthropic organizations to use in their overseas giving, intended to prevent the channelling or diversion of American funds to terrorist organizations or purposes. These steps included the collection of considerably more information about grantees than is often available, the vetting of grantees, extensive donor review of financial operations beyond industry norms, and other requirements in quite detailed terms (*ibid.*).

These guidelines were so significant to the US non-profit sector because, although they were 'voluntary', in practice non-profit organizations faced considerable risk of being investigated and prosecuted for failing to carry out the due diligence checks that were sought. In the words of Barnett Baron, Executive Vice President of the Asia Foundation, the 2002 Treasury Guidelines carried the danger of 'setting potentially unachievable due diligence requirements for international grant-making, [and] subjecting international grant-makers to high but largely undefined levels of legal risk, [which] could have the effect of reducing the already low level of legitimate international grant making' (Baron, 2004). The Guidelines carried the risk that legitimate and well-meaning charities would struggle to comply with standards while less professional or less well-meaning groups might just ignore them.

The Guidelines sparked widespread opposition by many of the major charities and foundations engaged in significant overseas giving. They demanded withdrawal or substantial improvement in the Guidelines, while also proposing the 'Principles of International Charity', a new self-regulatory approach to ensuring that charitable funds did not find their way to terrorists.⁴ The Treasury revised its Guidelines on overseas giving in December 2005 and late 2006,⁵ but those changes did not satisfy the sector. In 2007 the Treasury Department added a 'risk matrix' for charitable institutions to use in connection with their overseas giving, also without consulting the sector.⁶

4. See 'Principles of International Charity' (www.independentsector.org/programs/gr/CharityPrinciples.pdf).

5. For the revised version of the Guidelines, see www.treas.gov/offices/enforcement/key-issues/protecting/charities-intro.shtml.

6. For the Treasury's risk matrix, see www.treas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

By early 2009, the overseas giving institutions and the Treasury Department were at an impasse — the organizations refused to recognize the legitimacy of the Anti-Terrorist Financing Guidelines, while the Treasury refused to allow the Principles of International Charity to supplant the Guidelines. In practice, however, both sides could claim a victory of sorts: increasingly overseas giving institutions were moving to a risk-shifting and risk analysis perspective in their overseas activities, in line with the approach of the Treasury's Guidelines. In conflict zones such as the Middle East, Pakistan, Afghanistan, Sri Lanka and some other areas, however, overseas giving organizations were clearly limited by US government policy, and by the links of some local NGOs to listed terrorist organizations, in pursuing a completely free giving policy abroad.⁷

Risk Analysis and Risk Shifting by American Foundations

For some prominent American foundations already concerned about political backlash and potential investigations of their grant making by the executive or legislative branches, the stakes were also high. Several of those organizations, most prominently the Ford and Rockefeller foundations, responded in some cases by shifting responsibility to their grantees for terrorism-related risks, through new and broadly worded grant letters. Ford introduced new grant language in 2003 that required grantees to promise not to 'promote or engage in violence, terrorism, bigotry or the destruction of any State, nor . . . make subgrants to any entity that engages in these activities' (see Sidel, 2007: 121–4). This risk-shifting grant language remained in place in late 2008 and showed no signs of shifting.

In turn that new contract language prompted initial opposition from a group of elite universities and a decision by the American Civil Liberties Union not to sign the broad new grant letter provisions and thus not to accept new funds from Ford (Sherman, 2006; Sidel, 2007) — a sharp response to the risk-shifting approach that Ford had adopted. In 2007, a prominent Indian NGO also raised this issue with the Ford Foundation, requesting modification of the Foundation's grant letter to restrict the very broad limitations to which it would have bound the Indian grantee.⁸

Space does not permit discussion of each of the various fields in which counter-terrorism law and policy have had direct impacts on non-profit and philanthropic organizations in the USA. In 2004, for example, the US federal agency that operates the Combined Federal Campaign (CFC) — the

7. In 2007, discussions focused on the US Agency for International Development's plans to implement a 'partner vetting system' that would require US AID grantees to provide highly detailed information about key grantee personnel and leaders for checking against government watchlists.

8. Letter to Ganesan Balachander, Representative, The Ford Foundation, New Delhi, 1 October 2007.

integrated giving effort in which hundreds of thousands of federal employees donate to non-profit organizations — announced that it would require each non-profit organization receiving CFC funds to certify that it ‘does not knowingly employ individuals or contribute funds to organizations found on the . . . terrorist related lists promulgated by the US Government, the United Nations, or the European Union’ (Combined Federal Campaign, 2003). This new requirement ignited a firestorm of opposition within the American non-profit sector, given the wide range of groups receiving CFC funding. Eventually the American Civil Liberties Union and a number of other organizations filed suit against the federal government seeking to overturn the new certification requirement (*New York Times*, 2004; *Washington Post*, 2004), and in November 2005 the federal government withdrew the new terrorism certification requirement (*New York Times*, 2005).

The ‘shifting of risk’ to grantees goes beyond the actions of some private foundations and the aborted effort by the CFC. In recent years, a number of local United Ways in the USA have required that each non-profit organization receiving United Way funds certifies that it complies with anti-terrorist financing laws and regulations; that individuals or organizations that the organization works with are not on government terrorism watch lists; and that no material support or resources are being provided to support or fund terrorism.

Beyond Legislation and Indictments: Surveillance of the American Non-profit Sector

There was a widespread assumption that government actions would be directed solely against a few Muslim charities and other targeted groups, and that the remainder of the non-profit sector would be left alone. But events in 2005 and 2006 directly challenged this perception. The American press revealed that the US government had in fact targeted a much broader swathe of the American non-profit sector for surveillance and observation than was originally understood or assumed. Hundreds or perhaps even more American non-profits have had events observed, telephone calls sorted, or financial transactions examined by government agencies (MSNBC, 2006; *Washington Post*, 2006).

In early 2007 press reports indicated that the US government was employing donor-tracking software to search and correlate donors to an as-yet undefined range of non-profit institutions (*Los Angeles Times*, 2007). New reports emerged in 2007 and 2008 on government surveillance of non-profits — particularly advocacy organizations — in several US states. The *New York Times* and the New York Civil Liberties Union revealed in 2007 that the New York City Police Department had conducted surveillance on advocacy groups, including non-profits, in at least thirteen states, as well as in Canada and Europe, before the 2004 Republican National Convention (*New York Times*, 2007; NYCLU, 2007). In Maryland, state police and other

security forces at the state and city level conducted surveillance on and infiltrated anti-war, anti-capital punishment and other non-profit organizations in 2005 and 2006, with reports sent to 'at least seven federal, state, and local law enforcement agencies' (ACLU of Maryland, 2008). While some US non-profits were slow to respond to these reports, since January 2009 NGOs have been giving testimony in congressional hearings relating to the government's counter-terrorism legal and policy responses, including government surveillance powers and the role of law enforcement in investigating advocacy groups (Guinane and Sazawal, 2009).

In order to get a measure of the harsh response of the US government towards Muslim charities and the broader non-profit sector, it is worth examining the case of the UK, a staunch ally to the USA and also a victim of global jihadist terrorism.

THE USA AND THE UK: DIFFERING APPROACHES

British law and policy with respect to charities and terrorist finance have, in some key respects, been consistent with developments in the USA and other countries. British law allows proscription of terrorist organizations and bans support of proscribed organizations, such as helping them arrange or manage meetings to further their activities. British law also more broadly bans fundraising and making various kinds of funding arrangements for 'purposes of terrorism'. It also prohibits retention or control of 'terrorist property', among other provisions.⁹

However, there are significant differences in approach between the USA and the UK. In particular, Britain's approach to shutting off terrorist finance from charities relies in significant measure on charity regulators as 'first responders' in the anti-terrorist enterprise in connection with charities. The independent statutory regulator of charities in England and Wales is the Charity Commission, which has been at the forefront of charity-related terrorism financing investigations since before September 11 and has played a key role in investigating, resolving, and where necessary collaborating in prosecuting ties between charities, terrorism and terrorist finance, while emphasizing the need for evidence and fairness in such proceedings. The Commission's central role was reaffirmed under the new Charities Act 2006. At the same time, of course, quick action by security forces and prosecutors is often appropriate as well, and co-operation between agencies is crucial; the Charity Commission recognizes both those imperatives.¹⁰

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9. Legal Opinion by Edward Fitzgerald QC and Caoilfhionn Gallagher, Doughty Street Chambers, London, in National Council of Voluntary Organisations (NCVO) 'Security and Civil Society' (January 2007) (www.ncvo-vol.org.uk).
 10. For detailed information on the role and functions of the Charity Commission, see <http://www.charity-commission.gov.uk/tcc/ccabout.asp>; for summary information on the Charities Act 2006, see <http://www.charity-commission.gov.uk/spr/ca2006prov.asp>.

The Charity Commission's approach has been effective because of its wide investigatory and enforcement powers and its detailed understanding of developments in the UK charitable sector. In addition, the Commission had an array of means at its disposal to deal with failures to abide by the law, ranging from technical assistance and advice on agreements to change practices to, where needed, orders removing trustees, freezing funds or closing organizations, and direct partnership with security forces and prosecutors to close offending organizations.

Differences between the American and British approaches emerged in several key cases. After the September 11 attacks, the US government alleged that Interpal, a charity operating in both the USA and the UK, was supporting political and/or violent activities of Hamas. After the US government formally named Interpal as a 'specially designated global terrorist' organization and proscribed its activities in the USA, the Charity Commission immediately opened a formal Inquiry and froze Interpal's accounts. The Commission also requested 'evidence to support the allegations made against Interpal' from the USA, but, according to an understandably limited report from the Commission, the US government was 'unable to provide evidence to support allegations made against Interpal within the agreed timescale'.

After the US government failed to deliver the evidence, the Commission decided that, 'in the absence of any clear evidence showing Interpal had links to Hamas' political or violent militant activities', Interpal's accounts would be unfrozen and the Commission's Inquiry closed. Although the USA and the UK diverged, very publicly, on Interpal, and the case indicates differences of approach and difficulties at times in trans-Atlantic co-operation, the inquiry also enabled the Commission to reassert that it will 'deal with any allegation of potential links between a charity and terrorist activity as an immediate priority . . . liais[ing] closely with relevant intelligence, security and law enforcement agencies to facilitate a thorough investigation'. The Commission also re-emphasized that 'as an independent statutory regulator the Commission will make its own decisions on the law and facts of the case' (Charity Commission, 2003).¹¹

New Initiatives against Terrorist Financing through Charities, and the Role of the Charity Commission

The July 2005 terrorist bombings in London and charges of other links between British-based charities and terrorism have brought renewed pressure to clamp down on terrorist networks and their financing. Intelligence and police activities, raids and detentions increased, the Charity Commission added

11. From the Commission reporting on this matter is it not clear if the issue was that there was no evidence or that the USA was unwilling to disclose the intelligence that it might have had.

new internationally proscribed individuals and groups to its domestic proscription lists, and opened several new investigations of charities operating in England and Wales. In February 2006, then-Chancellor of the Exchequer, Gordon Brown announced that the government would review measures to combat the use of charities in terrorist finance and would establish a new intelligence centre to investigate terrorist financing networks around the world and their impact on Great Britain (*The Guardian*, 2006a).

New Charity Commission and security investigations focused on a range of Muslim charities, including Sanabel, Islamic Relief, Jamaat ud Dawa (Association of the Call to Righteousness) and Crescent Relief, and their alleged ties, or diversion of funds to terrorist groups. The attention also sparked more intensive focus on charitable links to terrorism and their role in terrorist finance, especially links involving Islamic charities. The changed environment was captured by the *New York Times* in August 2006: 'The question is being asked here, with more urgency: To what extent do Muslim charities — on the surface noble and selfless — mask movements and money for terrorists and extremist groups?'. 'Since Sept. 11,' the *NY Times* continued, 'American officials have banned many charities that still operate freely in Britain, reflecting a disagreement about where charity ends and extremism begins'. Increasingly, American officials and commentators were critical of the process-based British approach, calling the Charity Commission and other British institutions 'too lax'. All agreed that 'the British showed signs of hardening, particularly after four bombers killed 52 people on buses and trains here on July 7 of last year' (*New York Times*, 2006).

In the wake of terrorist bombings and airline bomb plot arrests in 2005, the British government reconfirmed that the Home Office and Treasury Department were conducting a formal review of terrorist finance through charities and intended to recommend legal and policy changes. An umbrella non-profit group, the National Council for Voluntary Organisations (NCVO), also convened a panel to report on issues of charities and terrorist finance, deeply concerned that the Home Office and Treasury review would not be sufficiently consultative and would upset the delicate balance that included the need for evidence-based decision making, maintaining the rights of organizations under investigation, and maintaining the independent role of the Charity Commission.

In October 2006, the British government announced that it would promote 'closer co-operation between America and Europe' in this area, 'use classified intelligence to freeze assets of those suspected of having links to terrorism' and 'allow law enforcement agencies to keep their sources of information secret after it is used to track down and freeze bank accounts'. The government would also seek pre-emptive authority to halt terrorist financing (see Associated Press, 2006; *The Guardian*, 2006b). The Home Office and Treasury inquiry on charities and terrorist finance continued.

The new Terrorism Act 2006 also added to the array of counter-terror enactments in the UK since September 11, particularly the Terrorism Act

2000 and the Anti-Terrorism, Crime and Security Act 2001. The Act affected charities because it expanded the terrorist criminal offences and grounds for proscription to include acts preparatory to terrorism, including directly or indirectly inciting or encouraging others to commit terrorism, such as the 'glorification' of terrorism; the sale, loan, or other dissemination of publications that encourage terrorism or provide assistance to terrorists; and giving or receiving training in terrorist techniques, including mere attendance at a terrorist training site (Home Office, 2006).

In January 2007, in advance of the release of the long-awaited Home Office and Treasury review of charities, terrorist finance and the role of the Charity Commission in counter-terrorism law and policy, the NCVO released its own report on charities and terrorist finance, 'Security and Civil Society'. The report called on the government to view charities as allies in the fight against terrorism rather than as adversaries and pointed out the fundamental sufficiency of the existing legal regime while also recognizing some problems. It criticized the impact of some government actions in this arena on charitable activities in the UK and abroad, particularly with respect to Muslim organizations (NCVO, 2007).

The Home Office and Treasury review of charities and terrorist finance was released in May 2007. The review called for tightened co-ordination between the Charities Commission and government agencies dealing with terrorism and terrorist finance, a more prosecution-based approach by the Charity Commission, increased funding focused on prosecutions and investigations rather than on improved governance in the sector, and other measures.¹² The response from the NCVO was swift and critical: 'By placing a veil of suspicion over all charities, the Government is in danger of damaging the trusted reputation of the voluntary sector and making people less likely to donate to good causes'.¹³

The Charity Commission's response, considered and drafted very carefully, described plans to accelerate its work on terrorist finance and to strengthen co-ordination with government agencies. The Charity Commission also sought to safeguard the independence of its work and structure, and its role in co-operating with the charitable sector to strengthen governance and accountability. The Commission noted clearly:

The way we tackle the risk of terrorist abuse of charities falls squarely within our existing approach to regulation; we are uniquely placed to deal with abuse where it does occur, collaborate with other regulators and agencies and other parts of government and support trustees to protect their charities; when allegations of terrorist involvement or links with charities arise, we deal with them as a matter of priority. We will deal proactively, robustly, effectively and swiftly when we have evidence or serious suspicions of terrorist abuse

12. The Home Office and Treasury Review is available at www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/Charities_consultation.pdf?view=Binary.

13. 'NCVO: Overstating the risk of terrorist abuse could damage trust in charities' <http://politics.co.uk> (10 May 2007).

involving charities; effective regulation involves putting a strong emphasis on giving support and guidance to charities to prevent problems and abuse occurring in the first place; we believe that the most effective way for the sector to minimise its exposure to the risk of terrorist abuse is through implementing strong governance arrangements, financial management and partner management. (Charity Commission, 2007a)¹⁴

In its response, the Charity Commission undertook to ‘continue to . . . take a balanced approach which is evidence- and risk-based, targeted and proportionate; . . . work in partnership and collaboration with government and the charity sector itself; . . . and . . . maintain its strategic and operational independence in line with its statutory remit’ (ibid.). In December 2007, it released a Draft Counter-Terrorism Strategy that embodied these principles and set forth working priorities and tasks, maintaining the Commission’s role and ‘evidence- and risk-based, targeted and proportionate’ approach while committing to closer work with security agencies (Charity Commission, 2007b).

Comparing American and British Experiences

The British experience shows the value of continuing to have sophisticated charity regulators play a central role in investigating charitable links to terrorism and terrorist finance, including maintaining legal authority over these issues in the charity regulator. The Charity Commission has played a very useful role in England in co-operation with police and security forces, bringing to bear a detailed knowledge of the sector and of individual charitable organizations based on years of reporting and experience, while emphasizing evidence and civil liberties.

The British experience differs from that of the USA, where most charity regulation occurs at the state level and federal regulators are most directly involved in tax issues relating to charities and non-profit organizations. In that particular structure — driven by American federalism, the history of government regulation of the non-profit sector in the USA, and the tax focus of the only regular federal charitable regulator — there is no federal body providing independent expertise on the sector, working with the sector to strengthen governance and accountability, and able to function in partnership with the Treasury and other regulatory agencies directly responsible for terrorist finance. The result in the USA is a prosecutorial structure unburdened and unbalanced by any federal body that seeks to work with the non-profit sector against terrorist-related abuses as has developed in Britain. Having thus highlighted the specificities of the US approach through a comparison

14. Other responses to the Home Office and Treasury Review can be found at: www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/cons-2007-charities-responses?view=Binary.

with the UK, the next section examines the responses of civil society to the post-9/11 counter-terrorist laws and policies.

STRATEGIES OF OPPOSITION AND RESISTANCE, AND THE QUESTION OF IMPACT

How have civil society organizations responded to the swathe of counter-terrorist legislation and measures introduced in the wake of the September 11 2001 attacks? In particular which parts of civil society have actively opposed these measures and which have acquiesced in the changes? Statutes and regulations barring various forms of charitable assistance to or use by terrorists were generally in place before September 11. They have been broadened in the ensuing years, either through law or through so-called 'voluntary' measures, 'guidelines', or other methods. As the Combined Federal Campaign and other episodes indicate, these measures tend to broaden still further over time, either in scope or in application.

Opposition has been episodic and, perhaps understandably, significant opposition and resistance have been largely limited to groups directly affected by counter-terrorism policy and law, such as Muslim charities, along with a few leading voices in the civil liberties arena such as the American Civil Liberties Union and OMB Watch. A similar pattern of responses is noted in Kenya, as discussed by Lind and Howell in this cluster. Broader opposition or resistance has emerged where government efforts were perceived as dangerous to the broader sector, as in the government's guidelines on overseas giving, which sparked broader discontent and opposition in the sector. Where opposition or resistance has emerged, it has taken diverse forms depending on the nature of the government action or threat and the breadth of opposition. Those forms include alliance-building, litigation by individual organizations, and other strategies discussed in this article — but never have those strategies been sector-wide. The parts of the non-profit and philanthropic sector that have been directly prosecuted or attacked have responded with vigorous legal and public defences, but much of the American non-profit sector, not directly affected by new government policy, has remained quiescent.

Most of the American non-profit and philanthropic sector has learned to live with these new legal requirements, and in most cases these institutions have been able to continue their activities with relatively few limitations. As discussed here, the Treasury Department's Anti-Terrorist Financing Guidelines and the competing Principles of International Charity, drafted by a coalition of overseas giving charities, illustrate both the limitations and the reach of the government's initiatives in the USA. Public charities and foundations working overseas have refused to recognize the legitimacy of the Anti-Terrorist Financing Guidelines, while the Treasury refused to allow the Principles of International Charity to supplant the Guidelines. As noted,

both sides could claim a sort of victory. In that sense, US government policy could be said to have had a continuing and substantial effect on practices and giving in the American non-profit sector, particularly those groups working in major conflict areas where terrorism remains a significant concern.

Can Voluntary Sector Self-Regulation Provide an Alternative to Government Regulation of Charities and Terrorism?

Gradually, and in fits and starts, we have begun to see non-profit sectors seeking to self-regulate their activities to avoid stricter government initiatives in the arena of terrorist finance. The US philanthropic and overseas giving public charity sector, for example, proposed the 'Principles of International Charity' in 2004 as a self-regulatory alternative to the Treasury Department's much-criticized 'Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-Based Charities'. The European Foundation Centre and the US Council on Foundations worked together to draft and publicize self-regulatory principles for a wider range of international non-profits, the 'Principles of Accountability for International Philanthropy'.¹⁵ Several initiatives have been launched to raise standards and promote a self-regulatory environment in the Muslim charitable sector, including two distinct projects, the Montreux Initiative and the Humanitarian Forum.¹⁶ A separate self-regulatory initiative has taken place in Europe — the push for a 'code of conduct' at the EU level that would mandate strengthened self-regulation among voluntary sector organizations — but the 'code of conduct' has been initiated and promoted by the European Commission rather than arising from the voluntary sector itself (Vellenga, 2008).

However, as noted above, the US Treasury Department refused to permit the industry-drafted 'Principles of International Charity' to supplant its own 'Anti-Terrorist Financing Guidelines'. The 'Principles of Accountability for International Philanthropy' and the Montreux Initiative and Humanitarian Forum have each sparked interest in the communities for which they were targeted — European foundations for the first, and Muslim charities for the others — but they have not yet had a substantial effect in changing practices and raising standards in their particular areas. Moreover, there has been some voluntary sector opposition to the European Commission's notion of a 'code of conduct' for voluntary sector organizations throughout Europe on issues of charities and terrorist finance, opposition based on conflict over the real threat posed by charities in the terrorist arena, the scope of the 'code

15. See www.cof.org/council/prdetail.cfm?ItemNumber=10038.

16. For further information on the Montreux Initiative, see www.eda.admin.ch/eda/en/home/topics/peasec/peac/confre/conrel.html; on the Humanitarian Forum, see www.humanitarianforum.org; and on both, see Sidel (2009).

of conduct' proposal, and the need for real self-regulation to come from the sector itself rather than being imposed from above (Sidel, 2009).

If it is possible to summarize these very different self-regulatory initiatives in countries and regions with widely differing conditions, it may be possible to say that self-regulation is an issue under regular discussion, with important initiatives underway, but that it is currently showing no significant signs of being able to supplant or even effectively complement government regulation in this area.

CONCLUSION

The US government has proceeded furthest in introducing new counter-terrorist legislation and policies since 2001. Compared to the UK, also a liberal democracy, a victim of global jihadist terrorism, and an ally in the War on Terror (and also compared to Spain, as analysed by Colas in this cluster), the US approach has been considerably harsher. The British approach, in which the Charity Commission's regulatory role has thus far remained at the centre of investigatory and enforcement activities, has been far more easily accepted by the voluntary sector, and has arguably facilitated more effective partnership with government and with the non-profit sector. The US approach to counter-terrorism and civil society at home is matched externally, where again, compared to other bilateral donors, it has gone furthest in introducing restrictive measures on development agencies and US NGOs providing aid overseas. Given the predominance of US official development assistance in many parts of the world with respect both to volumes of aid and influence on aid policy and practice, its approach towards counter-terrorism and civil society both domestically and externally matter.

The US approach to counter-terrorism underlines several key issues central to the legal and political enabling environment for civil society. These include the process, scope, intentionality requirement and reviewability of proscription decision making; the availability and fairness of a de-proscription process; the breadth of terrorist 'support' or 'material support' or 'assistance' or 'training' or financing offences, including the frequent lack of a *mens rea* requirement and the breadth of the offence; the dangers to associational freedom and civil society posed by the broad legislation already enacted or proposed; and the difficulty in preserving a central role for non-political and non-partisan charity regulators, where they exist. Moreover, in its external relations, it raises issues around the use of development policies for foreign policy purposes and places NGOs operating in conflict areas and/or countries with large Muslim populations at risk of being accused of supporting terrorism. Perhaps most worryingly, it raises concerns that donors and NGOs may become over-cautious in their aid giving and thereby ultimately risk by-passing poor and vulnerable groups.

Opposition from civil society and the voluntary and charitable sector to new government restrictions on non-profit activity has been episodic at best. Even where new laws, regulations, guidelines, indictments, prosecutions, surveillance and other government activity have prompted substantial concern, charities and philanthropic organizations tend to become exercised by broadening government regulation in this area only when they are directly affected, as by the US Treasury Department's guidelines on overseas funding. This has left much of the work of challenging counter-terrorist legislation and policies to those groups directly affected by them, specifically Muslim charities, and to some civil liberties groups. The experiences of the USA in this respect are echoed in many countries in Europe, Africa, the Middle East and Asia (Howell and Lind, 2009), raising issues around the self-consciousness of government and/or donor-funded, formal, charities and non-profit organizations as defenders of civil society spaces.

As the Obama administration settles into power in the USA, it remains to be seen whether the approach to counter-terrorism and the implications for civil society will change significantly. The administration has already taken measures to reduce certain excesses: it has abandoned the language of the 'War on Terror'; it has made moves to close the Guantanamo Bay detention facility; and it has prohibited the use of torture. The administration has also demonstrated some willingness to engage in dialogue with the American non-profit sector on the Anti-Terrorist Financing Guidelines and other aspects of terrorist finance policy that particularly impact the American voluntary sector. However, conflict with the Muslim charitable sector continues and the enactments and guidelines of the past eight years and beyond remain firmly in place. The American experience in the regulation of charities and terrorism will continue to merit close scrutiny in the years ahead.

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A longer treatment of these issues appears in *Regulation of the Voluntary Sector: Freedom and Security in an Era of Uncertainty* (Routledge, 2009).

REFERENCES

- ACLU (2008) 'Court Blocks Government from Designating Charity as "Terrorist"', 9 October 2008. <http://www.aclu.org> (accessed 15 February 2009).
- ACLU of Maryland (2008) 'ACLU of Maryland Lawsuit Uncovers Maryland State Police Spying against Peace and Anti-Death Penalty Groups', 17 July 2008. <http://www.aclu-md.org> (accessed 15 February 2009).
- Associated Press (2006) 'UK Unveils Plan to Freeze Terror Funds', Associated Press 10 October.
- Baron, Barnett (2004) 'Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy', *International Journal of Not-for-Profit Law* 6(2).
- Charity Commission (2003) 'Inquiry Report: Palestinians Relief and Development Fund'. www.charity-commission.gov.uk/investigations/inquiryreports/interpal.asp
- Charity Commission (2007a) 'The Home Office and HM Treasury's Review of Safeguards to Protect the Charitable Sector (England and Wales) from Terrorist Abuse: The Charity Commission's Response to the Consultation'. <http://www.charity-commission.gov.uk/supportingcharities/terror.asp> (accessed 15 February 2009).
- Charity Commission (2007b) 'Draft Counter-Terrorism Strategy'. <http://www.charity-commission.gov.uk/spr/cts.asp> (accessed 15 February 2009).
- Chesney, Robert M. (2005) 'The Sleeper Scenario: Terrorism-Support Laws and the Demands of Prevention', *Harvard Journal on Legislation* 42(1): 1–89.
- Cole, David (2003) 'The New McCarthyism: Repeating History in the War on Terrorism', *Harvard Civil Rights: Civil Liberties Law Review* 38(1): 17–30.
- Combined Federal Campaign (2003) 'Combined Federal Campaign Memorandum 2003-10, New Certification for 2004 CFC Application'. www.opm.gov/cfc/opmmemos/2003/2003-10.asp
- Crimm, Nina (2004) 'High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy', *William and Mary Law Review* 45(4): 1341–451.
- Dallas News (2009) 'Holy Land Foundation Case Puts Burden on Muslim Charities', *Dallas News* 5 January. <http://www.dallasnews.com> (accessed 15 February 2009).
- The Guardian (2006a) 'Modern-Day Bletchley Park to Tackle Terror Finance Networks', *The Guardian* (London) 11 February. <http://www.guardian.co.uk> (accessed 15 February 2009).
- The Guardian (2006b) 'Brown to Use Classified Intelligence in Fight to Cut Terrorist Funding', *The Guardian* (London) 11 October.
- Guinane, Kay and Suraj Sazawal (2009) 'Counter-terrorism Measures and the NGO Sector in the USA: A Hostile Environment', in Jude Howell and Jeremy Lind (eds) *Civil Society under Strain: Counter-terrorism Policy, Civil Society and Aid Post-9/11*, pp. 53–74. Sterling, VA: Kumarian Press.
- Home Office (2006) 'Counter-Terrorism Strategy, Terrorism Act 2006'. <http://security.homeoffice.gov.uk/counter-terrorism-strategy>.
- Howell, Jude and Jeremy Lind (2009) *Counter-terrorism, Civil Society and Aid: Before and After the War on Terror*. Basingstoke: Palgrave/Macmillan.
- Los Angeles Times (2007) 'Anti-Terrorism Program Mines IRS Records; Privacy Advocates are Concerned that Tax Data and Other Information May Be Used Improperly', *Los Angeles Times* 15 January. <http://www.latimes.com> (accessed 15 February 2009).
- MSNBC (2005) 'Is the Pentagon Spying on Americans? Secret Database Obtained by NBC News Tracks "Suspicious" Domestic Groups', MSNBC (NBC News) 14 December. <http://www.msnbc.com> (accessed 15 February 2009).
- NCVO (2007) 'Security and Civil Society'. London: National Council of Voluntary Organizations. <http://www.ncvo-vol.org.uk> (accessed 15 February 2009).

- New York Times* (2004) 'Charities Sue over Antiterrorism Certification Regulation', *New York Times* 11 November. <http://www.nytimes.com> (accessed 15 February 2009).
- New York Times* (2005) 'Groups Sue OPM on Terrorism Rule; Requirement on Watch Lists is Dropped', *New York Times* 10 November. <http://www.nytimes.com> (accessed 15 February 2009).
- New York Times* (2006) 'Airplane Terrorism Case Prompts Questions about the Work of Islamic Charities in Britain', *New York Times* 24 August. <http://www.nytimes.com> (accessed 15 February 2009).
- New York Times* (2007) 'City Police Spied Broadly Before G.O.P. Convention', *New York Times* 25 March. <http://www.nytimes.com> (accessed 15 February 2009).
- NYCLU (2007) 'Police Documents Released by NYCLU Show Broad Surveillance of Peaceful Political Activity before RNC' (16 May). New York: New York Civil Liberties Union. <http://www.nyclu.org> (accessed 15 February 2009).
- OMB Watch (2007) 'No Conviction, Mistrial for Holy Land Foundation' (23 October). <http://www.ombwatch.org> (accessed 15 February 2009).
- OMB Watch (2008a) 'Judge Says Shuttered Charity Must Be Given Due Process' (21 October). <http://www.ombwatch.org> (accessed 15 February 2009).
- OMB Watch (2008b) 'Federal Court Says Treasury Action Shutting Down Al-Haramain Islamic Foundation Unconstitutional' (7 November). <http://www.ombwatch.org> (accessed 15 February 2009).
- OMB Watch (2008c) 'Non-profits Call for Release of Frozen Funds for Humanitarian Efforts' (7 November). <http://www.ombwatch.org> (accessed 15 February 2009).
- OMB Watch (2009) 'Conviction of Holy Land Foundation Raises Questions, Concerns for Non-profits' (26 January). <http://www.ombwatch.org> (accessed 15 February 2009).
- Sherman, S. (2006) 'Target Ford', *The Nation* 5 June.
- Sidel, Mark (2006) 'The Third Sector, Human Security, and Anti-Terrorism: The USA and Beyond', *Voluntas: International Journal of Voluntary and Not-for-Profit Organizations* 17: 199–210. <http://www.ijnl.org> (accessed 15 February 2009).
- Sidel, M. (2007) *More Secure, Less Free? Anti-Terrorism Law and Civil Liberties since September 11*. Ann Arbor, MI: University of Michigan Press.
- Sidel, Mark (2008) 'Counter-Terrorism and the Enabling Legal and Political Environment for Civil Society: A Comparative Analysis of "War on Terror" States', *International Journal of Not-for-Profit Law* 10(3). http://www.icnl.org/knowledge/ijnl/vol10iss3/special_2.htm (accessed 15 February 2009).
- Sidel, M. (2009) *Regulation of the Voluntary Sector: Freedom and Security in an Era of Uncertainty*. London and New York: Routledge.
- US Treasury Department (2002) 'Anti-Terrorist Financing Guidelines: Voluntary Best Practices for US-based Charities'. Washington, DC: US Treasury Department.
- US Treasury Department (2006) 'Treasury Freezes Assets of Organization Tied to Hamas' (19 February). <http://www.ustreas.gov> (accessed 15 February 2009).
- Vellenga G. (2008) 'Civil Society and Terrorism: Law and Policy in the European Union'. Paper presented at the University of Iowa Provost's Forum on International Affairs, Iowa City (April).
- Washington Post* (2004) 'Charities Told to Screen Workers', *Washington Post* 11 November. <http://washingtonpost.com> (accessed 15 February 2009).
- Washington Post* (2006) 'Surveillance Net Yields Few Suspects', *Washington Post*, 5 February. <http://washingtonpost.com> (accessed 15 February 2009).

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