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**Counter-Terrorism, Civil Liberties,
and the Enabling Legal and Political
Environment for Civil Society:**

**A Comparative International Analysis of
“War on Terror” States**

Winner of the ICNL-Cordaid Civil Liberties Prize

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This paper focuses on the legal and political environment for civil society, with a focus on civil liberties, in an era in which counter-terrorism policy and law has severely challenged civil society and civil liberties in some countries. The ways in which counter-terrorism law and policy affect civil society can differ dramatically by country and region. So this paper provides a comparative international analysis of the impact of counter-terrorism policy and law on civil society in a number of countries in which the “war on terror” is being fought, emphasizing impacts on the enabling environment for civil society such as laws, regulations, policies and practice influencing the existence, structure, activities and vibrancy of civil society.

I address these impacts in the United States, the United Kingdom, and Australia, with some comparative reference in the conclusions to Canada, Netherlands and the European Union. Certainly other countries and regions could and should be discussed, but limited space forces a focus on some of the countries in which the “war on terror” has been waged most vigorously and where the impact of counter-terrorism law and policy on civil society has been most widely contested.¹

There are significant differences in the way that the nexus between counter-terrorism law and policy and civil is regulated in the U.K., the U.S., and Australia. The British approach has relied significantly on charity regulators as statutory-based core partners in the battle against terrorism, often as “first responders” in situations where charities are allegedly tied to terrorism or terrorist finance. The American approach to shutting off terrorist finance from nonprofits largely sidesteps charity regulators in favor of direct action by prosecutors, a function of both prosecution- and homeland security-led counter-terrorism measures in the United States and the bifurcated nature of nonprofit regulation under the American federal structure. Australia is still developing its approaches, and showing indications of using both models.

The paper begins from the important premise that measures used to monitor, investigate, restrict, prosecute or otherwise affect charities in the goal of restricting terrorist financing should also seek to maintain the autonomy and vibrancy that characterizes the charitable sector in democratic societies, and that serious efforts must be made to balance society’s interests in freedom from terrorism with society’s interests in a vibrant, autonomous and powerful charitable sector.

These are not the “state’s” interests distinguished from the “charitable sector’s” interests; our interests in combating terrorism and in preserving and enhancing the vital role of the charitable sector are interests that states and charitable sectors share, as do other forces in society.

¹ I have greatly benefited from responses by participants to earlier presentations and papers on these issues at the Centre for Civil Society Studies, London School of Economics (June 2007); Association for Research on Nonprofit Organizations and Voluntary Action (ARNOVA) (November 2007); Government of Canada Commission of Enquiry into the Investigation of the Bombing of Air India Flight 182 (Major Commission) (November 2007), and other venues.

The impact of counter-terrorism law and policy on civil society and the enabling environment for it have been the subject of important early,² as well as recent³ work by Barnett Baron, Alan Fowler, Jude Howell and colleagues, Joe McMahon, David Moore, Kasturi Sen, and other commentators, and of crucial work by organizations that have focused intensively on these issues.⁴ I seek to build upon that work here, as well as some of my earlier work in this area,⁵ to discuss the growing conflict between governments and

² The growing academic and practice literature on government-charitable sector relations and anti-terrorism includes Richard Moyers, *A Shocking Silence on Muslim Charities*, Chronicle of Philanthropy, 17 October 2002; Barnett Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, International Journal of Not-for-Profit Law 6(2), 1-32 (2004); Alan Fowler, *Assessing the Impact of Counter-Terrorism Measures for Nongovernment Organizations* (INTRAC, 2004, at www.intrac.org); InterAction, Handbook on Counter-Terrorism Measures: What U.S. Nonprofits and Grantmakers Need to Know (2004); Kumi Naidoo, *Coming Clean: Civil Society Organisations at a Time of Global Uncertainty*, International Journal of Not-for-Profit Law 6(3): 1-3 (2004); Alan Fowler, Aid Architecture: Reflections on NGDO Futures and the Emergence of Counter-Terrorism, INTRAC Occasional Papers Series No. 45, Oxford, 2005; Teresa Odendahl, *Foundations and their Role in Anti-terrorism Enforcement: Findings from a Recent Study and Implications for the Future*, Georgetown University, June 2005.

³ Alan Fowler, *Counter Terrorism Measures, Development, and Civil Society*, Powerpoint presentation given at the INTRAC workshop in the Netherlands, January 2006 (www.intrac.org); Blake Bromley, *The Post 9/11 Paradigm of International Philanthropy*, Paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006); Terrence Carter, The Impact of Anti-Terrorism Legislation on Charities: The Shadow of the Law (Carters, Toronto, 2006); Civicus, Impact of Counterterrorism Measures on Civil Society (Civicus, Southdale (South Africa), 2006); Jude Howell, *The Global War on Terror, Development and Civil Society*, Journal of International Development 18: 121-135 (2006); Mark Sidel, More Secure, Less Free? Antiterrorism Policy and Civil Liberties after September 11 (University of Michigan Press, 2004, revised ed. 2006); C.R.M. Versteegh, *Terrorism and the Vulnerability of Charitable Organisations*, Paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006); Jude Howell and colleagues, The Backlash against Civil Society in the Wake of the Long War on Terror (LSE Centre for Civil Society, 2006); LSE Centre for Civil Society, *Aid, Security and Civil Society in the Post-911 Context: Briefing Report of an International Workshop* (June 2007); Nancy Billica, *Philanthropy, Counterterrorism and Global Civil Society Activism* (June 2007).

⁴ They include Cordaid, INTRAC, the International Center for Not-for-Profit Law (ICNL), CIVICUS, and other organizations. For the important work of these organizations on the issues discussed here, see, e.g., Alan Fowler, *Counter Terrorism Measures, Development, and Civil Society*, Presentation given at the INTRAC workshop in the Netherlands, January 2006 (www.intrac.org); INTRAC/VANI *Overview on South Asia CTM Workshop*, June 2006; INTRAC, *Overview Report on CTM Workshops: Redefining Development for National Security – Implications for NGOs and CSOs* (2007) (www.intrac.org); Kasturi Sen, The War on Terror and the Onslaught on Development (INTRAC, October 2007, www.intrac.org); Joseph McMahon, *Developments in the Regulations of NGOs via Government Counter-Terrorism Measures and Policies*, INTRAC Policy Briefing Paper 11 (September 2007, www.intrac.org); ICNL, *Recent Laws and Legislative Proposals to Restrict Civil Society and Civil Society Organizations*, International Journal of Not-for-Profit Law 8:4 (August 2006); David Moore, *Safeguarding Civil Society in Politically Complex Environments*, International Journal of Not-for-Profit Law 9:3 (July 2007); and other publications.

⁵ Mark Sidel, *The Third Sector, Human Security, and Anti-Terrorism in Comparative Perspective* (Keynote address delivered to the Seventh International Conference of the International Society for Third Sector Research (ISTR)), Bangkok, July 2006); Mark Sidel, *The Third Sector, Human Security, and Anti-Terrorism: The United States and Beyond*, 17 Voluntas: International Journal of Voluntary and Not-for-Profit Organizations 199-210 (2006).

the charitable sector (sometimes called the nonprofit, not-for-profit, or “third”) sector in a number of countries. A significant reason for that growing conflict and mistrust is the perception on the part of a number of governments that the charitable sector is a link to terrorism, through financing, ideology, and facilitating meetings and organization.

More broadly, a number of governments do not now appear to regard civil society and the charitable sector as a source of human security. Rather, they seem to regard the third sector as a source of *insecurity*, not as civil society but as encouraging *uncivil* society, not as strengthening peace and human security, but as either a willing conduit for, or an ineffective, porous and ambivalent barrier against insecurity in the form of terrorism and violence.

There has always been mistrust of the voluntary sector by governments in many nations around the world. This mistrust is expressed by governments in tightened regulation, stricter governance and financial requirements, restrictions on foreign funding, limitations on endowment growth and investments, barriers to advocacy, and a host of other legal and policy requirements. But for a number of governments, the current suspicion of civil society goes beyond traditional mistrust or skepticism and reflects a vision of the charitable sector as a source of insecurity and incivility that has fueled the reemergence of terrorism, particularly in the wake of the 2001 and subsequent attacks in Bali, London, Madrid, and elsewhere. Civil society and the voluntary sector is now under suspicion and investigation for the role – real or alleged – that some charitable organizations may have played in ties to terrorism. And even where governments do not make the explicit ties between the charitable sector and terrorism, the sector is generally regarded as easily used by terrorism, an ineffective and porous source of finances, organization, communications, and the transfer of goods and services for terrorist purposes.

The ripples of this pressure on civil society travel far indeed. The perception that civil society is indeed uncivil and a source of insecurity contributes to an environment of enhanced regulation of the voluntary sector, strengthened state oversight of voluntary sector activities, and declining confidence in the sector’s ability to contribute to the resolution of social problems and the advancement of human security. Governments that believe that the third sector is a conduit for terrorism and a source of human insecurity may respond with heightened regulation of the charitable sector, including new or enhanced financial, governance, reporting or other restrictions. Sometimes these policies may be relatively informal, more along the lines of what Professor Jude Howell has called the “intangible creation of climates of opinion or shifting attitudes” toward the voluntary sector.⁶

⁶ Comments by Professor Howell at the Program on Terrorism and Development, London School of Economics, 17 October 1995 (www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20051017-TerrorismAndDevelopment.pdf).

These problems are not limited to the United States. Although this research paper specifically addresses government the impact of government counter-terrorism measures on the enabling environment for civil society in the United States, United Kingdom, and Australia, these issues also arise – and often with great force – in a wide range of countries, including Australia, Cambodia, Canada, the countries of Central Asia, China, India, the Netherlands, Pakistan, the United Kingdom, Pakistan, Zimbabwe, and elsewhere throughout Asia, Africa, and Latin America.

Government responses may take many specific forms, including prevention of terrorism laws and regulations in India and elsewhere in South Asia that directly affect the nonprofit sector (India and elsewhere in South Asia); enhanced restrictions on gatherings and associational activities (China); limitations on funding and new certification requirements for funders and nonprofits alike (the United States); inclusion of charities in new anti-terrorism legislation and enhanced investigations (the United Kingdom); and a host of other measures.

The state policies may, depending on the country context, contribute to declining funding for civil society and voluntary sector organizations, a declining ability for the sector to obtain support for innovative programs, and an atmosphere of investigation and suspicion that may envelop civil society. State policies may contribute to a shifting of aid priorities including preferences for anti-terrorism programs in foreign aid. And such government policies may contribute to timidity within the voluntary sector that may lead to refusal to engage in important and innovative but also perhaps controversial work at a time when charities are under pressure in a number of countries and intense pressure in a few. Finally, these conflicts and circumstances demand that the voluntary sector do more, and do more effectively, to regulate itself.

It is also important to note that the idea that the charitable sector is a source of insecurity, even a conduit of terrorism, may not be the primary factor in state attempts to monitor or tighten control over the sector. Other factors can play a major role in such policies. They can include opposition to the advocacy role of the sector, concerns about accountability and transparency, the growing role of political and religious giving, and the rapidly growing role of diasporas in social development, among many other possible factors. In some countries, and some situations, counter-terrorism may be a rationale or even an excuse for tightening regulation, not the core reason.

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A related problem is the limits of terrorist finance law in preventing terrorism, particularly in the context of charities. Can laws against terrorist finance and penalties on charities significantly assist in stopping terrorism when terrorists and their supporters may have multiple means to channel funds? When at least some forms of terrorism can be financed at a relatively low cost? The effectiveness of the law in stopping terrorism is necessarily part of an assessment of charities regulation and terrorist finance that takes into account proportionality and balancing.

I. Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in the United States

As the leading country in the “war on terror,” it is not surprising the counter-terrorism law and policy has had perhaps the greatest impact on – and engendered the greatest anxiety about – the enabling legal, political, and policy environment for civil society in the United States. The impact of counter-terrorism policy and law on civil society in the United States has been both real and perceived, and it has spread across the full range of government action. This section discusses the most important ways in which counter-terrorism law and policy has affected the enabling environment for civil society in the United States, as well as the responses by American charities, foundations, and other nonprofits in the United States to U.S. government counter-terrorism policies and statutes since September 2001.

These responses have taken many forms, some overlapping across nonprofit sub-sectors and some specific to particular parts of the nonprofit community or even a few institutions. Responses differ at times by public charities and foundations, for example, though at other times they have been allied in response to government initiatives such as the “voluntary guidelines” on overseas giving. One particular subset of affected institutions, indicted Muslim charities, has had a more severe set of challenges and thus a differing set of responses.

Resistance, compliance, alliance, self-regulation and other actions have all characterized the responses of the American nonprofit sector to government counter-terrorism policies and legal regulation that has affected the sector in the aftermath of the horrific and criminal September 11 attacks.

In the broadest sense, the American nonprofit sector has sought to maintain the autonomy and vibrancy of the sector and of their individual organizations while agreeing to and acceding in the government’s interest in preventing nonprofit organizations from being conduits in terrorist finance or otherwise supporting terrorist organizations or goals.

In general terms much of the American regulation of counter-terrorism that affects the nonprofit sector since September 11 has sought to prevent nonprofits being used or choosing to become involved in terrorist finance, and thus we often see a certain commonality of purpose between government and the charitable sector on these issues.

The Framework of Counter-Terrorism Law and Policy and its Impact on Civil Society in the United States

In the United States, enhanced regulation of charitable ties to terrorism (usually reflecting concerns about terrorist financing) goes back to the 1993 bombing of the World Trade Center, including legal provisions that allow proscription of terrorist organizations and that bar “material support” to terrorist organizations. These provisions have been the subject of extensive litigation in the United States and have generally been upheld.

By the time of the September 2001 attacks, a fairly comprehensive legal framework for investigating and prosecuting charitable links to terrorism was in place. In particular, the Antiterrorism and Effective Death Penalty Act, adopted in 1996, criminalized “material support” for terrorist organizations through charitable and other vehicles. The International Emergency Economic Powers Act (“IEEPA”), originally enacted in 1977, also prohibits transactions that the U.S. executive branch has determined to be inimical to the national security of the United States, including terrorist financing through charities.

These pre-2001 statutes were supplemented almost immediately after September 11 by Executive Order 13224 (October 2001), which eased the process of proscription and freezing of terrorist assets, and by several of the provisions of the Patriot Act (November 2001), which were made applicable to the charitable sector. Among its provisions, the Patriot Act expanded the ability of the government to seize 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. Such provisions are of course applicable to charitable and nonprofit institutions as well as a much broader range of individuals and organizations.⁷

Initial Prosecutions, Organizational Defiance, and Sectoral Disengagement

The government’s first moves in this area were against several Muslim charities, initially the Benevolence International Foundation, Global Relief Foundation, and the Holy Land Foundation for Relief and Development. Each was closed and their assets frozen in late 2001 and after on charges of violating the prohibition against providing “material support and resources” to a foreign terrorist organization, as well as violations of the IIEPA, money laundering, tax evasion, and other charges. Other organizations were added to the proscription list and their assets frozen in the years that followed.

The government’s offensive against several Muslim charities was pursued with a vigor that convinced many in the American nonprofit sector that the government’s

⁷ For further information, see Sidel, More Secure, Less Free?, chap. 6.

actions were based on solid evidence. But in the heat of the environment after the horrendous and murderous attacks of September 2001, the remainder of the American nonprofit sector – with virtually no exceptions – did not criticize the breadth of government tactics in the investigation and closure of Muslim charities that admittedly distributed funds in the Muslim world and, admittedly, in some cases to terrorist organizations and the families of suicide bombers.⁸

Some, however, tried to indicate problems with the breadth and potential implications of government’s approach. Key Muslim community organizations warned that the government’s actions contributed to an anti-Muslim backlash. But outside the Muslim community, there were few dissenting voices. One of the few was the director of an umbrella association of nonprofits in Ohio, in the American industrial Midwest. This nonprofit leader stepped forward in 2002 to warn of the quote “implications of the unprecedented effort by federal agencies, working in concert, to shut down significant charities, seize their records and assets, and force the organizations to suspend operations until their innocence can be proven.”⁹

But those voices were solitary ones in the sector. Most of the nonprofit sector in the United States hoped for a kind of unspoken bargain with the government: government criminal enforcement would be limited to Muslim charities that had funneled donations to some combination of terrorist and charitable activities abroad, and those organizations would be considered guilty until proven innocent. Meanwhile, in the other side of this unspoken bargain, the rest of the American nonprofit sector seemed to hope that the broader sector would remain unaffected, undisturbed by the investigations, indictments and broad statements about a group of registered Muslim charities, nor the possibility that the new Patriot Act could be applied vigorously against the nonprofit sector well beyond a handful of Muslim charities.

The director of the Ohio nonprofit association challenged that unspoken bargain. “Will any organization be subject to the same treatment if the government claims links to terrorism? How broadly will terrorism be defined ? What about eco-terrorism, or domestic disruptions such as the protests organized against global trade and financial institutions? If a major U.S. philanthropic institution is discovered to have made a grant to an organization that the government claims is linked to terrorism, will it be subject to the same ‘seize and shut-down’ treatment?”¹⁰

But that nonprofit leader stood virtually alone, other than the embattled lawyers for the Muslim charities. At this first stage of prosecution of Muslim charities on “material support” and other grounds, the response from the charities was defiance in an

⁸ These prosecutions are discussed in more detail in Sidel, id.

⁹ Richard Moyers, *A Shocking Silence on Muslim Charities*, Chronicle of Philanthropy, 17 October 2002.

¹⁰ Id.

atmosphere in which the government was clearly the stronger actor, and disengagement from the remainder of the nonprofit community.

Broadening Sectoral Opposition and Self-Regulation as a Response to Broadening Government Policy against the Nonprofit Sector

In late 2002, however, the U.S. administration took a broader action that more deeply concerned a wider range of the American philanthropic and nonprofit sector. That step was the release of the *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-based Charities*, by the U.S. Treasury Department in late 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 channeling 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.¹¹

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.”¹²

When threatened by government action that many prominent public charities active in overseas aid and foundations considered overbroad, vague, and impossible to effectively implement, a significant portion of the American philanthropic and nonprofit community providing aid and support overseas began to act, complaining about the breadth of the government’s so-called “voluntary” prescriptions, and banding together in opposition.

A band of major charities and foundations, angered and anxious at the sweep of the Treasury’s new guidelines and fearful that “voluntary best practices” would be treated as law even though they had not been adopted by Congress or formally adopted by a government agency, sought to engage the U.S. Treasury in discussions on the Anti-Terrorist Financing Guidelines. When they did not receive satisfactory responses from those episodic conversations, and after a lengthy process among themselves, these foundations and charities active overseas also proposed a new approach that sought to employ the power of alliance and opposition to strengthen self-regulation as a means of forestalling government action: what they called the *Principles of International Charity*.

¹¹ U.S. Treasury Department, *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities*, November 2002.

¹² Barnett Baron, *Deterring Donors: Anti-Terrorist Financing Rules and American Philanthropy*, International Journal of Not-for-Profit Law 6(2), 1-32 (2004).

They prefaced their new Principles by noting that “after consideration of both the effectiveness of existing procedures and the implications of strict compliance with the [Anti-Terrorist Financing] Guidelines, charitable organizations concluded that that Guidelines are impractical given the realities of international charitable work and unlikely to achieve their goal of reducing the flow of funds to terrorist organizations, but very likely to discourage international charitable activities by U.S. organizations.” The nonprofits asked the government to withdraw the onerous and ineffective Treasury Department Guidelines and to substitute the new *Principles of International Charity* drawn up by the nonprofit and philanthropic sector.¹³

Those *Principles of International Charity* emphasized compliance with American law but also that charitable organizations and foundations are not agents of the U.S. government. They emphasized that charities are responsible for ensuring, to the best of their ability, that charitable funds do not go toward terrorist organizations, and that there are key baseline steps that can be taken to help in reaching that goal – but also that there are a diverse range of ways to accomplish that goal, and that different methods of safeguarding and protection will work for different kinds of organizations that have different types of risk. And the charitable organizations concluded, “each charitable organization must safeguard its relationship with the communities it serves in order to deliver effective programs. This relationship is founded on local understanding and acceptance of the independence of the charitable organization. If this foundation is shaken, the organization’s ability to be of assistance and the safety of those delivering assistance is at serious risk.”¹⁴

In response to the charitable and philanthropic sector’s concern, and because of the unworkability of the earlier, hastily drafted Guidelines, the Treasury revised its Guidelines on overseas giving in December 2005. The “revised” *Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* did make some improvements, particularly in reducing some of the onerous and unworkable due diligence burdens on American organizations providing charitable funds overseas.¹⁵

But three basic issues remained that were of continuing and deep concern to the nonprofit sector. First, in the words of the concerned charities and foundations, “the revised Guidelines contain provisions that [continue to] suggest that charitable organizations are agents of the government.” Such an assumption could lead both to

¹³ *Principles of International Charity* (developed by the Treasury Guidelines Working Group of Charitable Sector Organizations and Advisors, March 2005) (www.independentsector.org/programs/gr/CharityPrinciples.pdf). In effect, the organizations sought to convince the authorities that a self-regulatory approach would work better in controlling these matters.

¹⁴ Id.

¹⁵ U.S Treasury Department, *Revised Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities* (2005) (www.treas.gov/offices/enforcement/key-issues/protecting/charities-intro.shtml). This approach means, perhaps ironically, that legitimate and well-meaning charities will struggle to comply with standards while less professional or less well-meaning groups may not, as Professor Kent Roach has pointed out to me.

declining effectiveness and to severe harm to American aid personnel working overseas. Second, the revised Guidelines seem to require nonprofits funding overseas to collect even more data than the original 2002 Guidelines would have required. And third, the nonprofit community remained deeply concerned that these so-called “voluntary best practices” were in fact stealth law, adopted without consideration by Congress or formal rulemaking by an agency. In the words of the concerned charities and foundation Working Group, “we are concerned that the revised Guidelines will evolve into de facto legal requirements through incorporation into other federal programs, despite the inclusion of the word “voluntary” in the title.”¹⁶

When directly confronted with government action that would impinge on the ability of American nonprofits and foundations to undertake overseas giving and perhaps endanger their programs, the American nonprofit and philanthropic sector began to resist aspects of the new government regulation of the nonprofit sector based in anti-terrorism. A battle of sorts has been joined between the government and the philanthropic sector over overseas giving, and neither side is giving in: The Treasury has not withdrawn the new, revised Guidelines on overseas giving. Instead it issued a third, re-revised version of the Guidelines in late 2006,¹⁷ and then, without consulting with the American nonprofit and philanthropic sector, it issued a “risk matrix” for charitable institutions to use in connection with their overseas giving in 2007.¹⁸ In turn, the nonprofit community continues to urge that its *Principles of International Charity* should be substituted for the government’s revised Guidelines.¹⁹

Foundation Responses to Strengthened Government Policy and Regulation: Disengagement, or Shifting Risk to Grantees

¹⁶ Council on Foundations, Letter to the U.S. Treasury Department on the Revised Anti-Terrorist Financing Guidelines (2006) (www.usig.org/PDFs/Comments_to_Treasury.pdf).

¹⁷ See http://www.ustreas.gov/offices/enforcement/key-issues/protecting/docs/guidelines_charities.pdf. This most recent version of the Treasury Guidelines, and particularly differences from the earlier versions and sector reaction, will be discussed in the publication version of the paper.

¹⁸ For the Treasury’s risk matrix for the charitable sector, see www.treas.gov/offices/enforcement/ofac/policy/charity_risk_matrix.pdf.

¹⁹ A number of other issues have arisen as well, but space precludes a full discussion here. These problems include controversies over testimony by the Director of the Office of Strategic Policy for Terrorist Finance and Financial Crimes to the Senate Homeland Security and Governmental Affairs Committee (May 2007); a report by the Treasury Department’s Inspector General for Tax Administration (TIGTA) criticizing the Internal Revenue Service for not using the FBI Terrorist Screening Center consolidated watchlist to check for matches and process issues (May 2007); concerns raised by the American nonprofit community on the re-design of the Form 990, which reports on nonprofit activities, governance and finances to the Treasury (June 2007); and requests by the nonprofit community that funds blocked (for example, Muslim charitable funds blocked) under Executive Order 13224 be released for charitable usage, a request thus far denied by the government on grounds that those blocked funds must be retained for payment of civil judgments that may be entered against blocked charities. Discussions of these developments can be found at www.ombwatch.org.

In the philanthropic sector, some American foundations have been deeply concerned about potential investigations of their grant making by the executive or legislative branches. Others have largely ignored the issues, and disengaged from considering the impact of strengthened government counter-terrorism policy and regulation on their work beyond checking terrorist watch lists.

Those who are concerned – usually foundations that do extensive work overseas – have responded in some cases by shifting responsibility to their grantees, through new and broadly worded grant letters, not to engage in any activity that might be considered redolent of bigotry or encouraging terrorism or violence.

The Ford Foundation has been particularly active in this area, arising out of its disgust with the anti-Semitic statements made by one of its grantees at the United Nations Conference on Racism in Durban in 2000. But the breadth of the prohibitions and shifting of risk to grantee organizations in its new grant letters prompted 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,²⁰ a sharp response to the risk-shifting approach that Ford had adopted.

Ford introduced new grant language in 2003 that required grantees to promise not to engaged in a wide array of speech and other activities that might be perceived as bigotry or as encouraging terrorism or violence. The new grant letter stated that “By countersigning this grant letter, you agree that your organization will not promote or engage in violence, terrorism, bigotry or the destruction of any State, nor will it make subgrants to any entity that engages in these activities.”²¹

That broad new grant language left open, at least in the minds of a number of university grantees, whether grantees would be forced to limit speech or other activities because certain speech and activities – conducted on but not in the name of universities, for example – might be interpreted as violating the grant letter agreement. The Rockefeller Foundation introduced similar language as well. Concerned by the breadth of the language and prohibitions, a number of elite universities refused to sign the new grant agreements.

After negotiations between the Ford Foundation and a number of universities, the Foundation reaffirmed its commitment to academic freedom and free speech on campus, making clear that the language in the grant letter was not intended to interfere with academic freedom and free speech. In at least one case – Stanford – where the institution remained wary of signing the Foundation’s very broad language, a “side letter” was

²⁰ Sidel, *More Secure, Less Free?*, id.; S. Sherman, *Target Ford*, *The Nation*, 5 June 2006.

²¹ Quoted from a 2007 Ford Foundation grant letter; it is possible that some variations in wording were used earlier.

issued to that institution recommitting Ford in strong terms to academic freedom and free speech.²²

But this issue affected others as well. In 2004, after extensive internal debate, the American Civil Liberties Union also began declining Ford Foundation and Rockefeller Foundation grants. The ACLU did so, in the words of its Executive Director, Anthony Romero, “rather than accept restrictive funding agreements that might adversely affect the civil liberties of the ACLU and other grantees” by restricting the free speech rights of the ACLU and its members. The ACLU issued a statement that primarily blamed the government, not the Ford Foundation, for this conflict:

“This administration and its war on terror have created a climate of fear that extends far beyond national security concerns and threatens the civil liberties of all Americans.... The board and leadership of the ACLU have made the painful but principled decision to turn down \$1.15 million in future funding from the Ford and Rockefeller Foundations rather than accept restrictive funding agreements that might adversely affect the civil liberties of the ACLU and other grantees.... It is a sad day when two of this country's most beloved and respected foundations feel they are operating in such a climate of fear and intimidation that they are compelled to require thousands of recipients to accept vague grant language which could have a chilling effect on civil liberties. But the ambiguities are simply too significant to ignore or accept. They include potential prohibitions on free speech and other undefined activities such as "bigotry" as part of a misconceived war on terror. Indeed, vague terms such as "bigotry" often have charged meanings in a post-9/11 world. The ACLU cannot effectively defend the rights of all Americans if we do not stand up for those same rights ourselves....” (emphasis added)²³

This was a remarkable break. The Ford Foundation and the ACLU have a long and close history of work together on major civil liberties issues, and Ford has provided millions of dollars in grants to the ACLU for programs, operating costs, and endowment. The President of the Ford Foundation, Susan Berresford, responded in a clear but subdued statement in which Ford’s respect for the ACLU was fully clear:

“We share the same basic values as the ACLU. The ACLU is dedicated to defending free speech, and we fully support their work in doing so. We also fully support their work in defending the rights of promoters of unpopular causes. That is why we have provided significant general financial support to the organization over the years for the full range of its activities.... The issue at hand has to do

²² For a detailed account of Stanford’s discussions with Ford from the Stanford perspective, see the January 26, 2005 minutes of the Stanford Faculty Senate at news-service.stanford.edu/news/2005/january26/minutes-012605.html.

²³ See ACLU Declines Ford and Rockefeller Grants Due to Restrictive Funding Agreement; Painful but Principled Decision to Put Civil Liberties First, Statement of Anthony D. Romero, ACLU Executive Director, October 17, 2004, at www.aclu.safefree/general.

with our different missions. Ford's mission is to strengthen democratic values, reduce poverty and injustice, promote international cooperation and advance human achievement. Consistent with that mission, we are proud to support the ACLU's defense of free speech. We do not, however, believe that a private donor like Ford should support all speech itself (such as speech that promotes bigotry or violence). We accept and respect the fact that we have a different mission from the ACLU, even while we share the same basic values.... We hope that over time we will once again work together."²⁴

This sort of philanthropic resistance has been largely limited to some elite American universities and groups like the ACLU. But 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 or that the Foundation provide "assurances of its commitment to the value of independent citizenship and civil society actions to hold ... governments and their leaders to account." This Indian organization has been told that it is "the only southern NGO to raise this issue."²⁵

Broadening Government Regulation, Broadening Sectoral Opposition – and a Victory

In another related step, during the summer of 2004 the U.S. federal agency that runs the Combined Federal Campaign – the integrated giving effort for hundreds of thousands of federal employees in which government workers donate to nonprofit organizations – announced a significant change in its policies.

The agency issued a memorandum requiring each nonprofit 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 U.S. Government, the United Nations, or the European Union." The new, mandatory certification requirement was explicitly drawn from the provisions of the so-called "voluntary" anti-terrorism financing guidelines issued by the Treasury Department in 2002.²⁶

This new requirement ignited a firestorm of controversy. A number of American nonprofit organizations refused to sign the certification, arguing that they could not vouch for every single one of their employees, contractors, consultants and anyone else who worked with their organizations, particularly given the chaotic nature of the government's terrorist watch lists. Finding such a name, though clearly a false positive, would require nonprofits to ask the employee "intrusive questions about his [or her]

²⁴ Statement of Susan V. Berresford in response to announcement by the American Civil Liberties Union, www.fordfound.org/news/view_news_detail.cfm?news_index=147.

²⁵ Letter from [redacted individual, redacted organization] to Ganesan Balachander, Representative, The Ford Foundation, New Delhi, October 1, 2007,

²⁶ Combined Federal Campaign, *Combined Federal Campaign Memorandum 2003-10, New Certification for 2004 CFC Application* (2003) (www.opm.gov/cfc/opmmemos/2003/2003-10.asp).

personal life and beliefs.”²⁷ They argued that the federal agency administering the Combined Federal Campaign lacked the statutory or constitutional authority to issue this new regulation, and that doing these kinds of checks would violate the privacy and associational rights of their employees. And they opposed the conversion of the so-called “voluntary” guidelines issued by the Treasury Department into a legal mandate without Congressional approval or formal rulemaking.²⁸

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.²⁹ In the meantime, nonprofits lost funds because of their refusal to sign the certification – the ACLU, for example, lost \$500,000 in donations by federal government employees in 2005.³⁰ In November 2005, however, the federal government withdrew the new requirement that recipient organizations under the Combined Federal Campaign sign the certification in favor of a much more general pledge by organizations participating in the Combined Federal Campaign that they are in compliance with existing anti-terrorist financing laws.³¹

It would be unfortunate, however, to leave the impression that the “shifting of risk” to grantees is occurring only by private foundations and the aborted effort by the Combined Federal Campaign. In recent years at least several local United Ways in the United States – and possibly a large number – have been requiring that each nonprofit agency receiving funds from the United Way to certify that the receiving agencies comply with anti-terrorist financing laws and regulations; that individuals or organizations that receiving agencies work with are not on government terrorism watch lists; and/or that no material support or resources are being provided to support or fund terrorism.

The forms of these required certifications seem to vary depending on the United Way and perhaps depending on the year involved. In 2007, for example, the United Way of New York City required that receiving agencies certify “that all United Way funds and

²⁷ American Civil Liberties Union, *ACLU Announces Diverse Nonprofit Coalition Opposing Restrictions on Recipients of the Combined Federal Campaign*, 12 August 2004 (www.aclu.safefree/general).

²⁸ *ACLU to Withdraw from Charity Drive*, New York Times, 1 August 2004; *Nonprofits Scramble to Meet Terror Rules; Worker Screening Required for CFC funds*, Washington Post, August 14, 2004; see also Sidel, *More Secure, Less Free?*, *id.*

²⁹ *Charities Sue Over Antiterrorism Certification Regulation*, New York Times, 11 November 2004; *Groups Sue OPM on Terrorism Rule; Charities Told to Screen Workers*, Washington Post, 11 November 2004.

³⁰ *ACLU Board is Split Over Terror Watch Lists*, New York Times, 31 July 2004.

³¹ *Requirement on Watch Lists is Dropped*, New York Times, 10 November 2005.

donations will be used in compliance with all applicable anti-terrorist financing and asset control laws, statutes and executive orders.”³²

Another major United Way agency in another large American city required each receiving agency to “represent[] that it takes reasonable steps to: I. Verify that individual or entities to which it provides, or from which it receives, fund or other material support or resources are not on the U.S. Government Terrorist Related Lists; II. Protect against fraud with respect to ... material support or resources to person[s] or organizations on such lists; and III. Ensure that it does not knowingly provide financial, technical, in-kind or other material support or resources to any individual entity that it knows beforehand is support or funding terrorism...” (internal grammar adapted)³³

The great breadth of this required certification or “represent[ation]” is clearly an attempt to shift risk of non-compliance with any government regulation to the nonprofit concerned, and away from the funding agency.

Opposition in Isolation: The Lonely Struggle over “Material Support”

The prosecutions and deregistration of Benevolence, Global Relief, Holy Land and other Muslim charities have been pursued over a number of years and in several cases remain under prosecution. In many cases those government actions are based on the provisions of law, carried forward from before 2001 but strengthened since, that ban “material support” to terrorism and terrorist organizations.

These “material support” provisions have been among the most controversial legislative provisions on terrorism affecting the nonprofit sector in the United States. The crime of providing material support to terrorism was drafted into the Antiterrorism and Effective Death Penalty Act of 1996, which was adopted after the Oklahoma City bombing in 1996.

In its original form, the 1996 Act provided criminal and civil penalties for anyone who “provides material support or resources or conceals or disguises the nature, location, source, or ownership of material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out [various terrorist offences] or in preparation for, or in carrying out, the concealment from the commission of any such violation...” The 1996 Act also criminalized “knowingly provid[ing] material support or resources to a foreign terrorist organization, or attempt[ing] or conspire[ing] to do so,” in accordance with the procedures for “designating” foreign terrorist organizations.

³² United Way of New York City, Anti-Terrorism Compliance Measures form (2007), on file with the author.

³³ United Way of [xxx], USA Patriot Act [on cover sheet] Statement of Compliance (2007), on file with the author. Location redacted to protect source.

In the 1996 Act, “material support or resources” was defined as “currency or other financial securities, financial services, lodging, training, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and other physical assets, except medicine or religious materials.”

The material support provisions came under attack even before September 11. A U.S. district court in 1998,³⁴ and then the U.S. Court of Appeals for the Ninth Circuit³⁵ ruled in 2000 that the terms “training” and “personnel” were unconstitutionally vague because they might include constitutionally protected activities within their scope. The Ninth Circuit also “construed the AEDPA to require that the donor of material support have knowledge that the recipient either had been designated as a foreign terrorist organization or engaged in terrorist activities.”³⁶ This litigation continued after September 11.

The Patriot Act expanded the offense of material support in several important ways. It added “monetary instruments” to the definition of “material support or resources,” filling a possible lacuna between “currency” (cash) and “financial securities.” Perhaps more importantly, it added the term “expert advice or assistance” to the definition of “material support or resources.”

So by late 2001, American legislation barred “material support or resources” defined as “any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, and other physical assets, except medicine or religious materials.”

By not removing the term “training,” in the Patriot Act, but adding “expert advice or assistance,” the Patriot Act “only increase[d] the ambiguity” in the scope of activity punished.³⁷ “This vague language allows wide-ranging prosecutorial discretion and could chill legally protected activities by nonprofits, which might fear criminal charges.” And OMB Watch quotes David Cole noting that “the reason material support laws have proven so popular with federal prosecutors is that . . . these laws do not require proof that an individual intended to further any terrorist activity. . . . Under this law it would be a

³⁴ Humanitarian Law Project v. Reno, 9 F. Supp. 2d 1176 (C.D. Cal. 1998).

³⁵ Humanitarian Law Project v. Reno, 205 F.3d 1130 (9th Cir. 2000).

³⁶ Humanitarian Law Project v. Gonzales 2005, p. 6.

³⁷ OMBWatch report on material support provisions, www.ombwatch.org.

crime for a Quaker to send a book on Gandhi's theory of nonviolence -- a 'physical asset' -- to the leader of a terrorist organization in hopes of persuading him to forgo violence."³⁸

In the years after 2001 there has been extensive litigation on the scope, meaning and constitutionality of the material support provisions. In 2004, a federal court in California ruled that "the term 'expert advice or assistance,' like 'training' and 'personnel.' [invalidated earlier] to be impermissibly vague."³⁹

Congress attempted to fix these various problems in the late 2004 revision to the Antiterrorism 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.

Congress mandated that "no person may be prosecuted under this section in connection with the term "personnel" unless that person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization's direction or control or to organize, manage, supervise, or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization's direction and control."

Congress also legislated an "exception" to the "personnel", "training," and "expert advice or assistance" prohibitions "if the provision of that material support or resources to a foreign terrorist organization was approved by the Secretary of State with the concurrence of the Attorney General. The Secretary of State may not approve the provision of any material support that may be used to carry out terrorist activity (as defined in section 212(a)(3)(B)(iii) of the Immigration and Nationality Act)." It added the notion that providing support oneself to terrorism may constitute "material support," by redefining the provision of "personnel" in the 1996 to include "1 or more individuals who may be or include oneself" "to work under that terrorist organization's direction and control or to organize, manage, supervise or otherwise direct the operation of that organization." The 2004 amendments also stipulate that "individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist's organization's direction and control."⁴⁰

The 2004 amendments also sought to define the types of "training" and "expert advice or assistance" that would trigger application of the materials support provision. "Training was defined as "instruction or teaching designed to impart a specific skill, as

³⁸ David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 Harv. C.R.- C.L. L. Rev. 1, 9 (Winter 2003).

³⁹ Humanitarian Law Project v. Gonzalez 2005, p. 8.

⁴⁰ 18 U.S.C. § 2339B(h).

opposed to general knowledge.” “Expert advice or assistance” was defined as “advice or assistance derived from scientific, technical or other specialized knowledge.”

And Congress also mandated that “nothing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.” And Congress “clarified a mens rea requirement that the donor know that the foreign terrorist organization has been designated as a foreign terrorist organization or has engaged in terrorist activities,”⁴¹ stipulating that “a person 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 terrorism.”⁴² In short, “Congress’s 2004 ... amendment underscores Congress’s decision to dispense with any specific intent requirement. The 2004 ... amendment clarified that the only *mens rea* required under §2339B is that a donor know that the recipient is a foreign terrorist organization.”⁴³

In response to the Congressional amendments, the Ninth Circuit affirmed the District Court’s 2001 order “holding the terms ‘training’ and ‘personnel’ impermissibly vague ... [and] vacated its [2000] order ... in which it had previously construed the [1996 Act] to require knowledge that a recipient organization was either a foreign terrorist or had engaged in terrorist activities.”⁴⁴

In response, the same plaintiffs once again questioned the constitutionality of several important elements of the “material support” provisions after the amendments became law. The same federal court in California ruled in 2005 that “the terms ‘training’ and ‘expert advice or assistance’ in the form of ‘specialized knowledge’ and ‘service’ are impermissibly vague” under the Constitution but that other challenges to the material support provisions failed.⁴⁵

“Training” was originally judged impermissibly vague because “it easily reached protected activities, such as teaching how to seek redress for human rights violations before the United Nations.” Adding the definition of training as “instruction or teaching designed to impart a specific skill, as opposed to general knowledge,” “fails to cure the vagueness concerns that the Court previously identified” and “leaves the term ‘training’ impermissibly vague because it easily encompasses protected speech and advocacy, such as teaching international law for peacemaking resolutions or how to petition the United Nations to seek redress for human rights violations.”⁴⁶

⁴¹ Humanitarian Law Project v. Gonzales 2005, p. 7.

⁴² 18 U.S.C. § 2339B.

⁴³ Humanitarian Law Project v. Gonzales 2005, p. 24.

⁴⁴ Humanitarian Law Project v. Gonzales 2005, p. 7.

⁴⁵ Humanitarian Law Project v. Gonzales 2005, p. 29.

⁴⁶ Humanitarian Law Project v. Gonzalez 2005, p. 29, 30.

Similarly, the vagueness of “expert advice or assistance” is not fixed because, “even as amended, the statute fails to identify the prohibited conduct in a manner that persons of ordinary intelligence can reasonably understand,” and “includes the same protected activities that ‘training’ covers....”⁴⁷ The term “service” in the material support statute was also impermissibly vague under the Constitution.

In 2006, a federal court in California ruled that the post-September 11 executive order issued by the President banning “services” for terrorist organizations was not unconstitutionally vague or overbroad; that other terms used were not unconstitutionally vague. But the court also ruled that the President’s designation of 27 terrorist organizations in the order had been done “provide[d] no explanation of the basis upon which these twenty-seven groups and individuals were designated, and references no findings akin to those the secretary of treasury is required to make ... [and] the procedures for challenging designations made by the secretary of treasury are not clearly available with regard to designations made by the President....[T]he President’s designation authority is subject only to his unfettered discretion...” and thus “unconstitutionally vague.” It also found that “the prohibition on being ‘otherwise associated with’ an SDGT on its face unconstitutionally intrudes upon activity protected by the First Amendment.” It is also unconstitutionally overbroad because it “imposes penalties for mere association with an SDGT.”

In 2007, attempts were even made to strengthen and broaden the “material support” prohibition. Legislators introduced an amendment that would have redefined material support to apply to any individual who “provides material support or resources to the perpetrator of an act of international terrorism, or to a family member or other person associated with such perpetrator, with the intent to facilitate, reward, or encourage that act or other acts of international terrorism.”

As the Washington-based NGO OMBWatch noted, “the terms ‘family member’ or ‘person associated’ were not defined in the amendment. Under this language, it may have been possible that someone who provided water or medical care to the child of a suicide bomber would have been subjected to criminal penalties. This legislative vagueness, combined with severe penalties, had the potential to discourage humanitarian aid and development programs, particularly in high-risk areas where such aid is greatly needed.”⁴⁸ Penalties would have been increased to up to 25 years in prison, or up to life in prison if a death resulted.⁴⁹

⁴⁷ Id., p. 32.

⁴⁸ Senate Votes Down Effort to Expand Definition of Material Support, OMB Watch, 20 March 2007, <http://www.ombwatch.org/article/articleview/3759/1/407?TopicID=1>.

⁴⁹ On recent issues in this area, see Shutting Out Terrorism’s Victims (editorial), The New York Times, 9 March 2007; www.nytimes.com/2007/03/09/opinion/.

Material support issues have remained at the forefront of concern in the United States about the impact of counter-terrorism law and policy on the enabling legal and policy environment for civil society. These issues came to the fore in the first major “material support” prosecution in the United States, the trial of the Holy Land Foundation and its leaders in 2006-2007. In that trial, the defendants were acquitted on a number of the major material support-related charges in the fall of 2007. That fall, Muslim organizations and charities renewed a call to the government for guidelines on safe giving, because of the continuing anxiety within American Muslim communities that their charitable donations would be subject to special scrutiny by the government. Some Muslim charities and other organizations reported continuing problems in relationships with banks and banking authorities.⁵⁰

General Conclusions

What can we learn from the difficult and complex history of counter-terrorism law and policy and its impact on the enabling environment for civil society in the United States since 2001?

Statutes and regulation barring various forms of charitable assistance to or use by terrorists were generally in place before September 11. They have been rapidly broadened in the ensuing several years, either through positive law or through so-called “voluntary” measures, “guidelines” or other methods. As the Combined Federal Campaign and other episodes indicate, these measures tend to continue to broaden still further over time, either in scope or in application.

Opposition has been episodic and, perhaps understandably, significant opposition and resistance has been largely limited to groups directly affected by counter-terrorism policy and law, such as Muslim charities, or a few leading voices in the civil liberties arena such as the American Civil Liberties Union. 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 may include alliance-building, litigation by individual organizations, and other strategies discussed in this paper – but never have those strategies been sector-wide.

Of these, attempts by the nonprofit sector to strengthen self-regulation have emerged as a method of forestalling either further government intervention or the application of new or existing policies. This new self-regulation “imperative,” as I have discussed it in a broader context, enables the American nonprofit sector to try to address broader issues of accountability and transparency while also addressing specific problems of counter-terrorism law. The *Principles of International Charity* proposed by a group of

⁵⁰ Further information on these developments is available at www.ombwatch.org.

nonprofit and philanthropic organizations are one key example of the use of self-regulation as a sophisticated defensive strategy.⁵¹

The Dangers in the Failure to Oppose

Six years after the September 11 attacks and the strengthening of government counter-terrorism regulation in the United States, we may begin to draw some lessons from nonprofit and philanthropic sector responses to government action in this area. The parts of the nonprofit and philanthropic sector that have been directly prosecuted or attacked have responded with vigorous legal and public defenses, but much of the American nonprofit sector, not directly affected by new government policy, has remained quiescent. And in that quiescence poses potential dangers.

One danger in nonprofit sector passivity is the assumption that government action vis-à-vis the nonprofit sector will be limited to organizations under formal investigation, indictment, or prosecution. But events in 2005 and 2006 directly challenged the hopeful assumption of many American nonprofits and philanthropic organizations that government actions would be directed solely against a few Muslim charities and other targeted groups, and that the remainder of the nonprofit sector would be left alone.

The American press has revealed that the U.S. government has in fact targeted a much broader swathe of the American nonprofit sector for surveillance and observation than was originally understood or assumed. Hundreds or even thousands of American nonprofits have had events observed, telephone calls sorted, or financial transactions examined by government agencies.⁵² And in early 2007 it was revealed that the U.S. government is employing donor-tracking software to search and correlate donors to an as-yet undefined range of nonprofit institutions.⁵³

Despite these growing ripples of influence on the broader nonprofit sector from government activity, there is relatively little hope that the broader American nonprofit and philanthropic sector will take a more active role in opposing over-reaching impacts of government counter-terrorism policy and law on the sector, or in providing assistance to legal efforts to provide a legitimate defense to organizations that have been indicted and prosecuted. U.S. government policy has fairly carefully avoided targeting large

⁵¹ In this as in many other aspects of the relationships between nonprofits and counter-terrorism, the situation in the U.K. appears to be quite different. In the U.K., the important role of the Charity Commission in educating the charitable sector and seeking to forestall these issues through proactive institutional action, as well as its role in knowledgeable investigatory and enforcement action, has perhaps reduced the need for a “self-regulatory” approach given the Commission’s multiple roles.

⁵² See, e.g., MSNBC, *Is the Pentagon Spying on Americans? Secret Database Obtained by NBC News Tracks ‘Suspicious’ Domestic Groups*, [MSNBC.com](#) (NBC News), 14 December 2005; *Surveillance Net Yields Few Suspects*, [The Washington Post](#), 5 February 2006.

⁵³ *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 2007.

swathes of the American nonprofit and philanthropic sector, and there has avoided the emergence of large-scale opposition.

Opposition and resistance has been largely limited to specific organizations and sub-sectors that have come under investigation, strengthened regulation, or prosecution, with the broader array of nonprofits and philanthropic institutions staying away from those battles. To the degree that the broader sector has reacted to increasing government efforts, that has been primarily through broad-based support for increased self-regulatory efforts – a form of compliance that, the sector hopes, put the nonprofit and philanthropic community increasingly in charge of its own destiny.

But additional dangers emerge as well. In recent years, for example, several “federated” American nonprofits such as the United Way have begun requiring their local affiliates to obtain certifications from their local grantee charitable institutions that those local nonprofits have no ties to terrorism. This is a substantive over-reaction, but it is to be expected in a situation in which the government has inspired anxiety and concern through the application of counter-terrorism law and policy to the nonprofit sector. Likewise, public charities and community foundations have become increasingly concerned about the possibility that diaspora donations – gifts by emigrant communities in the United States earmarked for charitable organizations and causes back in their home countries through donor advised mechanisms – will inadvertently wind up in terrorist hands or used for “dual” purposes.

II. Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in the United Kingdom

The Framework of Counter-Terrorist Law and Policy and its Impact on Civil Society

British law and policy with respect to charities and terrorist finance has, in one key respect, been consistent with developments in the United States and other countries. British law allows proscription of terrorist organizations, bans support for such proscribed organizations, helping such organizations arrange or manages 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.”⁵⁴

⁵⁴ Legal Opinion by Edward Fitzgerald Q.C. 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).

But state policy has gradually expanded to the point that new legislation adopted in 2006 (the Terrorist Act 2006) criminalizes not only direct support for terrorist organizations and activities, but “encouragement,” “glorifying,” and other activities more closely related to freedom of speech and freedom of association. This seemingly inexorable expansion of mandates for the charitable sector puts particular pressure on charitable organizations affiliated with certain religious and ethnic groups.

The primary anti-terrorism legislation affecting charities in the U.K. is the Terrorism Act 2000, which entered into force in February 2001. The Terrorism Act 2000 gives the Secretary of State authority to proscribe organizations if the Secretary “believes that it is concerned in terrorism.” “Concerned in terrorism” is defined broadly as “commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism, or is otherwise concerned in terrorism either in the UK or abroad.” An organisation may be “any association or combination of persons.” Proscribed organization membership is illegal, as well as assisting, fundraising, providing funds to such an organisation or any member, or to belong to, support, or display support for a proscribed organization. All property of a proscribed organization may be seized by the government. Organizations are allowed to apply for de-proscription, and an appeals process is provided for organizations denied de-proscription.⁵⁵

The Terrorism Act 2000 also criminalizes membership in a proscribed organization (sec. 11); it also criminalizes various forms of support for proscribed organizations, including the offenses of “invites support” (not limited to financial support for a proscribed organization (sec. 12(1)); “arranges, manages or assists” in arranging meetings for a proscribed organization (sec. 12(2)); wearing the uniform of a proscribed organization (sec. 13). More broadly the Terrorism Act 2000 also criminalizes fundraising for “purposes of terrorism” (sec. 15); use of money or other property for purposes of terrorism (sec. 16); undertakes other funding arrangements for purposes of terrorism (sec. 17); or engages in broadly defined money laundering of terrorist property (sec. 18).⁵⁶

In addition, the Charity Commission has the statutory power under the Regulation of Investigatory Powers Act 2000 and the Serious Organised Crime and Police Act 2005

⁵⁵ Terrorism Act 2000, Part II, Sec. 3. See Charity Commission, *Operational Guidance: Charities and Terrorism*, OG96-28 (January 2003) (www.charity-commission.gov.uk/tcc/terrorism.asp). A list of proscribed organizations is provided at the end of OG96-28 Operational Guidance. See also Home Secretary Moves to Ban 15 Terror Groups, Home Office, Press Office, 10 October 2005 (press.homeoffice.gov.uk/press-releases) (containing a full banning order and additional information).

⁵⁶ Terrorist Act 2000, Part III, Secs. 14-19.

to “send ‘Covert Human Intelligences Sources’ ... i.e. spies or undercover agents, to work in charities that are under suspicion.”⁵⁷

The Role of the Charity Commission: Keeping Charity Regulators Central in Terrorist Finance Enforcement

A difference in the British context is that while the American approach to shutting off terrorist finance from nonprofits largely sidesteps charity regulators in favor of direct action by prosecutors, the British approach has, at least in part, relied as charity regulators as partners and, often but not always, “first responders” in the antiterrorist enterprise.⁵⁸ The Charity Commission is the central regulator and registrar for charities in England and Wales, has been key to these efforts and has played a core role in investigating, resolving and where necessary collaborating in prosecuting ties between charities, terrorism, and terrorist finance. Its central role has been reaffirmed under the new Charities Act 2006.⁵⁹

Of course, that approach is not the only possible means of attack on this issue. Charities have been used to funnel funds to external terrorist groups in Britain as in the United States and other countries, and the government moved quickly after September 11 to enforce the U.N. resolutions that called for freezing funds held by Al Qaeda, the Taliban and other terrorist groups. So clearly prosecution has an important role to play as well, and the Charity Commission clearly recognizes that as well.

Charity regulators in the United States – for example, well-informed specialists in the U.S. Treasury Department’s Exempt Organizations Division – appear somewhat marginalized in the enforcement of laws against terrorist financing by charities in the U.S. because of the structure of nonprofit regulation in the United States, historical limitations on their roles, and the prosecution-centered nature of antiterrorist law and policy in the U.S. But their counterparts, charity regulators in the U.K., appear to play a more central role than federal charity regulators in the United States. That different structure has been to Britain’s advantage in working out a response to the uses of charities by terrorist organizations in the post-September 2001 era that has helped keep charity regulators directly involved in anti-terrorist policy and activities.

In Great Britain, the key charity regulator is the Charity Commission, which has been near the forefront of charity-related terrorism financing investigations since before

⁵⁷ Legal Opinion by Edward Fitzgerald Q.C. and Caoilfhionn Gallagher, Doughty Street Chambers, London, in NCVO, *Security and Civil Society* (January 2007), at www.ncvo-vol.org.uk. Whether government bodies agree that they have this statutory power has not yet been confirmed.

⁵⁸ See also the author’s discussion of British approaches to antiterrorism and the nonprofit sector in Sidel, *More Secure, Less Free?* (University of Michigan Press, 2004, revised ed. 2006).

⁵⁹ For detailed information on the role and functions of the Charity Commission, see <http://www.charity-commission.gov.uk/tcc/ccabout.asp>, and, for summary information on the Charities Act 2006, <http://www.charity-commission.gov.uk/spr/ca2006prov.asp>.

September 11. The Charity Commission certainly had jurisdiction over investigations of charitable links to terrorism in England and Wales before the September 2001 attacks. For example, the Commission had already investigated the North London Central Mosque Trust (Finsbury Park Mosque), which Sheikh Abu Hamza al-Masri (Abu Hamza) had taken over in the late 1990s. In that earlier proceeding, after Commission investigation, the original mosque trustees had reached an agreement with Abu Hamza in which the trustees would resume “full control of the Mosque and other property” in exchange for Abu Hamza being permitted to give half of the Friday sermons at the Mosque (later three out of four sermons).⁶⁰

But Abu Hamza’s control of the Mosque persisted, and the more moderate trustees were forced to the sidelines until the Charity Commission intervened again. This was done after 2001 and effectively removed Abu Hamza and returned the Mosque to proper control. This approach was effective because of the Charity Commission’s wide investigatory and enforcement powers and its detailed understanding of developments in the charitable sector including the North London Mosque. In addition, the Commission had an array of means at its disposal to resolve charitable failures to abide by the law – ranging from technical assistance and advice to agreements to change practices to, where needed, orders removing trustees, freezing funds, or closing organizations.

The Charity Commission’s role in this area accelerated after 2001, initially with an investigation of the U.K.-registered International Islamic Relief Organization after a *Times of London* report that “the charity was under CIA scrutiny in connection with the possible transfer of funds which may have been used to support the terrorist attacks in the United States.” That inquiry was closed a month later after the Commission determined that the organization had ceased to operate in the U.K. and removed it from the register of charities.⁶¹

A number of other inquiries have taken place since the September 11 attacks, as the Commission reaffirmed that “any kind of terrorist connection is obviously completely unacceptable [and] investigating possible links with terrorism is an obvious top priority for the charity commission.” But in doing so the Commission also sought to assuage fears of a witch-hunt: “The good news is that, in both absolute and relative terms, the number of charities potentially involved are small. Neither the charity commission, nor other regulatory and enforcement organizations have evidence to suggest that the 185,000 charities in England and Wales are widely subject to terrorist infiltration.”⁶²

The Charity Commission’s role in investigating charitable links to terrorism has continued and expanded in recent years. In May 2002, the Commission reported that it

⁶⁰ Charity Commission, *Inquiry Report: North London Central Mosque Trust* (2003) (www.charity-commission.gov.uk/news/mosqueinq.asp).

⁶¹ Debra Morris, *Charities and Terrorism: The Charity Commission Response*, *International Journal of Not-for-Profit Law* (September 2002) (www.icnl.org).

⁶² John Stoker, *Weeding Out the Infiltrators*, *The Guardian* (U.K.), 28 February 2002.

had “evaluated concerns” about ten charities since the September 11 attacks, “opened formal inquiries” into five, closed two, and frozen the assets of one group.⁶³ “Vigilance is everything,” the Commission warned: “Any links between charities and terrorist activity are totally unacceptable. Links ... might include fundraising or provision of facilities, but also include formal or informal links to organizations ‘proscribed’ under the Terrorist Act 2000, and any subsequent secondary legislation.”

But the Commission also emphasized that its relationship to the charitable sector was useful in the antiterror battle, and that charities would not be left out of the process. “[T]he Charity Commission is committed to working with the sector it regulates – to ensure that terror groups are never allowed to gain a foothold within England and Wales; 185,000 registered charities.” And an important responsibility would continue to fall to trustees to “take immediate steps to disassociate” any charity from links to terrorist activity and to “be vigilant to ensure that a charity’s premises, assets, volunteers or other goods cannot be used for activities that may, or appear to, support or condone terrorist activities....” Accountability and transparency – not only prosecution – were crucial to that process,⁶⁴ and particularly crucial was the existence and clear role of the Charity Commission.

As investigations continued, more guidance was clearly needed for charitable organizations. The Commission issued “operational guidance” on “charities and terrorism” in January 2003 that reaffirmed the Commission’s central role in investigating alleged charitable links to terrorism and enforcing law and policy with respect to the sector. The 2003 operational guidance also reconfirmed the close relationship between the Commission – through its Intelligence and Special Projects Team (ISPT) – and other law enforcement, security and intelligence organizations.⁶⁵ Later that spring, the Commission issued guidelines for charities working abroad that focused on the risk that charitable funds would reach terrorist organizations and did not appear to impose as many new burdens on charities as their American counterpart guidelines.⁶⁶

Throughout this work a recurring theme was the notion that the Commission should remain at the forefront of work against the use of charities in terrorist financing, seeking to retain cooperation with the voluntary sector while combating terrorism, rather than ceding that work to security and police organizations. That fit well with the Commission’s traditional role. As the Commission’s annual report for 2002 and 2003 put

⁶³ Charity Commission, *Charity Commission Policy on Charities and Their Alleged Links to Terrorism* (May 2002) (www.charity-commission.gov.uk/tcc/terrorism.asp).

⁶⁴ Id.

⁶⁵ Charity Commission, *Operational Guidance: Charities and Terrorism*, OG96-28 (January 2003) (www.charity-commission.gov.uk/tcc/terrorism.asp).

⁶⁶ Charity Commission, *Charities Working Internationally* (2003) (www.charity-commission.gov.uk/tcc/terrorism.asp).

it, perhaps in a broader context, the goal was “maintaining out independence and working with others.”⁶⁷

North London Central Mosque (Finsbury Park Mosque) (2001-2003)

Investigations have continued. The most prominent has been the Commission’s long engagement with the problems of the North London Central Mosque (Finsbury Park Mosque) and its radical, anti-American leader until 2004, Sheikh Abu Hamza al-Masri. Abu Hamza and his followers had taken over the mosque from more moderate trustees and were using it for extremist religious and political purposes. After the September 11 attacks, the Commission renewed earlier investigations of the mosque and Abu Hamza’s role upon receiving tapes of sermons that were “of such an extreme and political nature as to conflict with the charitable status of the Mosque” and investigatory report of a “highly inflammatory and political conference” at the mosque on the first anniversary of the World Trade Center and Pentagon attacks.

In cooperation with police and security agencies and with the support of the mosque’s original trustees, in a 2003 decision the Commission suspended Abu Hamza from his position within the mosque, froze mosque accounts controlled by Abu Hamza and in February 2003 removed him from all positions in the mosque. At the same time the London police secured the mosque and handed it back to the original trustees.⁶⁸ In undertaking this complex task the Charity Commission was aided by the wide array of powers at its disposal. These powers included freezing funds, appointing substitute trustees and auditors, ordering specific activities or organizations shuttered for periods of time, and other measures. The Commission was also assisted by its detailed knowledge of the Mosque gained through a number of years of charity enforcement.

In May 2004, U.S. Attorney General Ashcroft unsealed an eleven count indictment charging Abu Hamza with conspiracy to provide material support to terrorists, assistance to a 1998 bombing in Yemen and other offenses. The British authorities arrested Abu Hamza at the request of the U.S. government and prepared to extradite him to the United States. In 2006 Abu Hamza was sentenced to seven years imprisonment in the U.K. for counseling murder and racial hatred.⁶⁹

Society for the Revival of Islamic Heritage (2002)

⁶⁷ Charity Commission Annual Report 2002-2003.

⁶⁸ Charity Commission, *Inquiry Report: North London Central Mosque Trust* (2003) (www.charity-commission.gov.uk/news/mosqueinq.asp); *British Arrest Radical Cleric U.S. Seeks*, New York Times, 28 May 2004. See also extensive coverage of the Abu Hamza case in British newspapers, especially The Times (London) and The Guardian, in May and June 2004. For a sense of the different atmosphere at the mosque in 2005, see *At Mosque That Recruited Radicals, New Imam Calls for Help in Catching Bombers*, New York Times, 9 July 2005.

⁶⁹ *Abu Hamza Convicted*, The Guardian (London), 8 February 2006. Such a prosecution might be more difficult in the United States because of speech protections.

The Charity Commission conducted a number of other investigations into alleged charitable links with terrorism, not all with similarly dramatic conclusions. A 2002 inquiry into the Society for the Revival of Islamic Heritage was prompted by notice that the U.S. Treasury Department had issued a blocking order against a group with a similar name that had offices in Pakistan and Afghanistan, and that the U.S. government believed that that the group “may have financed and facilitated the activities of terrorists ... through Usama Bin Laden.” After investigating possible ties between the organization registered in London and the group proscribed by the United States, the Commission found no evidence linking the U.K. charity with the U.S.-banned group, and closed its inquiry.⁷⁰

Minhaj-UI-Quran UK and Idara Minhaj-UI-Quran UK (2002)

Another inquiry was launched in 2002 after allegations that the London-based Minhaj-UI-Quran UK and Idara Minhaj-UI-Quran UK was “supporting political activities in Pakistan.” There were also allegations that the records kept at the Charity were poor and that its financial controls were weak. After investigation, the Commission cleared the charity of the political support allegations that had been made against it. The Commission did, however, order the group to strengthen accounting controls, and reached an agreement with the trustees on new controls.⁷¹ This case demonstrates the Commission’s ability to investigate both a charity’s internal functions, as well as whether it has improper ties.

Divergence from the United States: The Interpal Case (2003)

In response to a U.S. allegation that funds from the Palestinians Relief and Development Fund (Interpal) were going to Hamas, the Commission contacted Interpal in April 2003 to determine whether Interpal funds had gone for “political or violent militant activities” of Hamas in Palestine. This followed on a 1996 investigation of Interpal that had found “no evidence of inappropriate activity, and the information available indicated that Interpal was a well-run organization.”

The initial 2003 investigation by the Commission found that Interpal had “improved its procedures and record keeping since the Commission’s previous Inquiry,

⁷⁰ Charity Commission, *Trustees Have No Link with Terrorism* (Press Release PR94/02), 5 November 2002 (www.gnn.gov.uk/environment/detail.asp?ReleaseID=31330&NewsAreaID=2&NavigatedFromDepartment=True). Unfortunately we do not know with certainty whether the Commission found no evidence, or no evidence that rose to a useable or probative level. The Commission is required to maintain confidentiality of sensitive security information.

⁷¹ Charity Commission, *Inquiry Report: Minhaj-UI-Quran UK*, 2002 (www.charity-commission.gov.uk/inquiryreports/minhaj.asp); and *Inquiry Report: Idara Minhaj-UI-Quran UK*, 2002 (www.charity-commission.gov.uk/inquiryreports/idara.asp).

although these procedures could be further enhanced by introducing a greater degree of independent verification of the work done by Interpal's partners in the region on its behalf." The Inquiry also turned up evidence that Interpal had received funds from an organization proscribed under U.N. sanctions in May of 2003, the Al-Aqsa Foundation, though "the funds received were in respect of humanitarian work already carried out by Interpal and then invoiced" to Al-Aqsa.

While the Commission's Inquiry was underway, the U.S. government formally named Interpal as a "specially designated global terrorist" organization and proscribed its activities in the United States "for allegedly supporting Hamas' political or violent militant activities." The Commission immediately opened a formal Inquiry under section 8 of the Charities Act 1993 and froze Interpal's accounts "as a temporary and protective measure." The Commission also requested "evidence to support the allegations made against Interpal" from the United States, but, according to an understandably limited report from the Commission, the U.S. was "unable to provide evidence to support allegations made against Interpal within the agreed timescale."⁷²

In late September, the Commission decided "in the absence of any clear evidence showing Interpal had links to Hamas' political or violent militant activities" that Interpal's accounts would be unfrozen and the Commission's Inquiry closed.

The Interpal 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 reemphasized that "as an independent statutory regulator the Commission will make its own decisions on the law and facts of the case."⁷³

The British bank NatWest has also been sued by people wounded in suicide bombings in Israel or their relatives, in cases where Hamas has claimed that it carried out the bombings, based on claims that NatWest sent funds through accounts held by Interpal to Hamas. NatWest called the suit "without merit," contested it in New York, and said that the Charity Commission had "found no evidence of wrongdoing" by Interpal in the 1996 and 2003 inquiries.⁷⁴ In September 2006 a federal judge in New York denied NatWest's motion to dismiss the suit, allowing it to continue.⁷⁵

⁷² From the Commission reporting on this matter is it not clear if the issue was that there was no evidence or that the United States was unwilling to disclose the intelligence that it might have had.

⁷³ Charity Commission, *Inquiry Report: Palestinians Relief and Development Fund*, 2003 (www.charity-commission.gov.uk/investigations/inquiryreports/interpal.asp).

⁷⁴ *Victims of Bombings in Israel Seek Damages in New York*, New York Times, 7 January 2006; *Hurt by Hamas, Americans Sue Banks in U.S.*, New York Times, 15 April 2006.

⁷⁵ *NatWest Loses First Round in Court Case over Charity Linked to Hamas*, The Guardian (London), 29 September 2006.

Tamils Rehabilitation Organisation (2000-2005)

In September 2000, the Charity Commission opened an Inquiry into the Tamils Rehabilitation Organisation (TRO), after allegations that TRO was “supporting terrorist activity by transferring funds to Sri Lanka in support of the Liberation of Tamil Tigers of Elam (LTTE),” a proscribed organization under the U.K. Terrorism Act 2000 and under many other nations’ laws as well. TRO worked by providing funds to the Tamils Rehabilitation Organisation Sri Lanka (TRO SL), and it appeared that some of those funds might be making their way to the Tigers.

After receiving information that the charity’s “funds might be at risk,” the Commission restricted payments from TRO accounts under section 18 of the Charities Act (a step short of a complete freeze on the use of assets), and then found inadequate financial controls, lack of operational transparency, and evidence of mismanagement during its investigation. “The Trustees exercised little or no control over the application of funds in Sri Lanka and failed to demonstrate a clear audit trail relating to expenditure. They also failed to provide the Commission with any explanation as to the provenance of some of the funds received from the US and Canada. The Commission therefore concluded that the Charity’s property was at risk,” and appointed a prominent London lawyer as TRO’s interim manager under the Charities Act.

The interim manager’s tasks were indeed broad – in addition to managing the entire charity, he was charged with “establishing whether it was able to operate lawfully, in the manner intended by the Trustees, in providing charitable relief to Sri Lanka in circumstances of civil unrest” “and “required to ascertain the extent of the risk that funds had been, or would in the future be, received by any organisation proscribed...” and “making recommendations for the Charity’s future.”

The interim manager, Don Bawtree of BDO Stoy Hayward, determined that the Trustees could not account for funds and “were not administering the charity to an acceptable standard.” He commissioned a Sri Lankan firm to trace funds from TRO to TRO SL and onward to charitable activities in Sri Lanka, and that investigation determined that “TRO SL liaised with the LTTE in determining where funds could be applied.” Funds donated “were used for a variety of projects which appeared to be generally humanitarian, but not necessarily charitable in English law nor in line with the Charity’s objects.” The manager sought to find an NGO willing to work with TRO in finding appropriate projects and monitoring them effectively, but could not find an NGO willing to take this task on.

The interim manager then set up a separate new charity, the Tamil Support Foundation, in which he and the Commission could have confidence that legal obligations were being met. The plan was to transfer funds from the TRO to this new charity. (This seemingly extraordinary power is contemplated in the Commission’s authorizing legislation and appears to be unquestioned in Britain.) Then the tsunami hit Sri Lanka and other countries in December 2004, and the manager decided to donate

most of TRO's assets to tsunami relief through recognized charities, as well as to transfer some funds to the new Tamil Support Foundation. By August of 2005 TRO had no funds left because they had all been transferred to legitimate organizations working on tsunami relief or to the new, safeguarded Tamil Support Foundation. TRO ceased to operate, it was removed from the Register of Charities, and the Commission discharged the interim manager.

From the perspective of the Commission, the results of this long and complex process were entirely positive: "The appointment of the Interim Manager protected the Charity's funds at the time when he took control of its bank accounts, by preventing them from being applied in a manner that was unaccountable....Through the setting up of the Tamil Support Foundation, the Interim Manager secured another vehicle for those wishing to support the Tamil speaking people."⁷⁶

New Initiatives Against Terrorist Financing through Charities, 2006-2007

The July 2005 bombings in London and charges of other links between British-based charities and terrorist abroad have brought renewed pressure to clamp down on terrorist networks and their financing. Intelligence and police activities, raids and detentions have increased dramatically, and the British government has proposed new measures on terrorist finance that could well affect the charitable sector in the U.K. And the U.K. is under continuing, perhaps increasing pressure from other countries – including the U.S., Israel, Russia and others – to control terrorist finance through charities.

In February 2006 the United Nations added several more individuals resident in the United Kingdom, three companies and a related charity based in Birmingham, the Sanabel Relief Agency, to its list of internationally proscribed individuals and groups linked to terrorism. Sanabel and the individuals and companies were allegedly linked to an al-Qaeda-affiliated group called the Libyan Islamic Fighting Group.⁷⁷ The Charity Commission immediately opened an investigation as well and, it became clear later, British authorities either began or continued intensive surveillance of the group.

In February 2006, Gordon Brown MP announced that the government would conduct a new review of measures to combat the use of charities in terrorist finance and would establish a new intelligence center to investigate terrorist financing networks around the world and their impact on Great Britain. "[C]ut[ting] off the sources of terrorist finance ... requires an international operation using modern methods of forensic accounting as imaginative and pathbreaking for our times as the Enigma codebreakers at Bletchley Park achieved more than half a century ago." At the same time, the

⁷⁶ All quotations in this section are from Charity Commission, *Inquiry Report: Tamils Rehabilitation Organisation*, 2005 (www.charity-commission.gov.uk/investigations/inquiryreports/tamils.asp).

⁷⁷ *Man Denies Terror Link after Assets Freeze*, The Guardian (London), 9 February 2006.

government announced that it had frozen 80 million pounds of terrorist funds since September 2001 involving more than a hundred organizations.⁷⁸

In May, more than 500 British police raided nineteen locations around England in London, Bolton, Birmingham, Middlesbrough, Liverpool and Manchester against individuals and organizations suspected of funneling financial assets to terrorist organizations abroad. “At the center of the raids,” according to The Guardian, was Sanabel, whose offices were entered and one of whose trustees, Tahir Nasuf, was arrested under the Terrorism Act 2000.⁷⁹

Also in May, Israel called the British-based charity Islamic Relief a “front for terrorists” involving the “transfer [of] funds and assistance to various Hamas institutions and organizations.” The charges raised bilateral issues between Israel and Great Britain because Britain finances Islamic Relief’s health and other work in Gaza and elsewhere. Islamic Relief denied the charges and said that Israel appeared to have confused several of its sub-grantees with groups tied to Hamas. And the U.K. government overseas aid group that funded Islamic Relief, the Department for International Development, said “[w]e have no reason to believe that the allegations are true.”⁸⁰

In the summer of 2006, after British authorities uncovered a plot to blow up airliners traveling between Britain and the United States and detained 25 people. A British-based charity called Jamaat ud Dawa (Association of the Call to Righteousness) and a smaller, family-run charity named Crescent Relief came under investigation for possible diversion of earthquake relief funds to terrorist groups that had planned to carry out the airliner attacks. The funds were reported to have come directly from the British organization or individuals linked to it.

News reports linked Jamaat ud Dawa – which is on the U.S. proscription lists – to Lashkar-e-Taiba, a terrorist group banned by both the U.S. and Pakistan. New reports made clear that Jamaat ud Dawa and individuals linked to it had been under intensive surveillance for some time. A Charity Commission investigation was immediately launched as well, with its focus on Crescent Relief.⁸¹

⁷⁸ *Modern-Day Bletchley Park to Tackle Terror Finance Networks*, The Guardian (London), 11 February 2006.

⁷⁹ *Ten Held in Police Counter-Terror Raids Over Claims of Chanelling Cash to Iraq Insurgency*, The Guardian (London), 25 May 2006.

⁸⁰ *Israel Accuses British-funded Islamic Charity of Being Front for Terrorists*, The Guardian (London), 31 May 2006.

⁸¹ *Pakistani Charity Under Scrutiny in Financing of Airline Bomb Plot*, New York Times, 14 August 2006; *Terror Plot*, The Guardian (London), 15 August 2006; *In British Inquiry, a Family Caught in Two Worlds*, New York Times, 20 August 2006; *Arrest: Father of Airline Attack Suspects is Held in Pakistan*, The Guardian (London), 21 August 2006; *British Study Charitable Organization for Links to Plot*, New York Times, 25 August 2006; *In Tapes, Receipts and a Diary, Details of the British Terror Case*, New York Times, 28 August 2006.

All these events sparked more intensive focus on charitable links to terrorism and their role in terrorist finance, especially links involving Islamic charities. As the *New York Times* reported from London in August, “the question is being asked here, with more urgency: To what extent to Muslim charities – on the surface noble and selfless – mask movements and money for terrorists and extremist groups?” And events in 2005 and 2006 highlighted the different approaches – in some cases divergent approaches – taken by American and British authorities on charities and terrorist finance and on charities that had come under suspicion.

“Since Sept. 11,” the *Times* continued, “American officials have banned many charities that still operate freely in Britain, reflecting a disagreement about where charity ends and extremism begins.” And 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.”⁸²

In the wake of the airline bomb plot arrests, the government reconfirmed that the Home Office and Treasury Department are reviewing the problem of terrorist finance through charities and intend to recommend legal and policy changes. “We are aware that existing safeguards against terrorist abuse in the charitable sector need to be strengthened,” a Home Office official told the *New York Times*.⁸³ The National Council of Voluntary Organizations (NCVO) also convened a panel to report on issues of charities and terrorist finance, concerned that the Home Office and security review would not be sufficiently consultative.

The investigations continued into the fall, including a widespread investigation of alleged “jihadists” that culminated in the arrest of fourteen people in London in September. They had allegedly been training for terrorist activities, including possibly at an independent school owned and run the by charitable group Jameah Islamiyah, which came under investigation by the Charity Commission as well in the fall of 2006.⁸⁴

In October 2006, the government began announcing some of its new measures to crack down on terrorist financing. Chancellor Gordon Brown and Economic Secretary Ed Balls stressed “closer cooperation between America and Europe,” and said that the U.K. government would now “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

⁸² *Airplane Terrorism Case Prompts Questions About the Work of Islamic Charities in Britain*, *New York Times*, 24 August 2006.

⁸³ *British Study Charitable Organization for Links to Plot*, *New York Times*, 25 August 2006.

⁸⁴ *Police Search Islamic School on Expansive Estate in South Britain*, *New York Times*, 4 September 2006; *Training Camps Link to Anti-Terror Arrests*, *The Guardian* (London), 4 September 2006.

accounts.” The government would also seek preemptive authority to halt terrorist financing. The inquiry on charities and terrorist finance continued. Brown also proposed new and inevitably controversial reforms to Britain’s terrorist law, including giving the government the power to detain terrorist suspects for longer than the current 28 days.⁸⁵

The Terrorism Act 2006 adds to the array of counter-terror enactments in the U.K. since September 11, particularly the Terrorism Act 2000 and the Anti-Terrorism, Crime and Security Act 2001. It may affect charities because it expands the terrorist criminal offenses to include acts preparatory to terrorism; directly or indirectly inciting or encouraging others to commit terrorism, including the “glorification” of terrorism; the sale, loan or other dissemination of publications that encourage terrorism or provide assistance to terrorists; and anyone who gives or received training in terrorist techniques, including mere attendance at a terrorist training site. The Terrorism Act 2006 also increases the scope of proscription for terrorist organizations, providing the government with authority to proscribe organizations that “glorify terrorism.”⁸⁶

As of fall 2006, 42 organizations had been proscribed in the U.K. under the Terrorism Act 2000, 14 organizations were proscribed in Northern Ireland under earlier law, and under the new authority given to proscribe organizations that glorify terrorism in the Terrorism Act 2006, two such organizations had been banned.⁸⁷

The Home Office and Treasury Review, and the Charity Commission’s Defense of its Role

In January 2007, in advance of the release of a 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 National Council of Voluntary Organisations (NCVO) released its own report on charities and terrorist finance, *Security and Civil Society*. The report criticized moves toward strengthening the U.K. legal regime for prosecuting charities and called on the government to view charities as an ally in the fight against terrorism rather than as an adversary. The report also pointed out the fundamental sufficiency of the existing legal regime while also recognizing some problems, and 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.⁸⁸

⁸⁵ U.K. *Unveils Plan to Freeze Terror Funds*, Associated Press, 10 October 2006; *Brown to Use Classified Intelligence in Fight to Cut Terrorist Funding*, The Guardian (London), 11 October 2006.

⁸⁶ Home Office, *Counter-Terrorism Strategy, Terrorism Act 2006* (security.homeoffice.gov.uk/counter-terrorism-strategy).

⁸⁷ Home Office, *Counter-Terrorism Strategy* (security.homeoffice.gov.uk/counter-terrorism-strategy); *Home Secretary Moves to Ban 15 Terror Groups*, Home Office, Press Office, 10 October 2005 (press.homeoffice.gov.uk/press-releases, containing a full banning order and additional information).

⁸⁸ NCVO, *Security and Civil Society* (January 2007) (www.ncvo-vol.org.uk).

The Home Office and Treasury review of charities and terrorist finance was released in May 2007. The review called for tightened coordination 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.⁸⁹

The Charity Commission released its formal response to the Home Office and Treasury Review in August 2007, providing plans to accelerate its work on terrorist finance and strengthen coordination with government agencies. The Charity Commission also sought to safeguard the independence of its work and structure, and its role in cooperating with the charitable sector to strengthen governance and accountability.⁹⁰

The Charity Commission spoke clearly: “The Commission will 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.”⁹¹ The Commission re-emphasized its view that 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 minimize its exposure to the risk of terrorist abuse is through implementing strong governance arrangements, financial management and partner management. Charities which implement good general risk management policies and procedures will be better safeguarded against a range of potential misuses.”⁹²

Lessons of the Experience in the United Kingdom

The English 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 an exceptionally useful role in England in cooperation 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. The Charity Commission conducts investigations, gathers information that it

⁸⁹ The Home Office and Treasury Review is at www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/Charities_consultation.pdf?view=Binary.

⁹⁰ See Charity Commission, 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 Reponse to the Consultation (August 2007), at www.charity-commission.gov.uk/supportingcharities/terror.asp. Other responses to the Home Office and Treasury Review are at www.homeoffice.gov.uk/documents/cons-2007-protecting-charities/cons-2007-charities-responses?view=Binary.

⁹¹ Section 3.2 of the Charity Commission’s Response, *supra*.

⁹² *Id.*

shares as relevant with other agencies, and may take measures to require organizations to substitute trustees, improve accounting and disbursement, or other reforms.

This maintenance of a central role for a charity regulator, combined with the intensive focus on a small number of organizations suspected of terrorist finance links, has arguably resulted in both better targeting and better information for British law enforcement than for some of its international counterparts. The British situation contrasts with Australia, where anti-terrorism laws have been adopted that clearly could apply to the charitable sector, but have not yet been applied, and with the U.S. prosecution-centered approach. The approach taken in the United States and Australia will be discussed below.

III. Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in Australia

The Framework of Counter-Terrorist Law and Policy and its Impact on Civil Society

In contrast with the United Kingdom and the United States, Australia had very little experience with terrorism within its borders before the September 11 attacks and thus very little specifically anti-terrorist legislation on its books.⁹³

After the September 11 attacks, the government tightened domestic surveillance of suspected terrorists and introduced a number of anti-terrorism bills in the Australian parliament that, in general terms, sought to enhance government power in the anti-terrorism arena by vesting additional discretion and power in the Australian federal attorney general. Those bills included the Security Legislation Amendment (Terrorism) Bill, Suppression of the Financing of Terrorism Bill, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill, Border Security Legislation Amendment Bill, and Telecommunications Interception Legislation Bill, all introduced in 2002.⁹⁴

The initial legislative proposals elicited widespread and broad opposition in Australia, including civil liberties groups and parliamentarians who argued that much of what the government wanted to re-criminalize through specialized anti-terrorist legislation was already effectively criminalized and handled through existing criminal law.⁹⁵ Opponents forced some changes in the original set of bills adopted in the wake of

⁹³ Christopher Michaelsen, *International Human Rights on Trial: The United Kingdom's and Australia's Legal Response to 9/11*, 25 *Sydney Law Review* 275-303 (2003). An earlier and shorter treatment of the Australian scene is in Sidel, *More Secure, Less Free?: Antiterrorism Policy and Civil Liberties after September 11* (University of Michigan Press, 2004, and 2006 revision).

⁹⁴ David Kinley and Penny Martin, *International Human Rights Law at Home: Addressing the Politics of Denial*, 26 *Melbourne University Law Review* 466-77, 471 (2002).

⁹⁵ For a clear expression of this view, see, e.g., Chris Maxwell, *September 11 and Its Aftermath: Challenges for Lawyers and the Rule of Law* (Address to Maddock Lonie and Chisholm law firm, 15 April 2002) (www.libertyvictoria.org.au/documents/2002-04-15_cm_speech.pdf).

the September 11 attacks. The very broad proposed definition of “terrorist act” in the government’s initial proposal was narrowed to require some element of intentional intimidation or coercion. And the government’s attempt to reverse the presumption of innocence in terrorism cases, requiring detainees to prove that they were not terrorists, was corrected.

The initial wave of legislative activity continued in 2003, when the government proposed the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (the ASIO Act), which was primarily intended to enable Australian security organisations to detain terrorism suspects or persons who might have some knowledge of potential terrorist activities and to criminalize “withholding of information regarding terrorism.”⁹⁶ This bill also elicited very strong opposition, delaying passage for more than a year, and resulting in softening to protect children in detention, adding a sunset clause, and other changes.

In 2003 and 2004 the government continued to press for statutory amendments to provide for closed trials for defendants charged with national security offenses, and clearances for lawyers, limited public access, and limited media coverage of certain national security trials, as well as authority to deny terrorism suspects bail and allow police to hold some detainees for terrorism-related question for twenty-four hours, a substantial increase from the four hour limit under current law.⁹⁷

In 2005 the Australian government proposed new and tougher anti-terrorism legislation that would expand the definition of terrorist organizations to include advocacy within the proscribable range, expand the government’s powers to use “control orders” and preventive detention against a widened range of suspects, and strengthen the crime of sedition.⁹⁸ The proposed expansion in government powers continued to be severely criticized by civil liberties groups.⁹⁹

Civil Society, Charities and Terrorist Finance

Within the framework of new and expanded anti-terrorist lawmaking in Australia there has been some attention to the problem of terrorist finance – and within that rubric, some, but not extensive, attention to the issue of charitable conduits for terrorist finance. Among the laws passed in 2002 was the Suppression of the Financing of Terrorism Act

⁹⁶ Michaelsen, *International Human Rights on Trial*, supra note 8, p. 281.

⁹⁷ These developments are discussed more fully in Sidel, *More Secure, Less Free*, pp. 156-62.

⁹⁸ See Prime Minister’s Officer, *Counter-Terrorism Laws Strengthened*, 8 September 2005, at www.pm.gov.au; Civil Rights Network, *The Anti-Terrorism Bill (No 2) 2005 (Cth)*, www.civilrightsnetwork.org. The text of the draft is at www.chiefminister.act.gov.au/docs/B05PG201_v281.pdf.

⁹⁹ ‘Appalling’ Anti-Terrorism Laws Draw Criticism, ABC News Online, 27 September 2005. See also

2002, which was intended to provide Australian implementation of the International Convention for the Suppression of the Financing of Terrorism and to “starve terrorists of assets and funds in order to reduce their capacity to operate.”¹⁰⁰

The Financing of Terrorism Act amends Australia’s general Criminal Code by criminalizing “the provision or collection of funds to facilitate a terrorist act.” The Financing of Terrorism Act also provides, as McCulloch and colleagues explain, that “cash dealers and financing institutions to report suspected terrorist-related transactions,” “provide a penalty for using the assets of those allegedly involved in terrorist activities,” “streamline the process for disclosing financing transaction information to foreign countries,” and “allow for the freezing of assets of proscribed persons and entities.”¹⁰¹

The Australian financing of terrorism regime implicates charities in a number of ways – through potential penalties on individuals and on organizations, including proscription of organizations, for a range of acts. Charities and individuals in charities could in some cases be charged with various terrorist and terrorist financing offences. In specific terms, as a result of post-September 11 legislation, the Australian Criminal Code criminalizes committing a terrorist act (subsection 101.1), providing or receiving training connected to terrorist acts (101.2), possessing things connected with terrorist acts (101.4), collecting or making documents likely to facilitate terrorist acts (101.5), other acts done in preparation for or planning for terrorist acts (101.6), directing the activities of a terrorist organisation (102.2), membership in, recruiting for, providing or receiving training in connection with a terrorist organisation (102.3, 102.4, 102.5), getting funds to, from or for a terrorist organisation (102.6), providing support to a terrorist organisation (102.7), associating with a terrorist organisation (102.8), with separate additional offenses for financing terrorism or a terrorist (103.1, 103.2). Individuals connected to charitable organizations may also be subject to the control orders or preventative detention provided in subsections 104 and 105 of the Code.

Some of the few commentators on this legal regime raised challenging questions. McCulloch and colleagues, for example, suggest that “[i]ncreased regulation and surveillance of non-profit organisations and charities may undermine the ability of legitimate organisations to operate effectively in addition to curtailing their political independence. The flexibility of the definition of terrorism and the ease with which governments can deem organisations ‘terrorist’ for the purpose of freezing assets may

¹⁰⁰ Jude McCulloch, Sharon Pickering, Rob McQueen, Joo-Cheong Tham and David Wright-Neville, *Suppressing the Financing of Terrorism*, 16 *Current Issues in Criminal Justice* 71-78 (2004). See also Jude McCulloch and Sharon Pickering, *Suppressing the Financing of Terrorism: Proliferating State Crime, Eroding Censure and Extending Neo-colonialism*, 45 *British Journal of Criminology* 470 (2005).

¹⁰¹ McCulloch et al, id., also citing M Tan, *Money Laundering and the Financing of Terrorism*, 14(2) *Journal of Banking and Finance Law and Practice* 81-107 (2003).

result in some politically inconvenient or dissident charities and non-profit organisations being labeled terrorist organisations.”¹⁰²

The workings of this legislation in practice have also raised concerns. Under the legislation discussed above and the *Charter of United Nations Act 1945* (Cth), for example, the Liberation Tigers of Tamil Eelam (LTTE) had been proscribed in Australia, making it a criminal offense to donate, provide funds or deal in the assets of the proscribed group, regardless of purpose, including humanitarian assistance. “This is of grave concern,” wrote one of Australia’s leading civil liberties organizations, Liberty Victoria, “especially given that the Australian Federal Police has acted upon this listing by raiding Tamil Co-ordinating Committee of Australia in November last year....The effect of these raids has been to generate fear amongst the Sri Lankan Tamil communities in Australia.”¹⁰³

The Report of the Security Legislation Review Committee (SLRC), released in June 2006, picked up on these criticisms and expanded them. The SLRC specifically criticized portions of the anti-terrorism amendments to the Criminal Code that “appear to have a disproportionate effect on human rights and could be subject to administrative law challenge.”¹⁰⁴ The SLRC recommended that these provisions be repealed or changed. The problematic legal provisions include¹⁰⁵:

1. Process for proscription. The SLRC called for revamping “the process for proscribing and organization as a terrorist organisation” under Criminal Code subsection 101.2, noting that

“no sufficient process is in place that would enable persons affected by such proscription to be informed in advance that the Attorney-General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation. A consequence of proscription is that, on account of their connection with the organisation, persons become upon proscription liable to criminal prosecution. In that prosecution the defendant cannot deny that the proscribed organisation is a terrorist organisation or for that matter ‘an organisation’. All members of the SLRC believe that a fairer and more transparent process should be devised for proscribing an organisation as a terrorist organisation.”

¹⁰² McCulloch et al, *supra* note 17. On Australian constitutional issues with this legislation and its impact, see Joo-Cheong Tham, *Possible Constitutional Objections to the Powers to Ban ‘Terrorist’ Organisations*, 27 University of New South Wales Law Journal 482 (2004).

¹⁰³ Liberty Victoria submission on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth), 10 December 2006.

¹⁰⁴ Report of the Security Legislation Review Committee (June 2006), p. 4, available at www.ag.gov.au/www/agd/agd.nsf/Page/National_securityReviewsSecurity_Legislation_Review_Committee. For the detailed recommendations, see pp. 8-16.

¹⁰⁵ Separate citations are not provided for each section below; all these recommendations and the specific quotations are found at *id.*, pp. 3-16. Individual citations available on request.

The SLRC recommended that the proscription process be improved either by enhancing the protective and notice aspects of executive proscription, or by making proscription a judicial process with notice, service and a judicial hearing. The grounds for proscription were broadened in 2005 to include organizations that advocate the doing of a terrorist act.

2. Advocating terrorist acts. The SLRC noted that “advocating the doing of a terrorist act is one of the grounds for proscription of an organisation as a terrorist organisation,” and called for the deletion of a portion of the broad definition of “advocates” in section 102.1(1A) in the Criminal Code that creates liability for “directly prais[ing] the doing of a terrorist act in circumstances where there is a risk that such praise might lead a person to engage in a terrorist act.”¹⁰⁶ The SLRC called that provision “on its face, broad and potentially far-reaching.” If its deletion were not possible, the SLRC stated that “the paragraph should be more tightly defined and changed to require that the risk be a substantial risk.”

3. Association. The SLRC also directly criticized the offence of “associating with terrorist organizations” that was added to the Australian Criminal Code in 2004.

“On its face, this offence transgresses a fundamental human right – freedom of association – and interferes with ordinary family, religious and legal communication....[S]ection 102.8 should be repealed. The interference with human rights is disproportionate to anything that could be achieved by way of protection of the community if the section were enforced....[T]he most important feature of the section – making it an offence to provide support to a terrorist organization with the intention that the support assists the organisation to expand or to continue to exist – can be achieved by a new offence that does not rely on association between the person charged and anyone else.”

4. Strict liability. The SLRC called for the repeal or amendment of several Criminal Code subsections applying strict liability (punishment without proof of fault - a concept quite similar to absolute liability in Canada).

5. Definition of terrorist act. The SLRC recommended that the definition of “terrorist act” in the Criminal Code also be amended by “omitting all reference to ‘threat of action’. Its place in the definition causes uncertainty and is unnecessary.” The SLRC recommended a separate offence for “threatening action” or “threat to commit a terrorist act” if that would be considered necessary.

The SLRC concluded that “the amendments ... recommended to the proscription, advocacy, association and strict liability elements of Part 5.3 of the Criminal Code would contribute to a reduction in fear and sense of alienation by at least some Muslim and Arab

¹⁰⁶ Here the SLRC is paraphrasing rather than directly citing section 102.1(1A).

Australians. By doing so, there will be an enhancement, not a diminution, of anti-terrorism efforts.”

6. Training. The SLRC also recommended that the provision of the Criminal Code that criminalizes “training a terrorist organisation or receiving training from a terrorist organisation” be amended to “make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act,” and that the offence should not be a strict liability offence.

7. Funding to, from or for a terrorist organisation. The SLRC recommended that the current broad offence of “getting funds to, from or for a terrorist organisation” under subsection 102.6 should “not apply to the person’s receipt of funds from the organisation ... solely for the purpose of the provision of ... legal representation ... or assistance to the organisation for it to comply with ... law....”

8. Providing support to a terrorist organization. The SLRC recommended that the support offence “be amended to ensure that the word ‘support’ cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organization and its stated objective,” reflecting freedom of expression concerns about the breadth of the support proscription.

Contrasted with the warnings and limitations suggested by the Security Legislation Review Committee, the new Anti-Money Laundering and Counter-Terrorism Financing Act, adopted in 2006, will potentially increase the impact on the Australian charitable sector. The Act is intended to bring Australia into compliance with the Financial Action Task Force (FATF) standards.

The Act¹⁰⁷ primarily affects “financial and gambling sectors, bullion dealers and lawyers/accountants (but only to the extent that they provide financial services in direct competition with the financial sector – legal professional privilege will still apply) who provide designated services,” and will be expanded to include further coverage of “real estate agents, jewellers, lawyers and accountants.” The Act’s definition of “designated services” covers “a wide range of financial services including opening an account, accepting money on deposit, making a loan, issuing a bill of exchange, a promissory note or a letter of credit, issuing a debit or stored value card, issuing traveller’s cheques, sending and receiving electronic funds transfer instructions, making money or property available under a designated remittance arrangement, acquiring or disposing of a bill of exchange, promissory note or letter of credit, issuing or selling a security or derivative, accepting a contribution, roll-over or transfer in respect of a member of a superannuation

¹⁰⁷ The Anti-Money Laundering and Counter-Terrorism Financing Act 2006 is at www.comlaw.gov.au/comlaw/legislation/act1.nsf/asmade/bytitle/AD9D7C024DC9E300CA257244001003BF?OpenDocument; the Explanatory Memorandum is at www.comlaw.gov.au/comlaw/legislation/bills1.nsf/bills/bytitle/666CB8390F7D8E10CA25721900788934?OpenDocument&VIEWCAT=attachment&COUNT=999&START=1.

fund and exchanging currency.”¹⁰⁸ It is thus possible that a charitable or other organization undertaking such services would fall within the purview of the Act, perhaps for accepting a contribution, or sending EFT instructions, even if it is not a designated target of the legislation.

Thus, according to a close Australian observer of this sector and the legislation, “funds received from this [charitable and nonprofit] sector will be subject to the provisions of the [Act]. Obligations are generally imposed on 'reporting entities', that is, entities providing 'designated services' (s 5). 'Designated services' cover a range of financial services (... s 6, Table 1) hence, charitable and nonprofit organisations receiving designated services will be affected by the [Act] in the sense that 'reporting entities' when discharging their obligations under the regime will be collecting financial information regarding these organisations and, in some circumstances, forwarding them on to AUSTRAC (and from then on to security and police agencies).”¹⁰⁹

Australian nonprofits and charities may also be “subject to special attention when 'reporting entities' seek to comply with their obligations under the [Australian] AML/CTF regime”¹¹⁰ because the Act seeks to codify Australia’s commitments under the FATF standards, and a key focus of the FATF, through Special Recommendation VIII, has been with nonprofit organizations.

The new Act also regulates what it terms “designated remittance arrangements,” which “is the [Act]’s synonym for alternative remittance systems like hawala.”¹¹¹ So such groups – which may be nonprofit or charitable organizations or have close links to them – will be affected by the Act’s requirements of such “designated remittance arrangements,” including reporting requirements as “reporting entities” under the Act (sec. 6) and registration requirements (part 6). One potential concern here is that the Act would be used for indirect and selective regulation of charities and perhaps those that provide services to them.

The Act was roundly criticized by industry, civil liberties, academic and other representatives during the mandatory comment period. At least one organization – Liberty Victoria, a leading civil liberties group, specifically raised the problem of impact on the charitable sector.

Liberty Victoria noted that because the underlying “financing of terrorism” offenses (discussed above, sec. 102.6 of the Criminal Code) are “very broad and capture conduct that go far beyond intentional funding of politically or religiously motivated violence,” including criminalizing donation of money to groups like Hamas “for the sole

¹⁰⁸ Explanatory Memorandum, p. 1.

¹⁰⁹ Communication from an Australian academic.

¹¹⁰ Id.

¹¹¹ Id.

purpose of assisting its humanitarian activities,” and because “all but one of the listed ‘terrorist organisations’ under the Criminal Code are self-identified Muslim groups, the Criminal Code ‘terrorist organisation’ provisions have resulted in a tangible sense of fear and uncertainty amongst Muslim Australians especially in relation to charity giving.”¹¹²

Liberty Victoria cites a member of the Islamic Council of Victoria on the effect of this legislation, and its potential compounding in the new Act: “This level of uncertainty in an offence this serious is deeply worrying. And for Australian Muslims, doubly so. Because charity is one of the five pillars on which Islamic practice is built, Muslims tend to be a charitable people. That is especially true at certain times of the Islamic year when charity is religiously mandated. Countless fund-raising efforts followed the tsunami and the Pakistan earthquake, and even in the normal course of events, Muslim charities regularly provide relief to parts of the Muslim world many other charities forget.”¹¹³

Liberty Victoria disputes the necessity of such provisions – as well as the idea that they faithfully reflect Australia’s obligations under the International Convention for the Suppression of the Financing of Terrorism and the Financial Action Task Force’s Special Recommendations on Terrorist Financing. In reality, writes Liberty Victoria, “both these documents, while calling for the criminalisation of the financing of terrorism, define financing of terrorism in a narrower manner than sections 20-1 of the *Charter of United Nations Act 1945* (Cth) and section 102.6 of the *Criminal Code*, by emphasising the need for an intention or knowledge that funds will be used to carry out terrorism.” “[B]y *not* requiring that there be intention or knowledge that funds be used to facilitate acts of violence, [the Australian legislation] is at odds” with these international standards.¹¹⁴

For Liberty Victoria, the solution is reasonably clear: the offenses in a separate section of the Australian Criminal Code, Division 103, “at least require that the funds have some connection with the engagement of a ‘terrorist act’. It is, therefore, recommended that ‘financing of terrorism’ under the [new Act] be restricted to conduct that amount to an offence under Division 103 of the Criminal Code.”¹¹⁵ That suggestion was not taken by the drafters.

Based on current information the enhanced Australian counter-terrorism statutory stream has not yet been used to proscribe charities on terrorism grounds or in other ways against charities. While new legislation may potentially have more effects on the charitable sector, the broad existing legislation does not appear to have been used against

¹¹² Liberty Victoria submission on the Anti-Money Laundering and Counter-Terrorism Financing Bill 2006 (Cth), 10 December 2006.

¹¹³ Liberty Victoria, id., citing Waleed Aly, *Reckless Terror Law Threatens to Make Charity End at Home*, *The Age* (Melbourne), 29 November 2005, 15.

¹¹⁴ Liberty Victoria, id.

¹¹⁵ Liberty Victoria, id.

the charitable sector, and its effectiveness in halting any financial flows to terrorist organizations using charities and stopping terrorism might legitimately be questioned.

General Conclusions: Counter-Terrorism, Civil Liberties, and the Enabling Legal and Political Environment for Civil Society in Comparative Perspective

A number of common areas and lessons arise in the exploration of counter-terrorism and the enabling legal and political environment for civil society in the United States, the United Kingdom, and Australia.

1. Statutes and regulation barring various forms of charitable assistance to or use by terrorists were generally in place before September 11. They were rapidly broadened in the ensuing several years, and have since been further broadened. In several countries – including Canada and others – still further broadening measures are underway.

2. Opposition from civil society and the voluntary and charitable sector has been episodic at most, and most clearly focused in the United States, where the government’s voluntary guidelines on overseas giving have sparked discontent, particularly in the philanthropic sector. Charities and philanthropic organizations tend to become exercised by broadening government regulation in this area only when they are directly affected, as by the U.S. Treasury’s guidelines on overseas funding. The British approach, at which the Charity Commission’s regulatory role has thus far remained at the center of investigatory and enforcement activities, appears to have sparked less opposition from the voluntary sector.

3. Certain key issues central to the legal and political enabling environment for civil society appear to arise in each country. They 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 offenses, including the frequent lack of a *mens rea* requirement and the breadth of the offense; ‘
- The dangers to associational freedom potentially posed by the broad legislation already enacted or proposed;
- The difficulty in preserving a central role for nonpolitical and nonpartisan charity regulators, where they exist; and other issues.

4. There are some key differences among “war on terror” states in their

approaches to counter-terrorism and civil society. The British and American cases represent divergent approaches, while each remains committed to combating terrorist activity, including the misuse of charities for terrorist purposes.

The British regulatory approach, with the Charity Commission at its center, focuses inquiries into suspicious cases, with a range of potential solutions that can include strengthened procedures, replacement of trustees and on up to closing and proscription of the charity. The American approach has been centered on prosecution for “material support” and other criminal charges, more recently supplemented by “voluntary guidelines” intended to promote compliance, particularly in the philanthropic sector.

In my view the British approach may well have worked more effectively in the years since 2001. The British case studies discussed above demonstrate that the Charities Commission employs a broad range of investigative and regulatory responses to concerns that charities have links with terrorism. Not all of the regulatory responses are punitive and can include requiring improved record-keeping and other measures that may make it easier to detect links with terrorists in the future. It should be noted, however, that the regulation of charities in Britain is centered in one level of government whereas the United States, Australia and Canada are all federations in which regulatory jurisdiction over charities are divided between different levels of government.

5. Is self-regulation by civil society and the voluntary sector a useful solution to the problems of counter-terrorism law and policy? Self-regulation emerges with mixed success in these jurisdictions.

In the United States, the self-regulatory approach of the Treasury’s voluntary guidelines on overseas giving sparked opposition. Some charities attempted to comply with these voluntary guidelines through additional vetting procedures while some attempted to shift risk downstream to grantees through revised and strengthened grant letters. In Britain the sophistication and nuance of the Charity Commission and its role has perhaps reduced the need for a self-regulatory approach as the Commission has helped to educate the charitable sector as well as adopting a range of investigatory and enforcement measures.

Measures affecting civil society and its enabling legal and political environment are, of course, not only limited to the United States, the United Kingdom, and Australia. They have been undertaken in many other countries as well. This paper has focused on those three countries because they have played a leading role in the “war on terror,” and because developments in them have gone deeper and may have a more long-lasting impact on civil society and the voluntary sector.

But it is important to note that other very important countries have encountered these dilemmas and conflicts as well. They include the Netherlands,¹¹⁶ Canada,¹¹⁷ and

¹¹⁶ See C.R.M. Versteegh, *Terrorism and the Vulnerability of Charitable Organisations*, Paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July

South Africa, as well as regions such as the European Union.¹¹⁸ And of course initiatives to chart a better course in the relationship between counter-terrorism law and policy and the enabling environment have been launched. These include the Montreux Initiative in Europe and the Middle East,¹¹⁹ other efforts to bring together Islamic charities and to improve standards, such as the Humanitarian Forum, established by the charity Islamic relief in June 2005,¹²⁰ the efforts by public charities and foundations in the United States to establish the Principles of International Charity,¹²¹ the joint work between the European Foundation Centre and the U.S. Council on Foundations to draft and publicize the Principles of Accountability for International Philanthropy,¹²² and the efforts by the Charity Commission in the U.K. to fight terrorism while preserving the enabling

2006). The Netherlands has enacted an Act on Terrorist Crimes (August 2004), intended to be consistent with the European Union framework for counter-terrorism measures. In 2006 the Netherlands adopted further legislation banning organizations (including charitable organizations) on the United Nations or European Union terrorism organization proscription lists. See Background Note: The Netherlands, at <http://www.state.gov/r/pa/ei/bgn/3204.htm>.

¹¹⁷ On developments in Canada, see Blake Bromley, *The Post 9/11 Paradigm of International Philanthropy*, Paper presented to the International Society for Third Sector Research Seventh International Conference, Bangkok (July 2006); Terrence Carter, *The Impact of Anti-Terrorism Legislation on Charities in Canada: The Need for an Appropriate Balance* (2007), at www.antiterrorism.ca; Terrance S. Carter, *Canadian Charities: The Forgotten Victims of Canada's Anti-Terrorism Legislation*, International Journal of Civil Society Law IV:4 (October 2006); Blake Bromley, *Funding Terrorism and Charities*, Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 (2007).

¹¹⁸ On developments in the European Union, see the Council Framework Decision on Combating Terrorism (13 June 2002), Commission Communication on the Prevention of and Fight against Terrorist Financing (20 October 2004), and the Commission Communication on the Prevention of and Fight against Terrorist Financing through Enhanced National Level Coordination and Greater Transparency of the Non-profit Sector (29 November 2005). These and other efforts are reviewed in the *Independent Scrutiny in Response to Recommendation 41 of the EU Counter Terrorist Financing Strategy Presented to the European Council of December 2004 to Assess the EU's Efforts in the Fight Against Terrorist Financing* (1 February 2007). These and additional useful materials are available at ec.europa.eu/justice_home/fsj/terrorism/prevention/fsj_terrorism_prevention_disrupt_en.htm. For independent analyses, see Grantmakers Without Borders, *Update note on developments at EU-level relating to CTM* (21 June 2007); and Amnesty International, Human Rights Dissolving at the Borders? Counter-Terrorism and EU Criminal Law (2005), at www.amnesty.org/en/library/info/IOR61/012/2005.

¹¹⁹ See *The Montreux Initiative (MI): Towards cooperation in removing unjustified obstacles for Islamic Charities* (February 2007); The Montreux Initiative, *Conclusions* (Revised in Istanbul, 22 November 2005); Jonathan Benthall, *Towards cooperation in removing obstacles for Islamic charities*, Feasibility study for the Federal Department of Foreign Affairs, Bern (May 2005).

¹²⁰ Citations to Humanitarian Forum.

¹²¹ See www.ombwatch.org/npa/Treasury%20Principles%20Final%20Document%20.pdf, and the discussion of the Principles of International Charity in the U.S. section above.

¹²² See <http://www.cof.org/council/prdetail.cfm?ItemNumber=10038>.

environment for the voluntary sector and the distinct roles of the Commission and other bodies in the U.K.¹²³

Each of the countries and regions analyzed here, and others such as the Netherlands, Canada, South Africa, and the European Union, as well as the various other initiatives to strengthen governance and accountability, will be important to follow carefully in the years ahead as nations struggle with the balance between security and freedom, in formulating and enforcing appropriate counter-terrorism laws and policies without unnecessarily damaging the enabling legal and political environment for civil society. Counter-terrorism law and policy is severely challenging civil society and civil liberties in a number of “war on terror” states, and we must work toward ameliorating those effects wherever possible.

¹²³ See Charity Commission, 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 Reponse to the Consultation (August 2007), at www.charity-commission.gov.uk/supportingcharities/terror.asp.