

# COUNTER-TERRORISM LAWS AND REGULATIONS: WHAT AID AGENCIES NEED TO KNOW

Presentations by  
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# COUNTERTERRORISM LAWS AND HUMANITARIAN ACTION



# Counterterrorism and Humanitarian Engagement Project (CHE Project)

- Started by identifying countervailing norms
  1. Increase in humanitarian action, including engagement with all parties to armed conflicts
  2. Increase in counterterrorism-based restrictions on engagement with designated terrorists/armed opposition groups

# Norm 1: Increase in humanitarian action, including engagement with all parties to armed conflicts

- Rooted in IHL “right of initiative”
- Manifested in Security Council resolutions; donor policies and funding; etc.

## **Norm 2: Increase in counterterrorism-based restrictions on engagement with designated terrorists/armed opposition groups**

- Decades-long accumulation of CT laws
- Significant increase in number and scope of laws after 11 Sept. 2001
  - SC resolutions; domestic laws; administrative regulations
  - Prohibit various forms of support to designated terrorists

# Potentially affected situations

- Afghanistan
- Gaza/West Bank
- Colombia
- Mali
- Pakistan
- Somalia
- Syria
- Yemen

# HPN Network Paper: Overview

- Aim:
  - To provide a brief primer and an overview of some of the most salient questions that humanitarian actors are grappling with in planning effective, principled, and lawful operations in high-risk environments.
- Outline:
  - Legal bases for counter-terrorism law and for humanitarian action
  - Key challenges anti-terrorism laws and regulations poses to humanitarian action
  - Key questions and approaches humanitarian actors may wish to consider when facing these challenges
  - Case study (Somalia) and hypothetical scenario



# Counterterrorism regulations

- International
  - UN Security Council resolutions binding on all Member States
    - UNSCR 1267 (al-Qaeda sanctions)
    - UNSCR 1373 (counterterrorism more generally)
    - UNSCR 2178 (foreign fighters)
  - FATF and GCTF

# Counterterrorism regulations, cont'd

- Regional / domestic
  - EU, U.S., UK, Australia, Canada, etc.
    - Generally penalize terrorist acts and acts preparatory to or in support of terrorism (with “support” often defined broadly)
    - Criminal, civil, and administrative regulations, including related to lists of designated terrorists
    - Geographic scope: domestic and (sometimes) abroad
    - Various standards of knowledge or intent

# How might CT laws affect humanitarian assistance?

- Heightened scrutiny by governments and funders due to concerns that aid could be exploited or diverted
- CT laws may be interpreted to apply to unintended or incidental diversion where listed armed groups control territory
- Risks to staff security from perceptions about fealty to neutrality and independence (including with respect to partner–vetting systems)
- Additional administrative burdens / staff resources

# Key Challenges

- Difficulties in discussing practical consequences of CT laws
- Effects of sanctions regimes on the financial sector
- Impacts of terrorist financing policies developed by intergovernmental bodies

# Key challenges, cont'd

- Lack of exemptions (with few exceptions) for humanitarian action in existing laws
- Criminalization of activity at the core of IHL/humanitarian action (e.g., medical assistance)
- Reputational harm

# Four factors indicating a potential shift in donors' approaches

1. Apparent increase in the number of listed terrorist organizations with transnational ambitions
1. Increased coordination among major donor governments on approaches to counterterrorism more broadly

# Four factors indicating a potential shift in donors' approaches (cont'd)

3. Governments are increasingly aware that diversion of aid or abuse of aid by listed groups is more likely to be made public quickly, and listed groups are more likely to know CT regulations
4. CT bureaucracy likely to grow not only within individual governments and multilaterally but also within the aid community itself

# Key questions for humanitarian organizations

- Consider the desirability and feasibility of documenting evidence of adverse or positive impacts of CT measures
- Identify whether operational areas are subject to sanctions
- Identify whether programs are subject to financial sanctions



# Key questions for humanitarian organizations, cont'd

- Assess whether programs may qualify for humanitarian exemptions
- Assess and respond to potential risks

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# COUNTERTERRORISM- RELATED CONTRACTS



# Previous Research and Analysis

- HPG Policy Brief 43 (2011)
- NRC/OCHA-commissioned report on donor counter-terrorism measures (2013)
  - Impact on humanitarian action of 16 major donors' CT measures
  - Seven recommendations
- CHE Project reports (2014)
  - CT-related contract clauses: scope and impacts
  - Anti-diversion policies of humanitarian organizations: current approaches and challenges

# Acknowledgements

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# Methodologies

- Field and desk research, informal consultations, and other research activities.
- Information and materials from United Nations bodies, funds, programmes, and specialize agencies; international non-governmental organizations; local NGOs; foundations; donor governments; and intergovernmental organizations.
- Collection of over 80 counterterrorism-related contract clauses.
- Nearly four-dozen interviews over the phone and in person; each interview ranged from 20 minutes to one hour. In-person interviews in Washington, D.C.; New York City; Geneva, Switzerland; and Nairobi, Kenya.
- Private, one-day Workshop to receive feedback on drafts.
- Reports available online at < <http://pilac.law.harvard.edu> >

# Counterterrorism clauses: Overview

- Tens, if not hundreds, of thousands of humanitarian actors draft, negotiate, revise, and implement contracts every day.
- Increasingly, donors are including counterterrorism-related clauses in humanitarian grant and partnership agreement contracts.
- The general purpose of these clauses is to help ensure that donors' funds are not used to benefit terrorists or to support acts of terrorism.

# Counterterrorism clauses: Sources of obligations

- International law
  - UN Charter, Anti-Terrorism Conventions, UN Security Council, IHL
- Domestic laws and regulations
  - U.S., Canada, Australia, UK
- Donor policies
- Multiple sources of counterterrorism-related obligations

# Counterterrorism clauses: Characteristics

- Standard of effort
  - Reasonable efforts vs. all necessary measures
- Political framing
- Due diligence
  - Certifications, prohibited transactions, and screenings
  - Monitoring and reporting potential diversion
  - “Enhanced” due diligence
  - Imposing obligations on and/or transferring obligations to “subs”
- Termination



# Counterterrorism clauses: Observations

- Many respondents noted that donors' risk tolerance is decreasing
- Strongest negotiating power seemed to be organizations with strong reputations that framed their programming not in the language of counterterrorism or security but in terms of pursuing principled humanitarian action
- Numerous humanitarian organizations identified adverse impacts on their operations due, at least in part, to counterterrorism-related clauses
- Nearly all of the participating humanitarian organizations purportedly draw a “red line” at screening ultimate beneficiaries
- The scope and content of the obligations entailed in counterterrorism-related contract clauses varied significantly

# Counterterrorism clauses: Observations, cont'd

- Pooled funds and the “viral” effect of UN partnership agreement templates
- Most of the surveyed humanitarian organizations use commercial software programs
- Perceived gap between sets and types of donors
- Potential disconnect between (1) organizations’ legal advisors and (2) staff implementing the contracts
- Growth and complexity of domestic, regional, and international counterterrorism laws and regulations have led many of the organizations to hire outside legal counsel who are experts in areas of law that the humanitarian organizations’ in-house counsel (where they exist) are not

# Counterterrorism clauses: Potential inflection points

- Attempt to identify industry-wide counterterrorism standards?
- Seek more clarity or constructive ambiguity?
- Identify and enforce “red lines”?
- Focus on developing approaches to counterterrorism at headquarters?

# Counterterrorism clauses: Example 1

- Grantor: United States Agency for International Development
- Recipient: NGO

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## CERTIFICATION REGARDING TERRORIST FINANCING IMPLEMENTING E.O. 13224

By signing and submitting this application, the prospective recipient provides the certification set out below:

1. The Recipient, to the best of its current knowledge, did not provide, within the previous ten years, and will take all reasonable steps to ensure that it does not and will not knowingly provide, material support or resources to any individual or entity that commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated, or participated in terrorist acts (...). (...)

# Counterterrorism clauses: Example 2

- Grantor: United States, Department of State, Bureau of Population, Refugees, and Migration
- Recipient: NGO

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It is the policy of [Grantor] to seek to ensure that none of its funds are used to provide support to individuals or entities associated with terrorism. In accordance with this policy, as well as applicable sections of the Geneva Conventions, the Recipient undertakes to use reasonable efforts to ensure that its activities are victim-oriented and have not been designed to assist parties to a conflict, governments, armed groups or any other authority, including individuals and groups that engage in or support acts of violence the primary purpose of which is to spread terror among the civilian population.

# Counterterrorism clauses: Example 3

- Grantor: Canadian International Development Agency (now part of the Canadian Department of Foreign Affairs, Trade and Development)
- Recipient: United Nations System Body, Fund, Programme, or Specialized Agency

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8.1 Consistent with numerous United Nations Security Council resolutions, including S/RES/1269 (1999), S/RES/1368 (2001), and S/RES/1373 (2001), both [Grantor] and [Grantee] are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism. It is the policy of [Grantor] that none of its funds are used, directly or indirectly, to support individuals or entities associated with terrorism.

8.2 As required by [Grantee's] rules and procedures, [Grantee] will screen potential partners to ensure it does not knowingly work with any entity appearing on the New Consolidated List established and maintained by the UN Security Council's 1267 Committee.

(...)

# Counterterrorism clauses: Example 4

- Grantor: Canadian International Development Agency (now part of the Canadian Department of Foreign Affairs, Trade and Development)
- Recipient: NGO

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10.6.1 The Organization declares and guarantees that the funding for the purposes of the Project will not knowingly be used to benefit terrorist groups as defined in the Criminal Code or individual members of those groups, or for terrorist activities, either directly or indirectly. The Canadian government list of terrorist entities can be found at the following web addresses:

[http://www.osfibsif.gc.ca/osfi/index\\_e.aspx?ArticleID=3](http://www.osfibsif.gc.ca/osfi/index_e.aspx?ArticleID=3) or  
<http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>;

# Counterterrorism clauses: Example 5

- Grantor: United Kingdom, Department for International Development
- Recipient: NGO

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The [recipient] and [grantor] are committed to taking appropriate steps to ensure that funds provided by the [donor government] are not used to provide assistance to, or otherwise support, terrorists or terrorist organizations. No such funds, other financial assets and economic resources will be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity associated with terrorism consistent with relevant United Nations resolutions, European Union measures and other international standards, such as those of the Financial Action Task Force, relating to counter terrorism in particular the financing of terrorism.