

COUNTERTERRORISM AND HUMANITARIAN ENGAGEMENT PROJECT

Counterterrorism and Humanitarian Engagement in Somalia and Mali

Background Briefing

March 2013

I. INTRODUCTION¹

Following the attacks of September 11, 2001, international bodies and states have adopted laws and policies, or strengthened existing ones, to address terrorist threats posed by non-state actors. Some of these laws affect humanitarian organizations operating in areas controlled by terrorist organizations; consequently, humanitarian actors may face the scenario where providing aid to a civilian population risks diversion of aid to individuals or groups associated with terrorism. For instance, the famine in Somalia, which reached its peak during the summer of 2011, embodied the growing tension between the requirements of counterterrorism laws and policies, particularly those prohibiting the provision of “material support and resources” to terrorist organizations, and humanitarian principles. Today, the situation that continues to unfold in Mali suggests that many of those tensions will continue to resurface as humanitarian groups navigate the post-9/11 legal and operational framework to assist civilian populations in need.

This background paper provides an overview of the trend towards the criminalization of humanitarian engagement, examining international and U.S. approaches toward “material support” and other counterterrorism laws. After discussing the legal framework, this paper explores the humanitarian crisis in Somalia, including the response of governments and humanitarian actors. This paper then examines the rapidly evolving situation in Mali. After identifying lessons learned from the response to the crisis in Somalia, the paper concludes by suggesting that the crisis may provide some guidance as humanitarian actors and governments responded to the ongoing crisis in Mali.

II. CRIMINALIZING HUMANITARIAN ENGAGEMENT

States have long dealt with the tension between security and protecting the rights and freedoms of their citizens. International humanitarian law (IHL) recognizes that tension and develops principles that protect humanitarian aid. For instance, IHL generally recognizes a government’s responsibility to permit humanitarian organizations access to a civilian population in need during an armed conflict. Increasingly over the past ten years, however, states and

other international actors have developed counterterrorism laws and policies that recognize a countervailing principle — namely, the idea that humanitarian assistance could serve as a form of “material support” that may benefit terrorist organizations. This conflict of norms may become especially salient in areas where terrorist organizations control territory. Particularly in these situations, the tension between addressing the perceived security threat and ensuring access to humanitarian aid for the civilian population may become especially hard to avoid. Tremendous uncertainty for humanitarian actors has resulted, in particular, from the countervailing trajectories represented, on the one hand, by recent developments in domestic legal systems, such as the United States, and, on the other hand, by humanitarian principles contained in IHL.

Many counterterrorism regimes adopted after the attacks of September 11, 2001 seek to curtail the provision of support and other forms of aid to terrorist organizations. Beginning in the 1990s and escalating after the attacks of September 11, the United Nations (U.N.) Security Council adopted a series of counterterrorism resolutions that, among other things, have affected the activities of humanitarian organizations. Two of these measures, Resolutions 1267 and 1373, were adopted by the U.N. Security Council pursuant to its authority under Chapter VII of the U.N. Charter, meaning that U.N. member states must carry out both resolutions. In some instances, the resolutions oblige U.N. member states to enact certain laws within their domestic legal systems.

Under Resolution 1267 and subsequent related resolutions adopted by the Security Council, U.N. member states must freeze funds and other financial resources of the Taliban and other designated entities associated with al Qaeda. Resolution 1267 also requires U.N. member states to prevent designated individuals from entering or traveling through their territory, and it imposes an arms embargo aimed at preventing the direct or indirect supply, sale, or transfer of arms and other materiel to designated individuals and groups. Resolution 1267 established a committee that not only oversees the implementation of the resolution by member states but also lists individuals and entities associated with al Qaeda. As of October 2012, the al Qaeda Sanctions Committee has designated 306 individuals and entities.²

On September 28, 2001, the U.N. Security Council unanimously adopted Resolution 1373. The resolution requires U.N. member states to implement several measures

1. This publication is part of a research and policy project and reflects academic research and consultations carried out by the commissioned author. This publication does not constitute legal or professional advice or legal services, and should not be used for decision-making purposes. Organizations and individuals should consult their own counsel prior to making decisions regarding compliance with the law and responses to regulatory requirements.

2. *Composition of the List, AL-QAIDA SANCTIONS COMMITTEE* (Oct. 18, 2012), available at http://www.un.org/sc/committees/1267/eq_sanctions_list.shtml.

aimed at enhancing their ability to prevent future terrorist acts. These measures include criminalizing the financing of terrorism, freezing the funds of those persons involved in acts of terrorism, denying financial support to terrorist groups, and cooperating with other governments to share information, along with investigating, detecting, arresting, and prosecuting individuals and entities involved in terrorist acts.

Legal developments in the United States have had a tremendous impact on the direction of counterterrorism law and policy, not only on international bodies like the United Nations, but also on the laws and policies of many donor and host countries. One key provision of U.S. counterterrorism law is the crime of material support. In the United States, providing material support or resources to a foreign terrorist organization is punishable by up to fifteen years in prison.³ “Material support or resources” include the provision of lodging, training, expert advice or assistance, communications equipment, facilities, personnel or transportation, with the exceptions of “medicine and religious materials.” While the statute criminalizes the knowing provision of material support or resources to a foreign terrorist organization, the U.S. Supreme Court has interpreted this requirement as meaning that an individual need not act with the specific intent to further the organization’s terrorist activities; rather, merely possessing “knowledge about the organization’s connection to terrorism” is sufficient for an individual to be guilty of violating the material-support laws.⁴

In June 2010, the U.S. Supreme Court upheld the constitutionality of the material-support statutes in *Holder v. Humanitarian Law Project*. The Humanitarian Law Project (HLP) organization, which challenged the constitutionality of the material-support laws, asked the Court whether certain proposed activities would violate the statute. Specifically, HLP asked the Court whether training members of the Kurdistan Worker’s Party (PKK) to use international law to resolve disputes, teaching PKK members how to petition international bodies for relief, and engaging in political advocacy for various members of the group would expose the organization to criminal liability under the material-support laws. The Court rejected HLP’s arguments that the Constitution’s guaranteed freedoms of speech and association, as well as due process of law, would protect HLP’s proposed activities. According to the Court, foreign terrorist organizations “are so tainted by their criminal conduct that any contribution to such an organization facilitates

that conduct.”⁵

Other U.S. laws and regulations may also affect the provision of humanitarian aid. For instance, Executive Order (E.O.) 13224, signed by President George W. Bush on September 23, 2001, authorizes the U.S. Department of Treasury’s Office of Foreign Assets Control (OFAC) to designate an individual or entity as a Specially Designated Global Terrorist (SDGT). OFAC has listed several thousand entities and individuals under E.O. 13224. Within the United States, some of these listed entities have brought legal challenges against the U.S. government, questioning the basis of their listing or the constitutionality of the seizure of their assets.⁶

Once designated, OFAC may freeze U.S. assets of SDGTs. E.O. 13224 also prohibits U.S. persons from making donations to designated persons or groups of certain items intended to relieve human suffering, such as food, clothing, and medicine. OFAC may issue general or specific licenses, however, that allow individuals or entities to engage in activities otherwise prohibited under E.O. 13224, although it remains difficult to ascertain the extent to which humanitarian organizations have successfully obtained these licenses.

The United States Agency for International Development (USAID) has adopted administrative regulations that seek to prohibit the diversion of humanitarian aid to terrorist organizations. For instance, non-governmental organizations (NGOs) applying for grants from USAID must “certify, before award of the grant will be made, that they do not provide material support to terrorists.”⁷ USAID requires additional vetting procedures for organizations applying for grants that will serve areas such as the West Bank, Gaza, Somalia, Afghanistan, and Yemen.⁸

III. SOMALIA

The humanitarian crisis in Somalia, which reached its peak during 2011 when a severe drought caused famine throughout most of the country, provides an important case study for assessing the issues raised by counterterrorism

3. 18 U.S.C. § 2339A and 2339B.

4. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

5. *Id.* (quoting the Antiterrorism and Effective Death Penalty Act of 1996, § 301(a)(7)).

6. See, e.g., *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, 647 F.Supp.2d 857 (N.D. Ohio 2009).

7. Statement issued by USAID to the Congressional Research Service (Feb. 5, 2009) in Jim Zanotti, *U.S. Foreign Aid to the Palestinians*, CONGRESSIONAL RESEARCH SERVICE (Jan. 13, 2011) at 7, available at <http://www.fas.org/sgp/crs/mideast/RS22967.pdf>.

8. Testimony of Dr. Rajiv Shah, USAID Administrator, to the Senate Appropriations Subcommittee (April 12, 2010), available at http://www.kirk.senate.gov/?p=press_release&id=137.

laws and their effects on humanitarian action.

Somalia's recent history is marked by instability, turmoil, and uncertainty. After the fall of Siyad Barre's government in 1991, various groups struggled for dominance and control of the country. Diplomatic talks held in Nairobi during 2004 led to the creation of the Transitional Federal Government (TFG), which the U.N. and the African Union recognized as the legitimate government of Somalia.⁹ Various international efforts to bolster the TFG, such as the creation of the African Union Mission to Somalia (AMISOM), failed to stabilize the country.

In 2011, a historic drought struck the Horn of Africa, exacerbating the humanitarian crisis engendered by years of political instability. Estimates by the U.N. Office for the Coordination of Humanitarian Affairs (OCHA) revealed that as many as 3.2 million people living in Somalia were in need of "immediate, lifesaving assistance . . ."¹⁰ While the international community recognized the need for immediate humanitarian assistance, efforts to provide aid to the Somali population were hindered by the Shabaab, an al Qaeda affiliate that is characterized as a terrorist group by the U.N. and most countries with domestic terrorism lists and that controls territory throughout southern and central Somalia. The Shabaab instituted numerous measures that complicated and impeded the delivery of aid to the Somali people, including the imposition of "taxes" on organizations delivering aid to Shabaab-controlled territory.¹¹

In addition to these logistical challenges, humanitarian organizations faced uncertainty about the legal consequences of interactions with the Shabaab. While U.S. government agencies such as OFAC released statements and documents purporting to "provide guidance to the public regarding making donations toward or undertaking the delivery of humanitarian assistance to Somalia,"¹² these statements and documents failed to provide legal cover for organizations seeking to operate in Shabaab-controlled areas of Somalia. Many humanitarian organizations began instituting or strengthened compliance programs or other internal mechanisms to help ensure that aid was not diverted.

9. See, e.g., "Statement by the President of the Security Council," S/PRST/2011/10 (May 11, 2010).

10. OCHA, *Weekly Humanitarian Bulletin*, Issue 26 (June 29 – August 5, 2011), available at http://reliefweb.int/sites/reliefweb.int/files/resources/Full%20Report_23.pdf.

11. 2010 *Human Rights Reports: Somalia*, U.S. DEPARTMENT OF STATE, available at <http://www.state.gov/documents/organization/160144.pdf>.

12. *Frequently Asked Questions Regarding Private Relief Efforts in Somalia*, OFFICE OF FOREIGN ASSETS CONTROL (Aug. 4, 2011), available at http://www.treasury.gov/resource-center/sanctions/Programs/Documents/somalia_faqs.pdf.

IV. MALI

In March 2012, Mali's president fell to a coup led by Taureg rebel groups, who acted quickly to seize nearly two-thirds of the country's territory.¹³ Soon after, Islamist militants allied with al Qaeda in the Islamic Maghreb (AQIM) took power from the rebels, furthering the political chaos. The Islamist militants took control of territory roughly the size of France, imposing Shariah law on Malians under their control. According to reports from the region, persons committing violations of Shariah law receive public beatings, amputations, and death by stoning.¹⁴ The U.N. Assistant Secretary General for Human Rights Ivan Simonovic has stated that the militants have committed systematic human rights abuses, including the use of child soldiers, as well as "summary execution of captured soldiers, instances of looting, [and] rapes."¹⁵

Reports from human rights organizations indicate increasing problems for the Malian people, including limited access to food, clean water, and medicine.¹⁶ Cholera outbreaks in settlements along the Niger River threaten the lives of many Malians.¹⁷ A report by the International Committee of the Red Cross (ICRC) indicates that malaria cases have risen in Mali due to recent torrential rains.¹⁸ Thousands of Malians have been displaced as they flee from areas controlled by the Islamist militants.¹⁹ The International Rescue Committee (IRC) has referred to the crisis as a "perfect storm," noting the collapse of basic public services coupled with impending humanitarian crisis.²⁰

Beginning in the fall of 2012, states and international organizations began voicing a growing acceptance for military intervention in Mali. In October, the U.N. Security Council adopted a resolution that called on African regional groups, including ECOWAS and the African Union, to present a specific plan for military

13. Michelle Nicols, *Mali Extremists Abusing Rights, Targeting Children, Women*: U.N., REUTERS (Oct. 10, 2012), available at <http://www.reuters.com/article/2012/10/10/us-mali-crisis-un-idUSBRE8991OI20121010>.

14. Peter Biro, "A Perfect Storm Brewing" in Mali's Embattled North, INTERNATIONAL RESCUE COMMITTEE (Oct. 15, 2012), available at <http://reliefweb.int/report/mali/%E2%80%9C-perfect-storm-brewing%E2%80%9D-mali%E2%80%99s-embattled-north>.

15. Nichols, *supra* note 12.

16. See, e.g., Biro, *supra* note 13.

17. *Id.*

18. *Mali Situation 'Deteriorating' Says Red Cross*, AFP (Oct. 16, 2012), available at news.google.com.

19. *Mali IDP Crisis Underestimated*, VOICE OF AMERICA NEWS (Nov. 2, 2012), available at <http://www.voanews.com/content/mali-displaced-persons-crisis-underestimated/1538351.html>.

20. Biro, *supra* note 13.

intervention in Mali.²¹ The resolution also expressed “grave concern about the continuing deterioration of the security and humanitarian situation in the north of Mali, the increasing entrenchment of terrorist elements including al Qaeda in the Islamic Maghreb, affiliated groups and other extremist groups, and its consequences for the countries of the Sahel and beyond.”²²

Initially, plans for a possible military intervention in Mali remained “embryonic.”²³ On January 11, 2013, however, French troops began conducting airstrikes in northern Mali, targeting Islamist militants in the region.²⁴ President François Hollande has explained that French military involvement will last “as long as necessary,” although it will be limited to “preparing for the deployment of an African intervention force.”²⁵ According to France’s defense minister, France intervened in Mali to prevent the possible collapse of Mali’s government and “the establishment of a terrorist state within range of Europe and France.”²⁶

Despite the French intervention in Mali and recent pledges of military and logistical support from Germany, the United Kingdom, and the European Union,²⁷ concerns about the situation in Mali remain. Some believe that the airstrikes have merely driven the militants into hiding, setting the scene for a sustained guerilla conflict.²⁸ The U.N. High Commissioner for Refugees has warned that as many as 700,000 people may flee the country or otherwise face internal displacement as a result of the escalating violence throughout the country.²⁹

21. Michelle Nicols, *U.N. Security Council Asks for Mali Plan Within 45 Days*, REUTERS (Oct. 12, 2012), available at <http://www.reuters.com/article/2012/10/12/us-mali-crisis-un-idUSBRE89B17U20121012>.

22. *Id.*

23. Adam Nossiter, *The Whiff of Conflict Grows in Mali*, N.Y. TIMES (Oct. 23, 2012), available at <http://www.nytimes.com/2012/10/24/world/africa/an-aura-of-conflict-grows-in-a-divided-mali.html>.

24. Adam Nossiter & Eric Schmitt, *France Battling Islamists in Mali*, N.Y. TIMES (Jan. 12, 2013), available at <http://www.nytimes.com/2013/01/12/world/africa/mali-islamist-rebels-france.html>.

25. Steven Erlanger & Scott Sayare, *French Airstrikes in Mali Deter Islamist Rebels*, N.Y. TIMES (Jan. 13, 2013), available at <http://www.nytimes.com/2013/01/13/world/africa/french-airstrikes-push-back-islamist-rebels-in-mali.html>.

26. Adam Nossiter & Eric Schmitt, *Facing the French, Mali Rebels Dig In and Blend In*, N.Y. TIMES (Jan. 16, 2013), available at <http://www.nytimes.com/2013/01/16/world/africa/mali-islamists-dig-in-for-a-long-military-struggle.html?pagewanted=all>.

27. *See German Cabinet Approves Troop Deployment to Mali*, DEUTSCHE WALLE (Feb. 19, 2013), available at <http://www.dw.de/german-cabinet-approves-troop-deployment-to-mali/a-16609627>; *Mali Conflict: British Soldiers to Train Armed Forces*, BBC NEWS (Feb. 18, 2013), available at <http://www.bbc.co.uk/news/uk-21501762>.

28. Peter Tinti & Adam Nossiter, *In Mali, the Peril of Guerrilla War Looms*, N.Y. TIMES (Feb. 16, 2013), available at <http://www.nytimes.com/2013/02/17/world/africa/militants-infiltrate-towns-in-freed-areas-of-mali.html?pagewanted=all>.

29. Nick Cumming-Bruce, *U.N. Refugee Agency Warns of Crisis in*

While U.S. officials have expressed support for the U.N. resolution,³⁰ as well as the French military intervention in Mali,³¹ U.S. involvement has been limited. The United States has taken steps domestically, however, to address the situation in Mali. On December 7, 2012, the U.S. State Department designated the Movement for Unity and Jihad in West Africa (MUJWA, also referred to as MUJAO), along with two of its leaders, as Specially Designated Global Terrorists.³² The MUJWA was created in late 2011 to further the activities of al Qaeda in the Islamic Maghreb (AQIM) throughout western Africa. The designation, made pursuant to E.O. 13224, allows U.S. government officials to block all property and interests of the MUJWA and prohibits U.S. persons or entities from engaging in transactions with the MUJWA. The al Qaeda Sanctions Committee also listed MUJWA as a terrorist organization, which means that all U.N. member states must freeze the assets of the MUJWA, as well as institute a travel ban and arms embargo against the organization.³³ In March 2013, the U.S. State Department and the UN Security Council also listed Ansar al-Dine (AAD), which reportedly has ties to AQIM and MUJWA, as a terrorist organization.³⁴

V. MALI INTERVENTION: LESSONS FROM SOMALIA

U.S. officials have drawn comparisons between recent events in Mali with those in Somalia. Assistant Secretary of State for African Affairs Johnnie Carson has stated that U.S. efforts in Somalia could serve as a “model” for intervention in Mali, noting that the response to Somalia should “be reviewed and looked at as an element for what

Mali, N.Y. TIMES (Jan. 18, 2013), available at <http://www.nytimes.com/2013/01/19/world/africa/un-refugee-agency-warns-of-crisis-in-mali.html>.

30. Press Statement, *UNSC Adoption of Resolution on Mali*, U.S. DEPARTMENT OF STATE (Oct. 12, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/10/199106.htm> (“The United States supports the resolution on Mali adopted by the U.N. Security Council today as a comprehensive approach to the overlapping governance, security, and humanitarian crises affecting Mali.”).

31. Steven Erlanger & Scott Sayare, *Mali Rebels, Now Aiding French, Say They’re Holding Militants*, N.Y. TIMES (Feb. 5, 2013), available at <http://www.nytimes.com/2013/02/05/world/africa/mali-rebels-now-aiding-french-say-theyre-holding-militants.html>.

32. *Terrorist Designations of the Movement for Unity and Jihad in West Africa, Hamad el Khairy, and Ahmed el Tilemsi*, U.S. DEPARTMENT OF STATE (Dec. 7, 2012), available at <http://www.state.gov/r/pa/prs/ps/2012/12/201660.htm>.

33. *Id.* *See also Movement for Unity and Jihad in West Africa (MUJAO)*, AL-QAIDA SANCTIONS COMMITTEE (Dec. 5, 2012), available at <http://www.un.org/sc/committees/1267/NSQE13412E.shtml>.

34. *Terrorist Designations of Ansar al-Dine*, U.S. DEPARTMENT OF STATE (Mar. 21, 2013), available at <http://www.state.gov/r/pa/prs/ps/2013/03/206493.htm>.

might be effective in that part of the world, but it's not there yet."³⁵

Other similarities, beyond military intervention, exist between the situations in Somalia and Mali. As in Somalia, Mali has experienced human rights abuses, the risk of infectious diseases, and the possibility of an international intervention led by African forces and supported by Western governments. In Mali, however, the possible security threat from al Qaeda-affiliated Islamist militants could be more serious than Somalia, based on the fragility of the region, the Islamist militants' clear ties to al Qaeda, and the country's proximity to Europe.

As they did with respect to Somalia, humanitarian organizations face many of the same dilemmas when contemplating engagement in Mali. For instance, the possibility of the diversion of aid to individuals or groups affiliated with al Qaeda, and the potential reputational harm to humanitarian groups if such diversion actually occurred, would be great. After Somalia, however, the humanitarian community has a greater awareness of counterterrorism issues and their impact on the provision of humanitarian aid. Continued communication throughout the humanitarian community regarding these issues can hopefully enable the community to respond more quickly and effectively to the crisis, regardless of the possible government response.

35. Anne Gearan & Craig Whitlock, *U.S. Looks to Effort in Somalia as Model for Mali Solution*, WASH. POST (Oct. 11, 2012), available at http://www.washingtonpost.com/world/national-security/us-looks-to-effort-in-somalia-as-model-for-mali-solution/2012/10/11/0385b36e-13c7-11e2-bf18-a8a596df4bee_story.html.

ABOUT

The Project on Counterterrorism and Humanitarian Engagement (CHE Project) is an initiative of the Harvard Law School. The CHE Project undertakes legal research, policy analysis, and engagement initiatives in order to identify and develop — as well as to facilitate networks to support — sustainable, principled, and practical solutions to the challenges of large-scale humanitarian operations conducted in areas where listed armed groups are active and counterterrorism laws affect humanitarian action.

This publication is part of the CHE Project's Research and Policy Paper series, which is intended to inform the humanitarian community regarding critical issues of law, policy, and practice related to counterterrorism and humanitarian action.

The CHE Project seeks to inform and shape debate regarding the intersecting trajectories of counterterrorism norms and humanitarian action. The Project does so principally by:

- Producing independent analyses of emerging and foundational challenges and opportunities concerning humanitarian engagement in situations involving listed non-state armed actors; and
- Engaging actors across international humanitarian NGOs, intergovernmental agencies, academic centers, and governments to capture, examine, and inform their (sometimes overlapping and sometimes countervailing) perspectives and approaches.

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