
HARVARD LAW SCHOOL | BROOKINGS

PROJECT ON LAW AND SECURITY

**Counterterrorism and
Humanitarian Engagement Project**

**An Analysis of Contemporary Counterterrorism-related Clauses in
Humanitarian Grant and Partnership Agreement Contracts**

Research and Policy Paper

May 2014

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Suggested citation: Counterterrorism and Humanitarian Engagement Project, "An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts," Research and Policy Paper, May 2014, available online at: <http://blogs.law.harvard.edu/cheproject/>.

HOW TO USE THIS REPORT

Without prescribing or proscribing certain approaches or responses, this report aims to identify and analyze key aspects of contemporary counterterrorism-related clauses in humanitarian grant and partnership agreement contracts. This report was written with a range of potential audiences in mind, especially humanitarian organizations' legal and policy advisors, grant officers, compliance officers, and regional and national coordinators; and donors' general counsel, policy advisors, and program officers. The various parts of the report may be of more or less interest to the different audiences. This report is intended to be read alongside the CHE Project's report on anti-diversion policies and practices of humanitarian organizations.¹

By excerpting the main findings of the report, the **Executive Summary** provides a high-level overview of the research, observations, and findings of the report. The **Glossary** defines the key terms used in the report, and the **Acronyms** section explains the abbreviations employed in the report. The **Methodologies** section explains what types of research and evidence—including interviews, on the phone and in person (in New York, Washington, D.C., Geneva, and Nairobi), desk research, and other stakeholder engagement, as well as the review of over 80 example clauses obtained for the research—underlies this report.

The **Introduction and Context** section describes, from a bird's-eye view, why the issue of counterterrorism-related clauses has seemingly raised such pressing concerns among humanitarian organizations. The section also explains some of the basic elements of contracts, and identifies general trends and trajectories in the humanitarian sector and in counterterrorism regulations that have shaped humanitarian organizations' and donors' approaches to counterterrorism-related clauses.

The **Key Sources and Characteristics of Counterterrorism-related Clauses** section delves into the collection of clauses obtained for the research. The section identifies the major types of funders and contracts uncovered during the research. The section enumerates the key elements and characteristics of the clauses. The section does so, for instance, by examining the sources of obligation; the standards of effort and political framings; and the types of due diligence obligations.

The **Observations** section identifies and elaborates four interrelated general categories that represent some of the most pressing sets of challenges and opportunities for the humanitarian community in relation to counterterrorism-related clauses: threshold issues, policy frameworks, and operational impacts; the scope and implementation of counterterrorism-related contract obligations; engagement with donors; and

¹ The anti-diversion policies report describes contemporary approaches by humanitarian organizations to anti-bribery/corruption, anti-fraud/money laundering, and anti-terrorism-financing. Counterterrorism and Humanitarian Engagement Project, "An Analysis of Contemporary Anti-diversion Policies and Practices of Humanitarian Organizations," Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

organizational culture and staff resources. The **Potential Inflection Points** section highlights four seemingly pressing questions for humanitarian organizations: whether they should establish industry-wide standards, should seek greater clarity or constructive ambiguity, should draw and implement red lines, and should adopt a headquarters-centered approach to counterterrorism measures.

The **Bibliography** lists the sources cited and many of the sources reviewed for this report. Finally, the **Annexes** reproduce verbatim forty of the counterterrorism-related clauses in humanitarian grant and partnership agreement contracts obtained as part of this research. These clauses may serve as a resource for, in particular, legal advisors and others involved in the drafting and negotiation of contracts. The annexes are categorized by donor type and reflect a range of clauses.

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I. EXECUTIVE SUMMARY

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. Whether in the form of contract clauses or other binding legal obligations, **counterterrorism measures may present a number of obstacles to humanitarian organizations.**

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. **Contracts form the basis for the majority of grants**—awards of financial assistance in the form of money, or property in lieu of money, by a government, company, or other legal entity to an eligible grantee to be used for a particular purpose—provided to humanitarian organizations to undertake relief actions.

In consultations with the CHE Project, humanitarian organizations and donors indicated that **the proliferation of counterterrorism-related clauses has created confusion and, in certain cases, seemingly posed an obstacle to the effective implementation of principled humanitarian action strategies** across a range of diverse situations. Without providing legal advice or prescriptive guidance, the CHE Project seeks in this report—the first of its kind—to identify and develop analysis on current trends concerning the constellation of key legal, policy, and operational issues associated with counterterrorism-related clauses in humanitarian grants and partnership agreements. The research for this report was undertaken simultaneously with research on a cognate project aimed at identifying and examining contemporary anti-diversion policies and practices of humanitarian organizations.²

Contracts represent an important and necessary part of the daily operations of many organizations. Contracts allow an organization to reach agreements and enter into relationships with other individuals and entities, including donors, contractors, and subcontractors. **Contracts with counterterrorism-related clauses are not equivalent to binding criminal, civil, and administrative counterterrorism-related laws.** Typically, a contract binds only the parties of the contract to do, or not do, a certain thing in exchange for something of value—in the case of humanitarian organizations contracting with donors, the thing of value is usually financial assistance.

Yet there are numerous counterterrorism-related legal obligations—both criminal and civil—incumbent on humanitarian organizations to fulfill irrespective of whether those obligations are included in a grant or partnership agreement contract. A penalty for not

² Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

fulfilling the obligations entailed in a contract may be termination of the contract. Depending on the terms of the contract, the party who committed a breach of the contract may be required to pay restitution or otherwise make the other party whole. In comparison, **the penalties for not fulfilling the obligations of counterterrorism-related criminal, civil, and administrative laws can range from fines to imprisonment.**

Humanitarian organizations do not typically treat counterterrorism measures as a standalone set of concerns. Rather, **counterterrorism measures are one of multiple fields of concern**—anti-bribery, anti-corruption, anti-money-laundering, and anti-fraud are others—that humanitarian organizations take into account when designing programs and implementing practices aimed at ensuring that humanitarian aid and assistance reach intended beneficiaries.

Humanitarian organizations **operate in a number of contexts—recent and ongoing examples include Afghanistan, Colombia, Mali, Pakistan, the Philippines, Somalia, Syria, and the West Bank/Gaza—where individuals and organizations designated as “terrorists” control access to territory and civilians, as well as local institutions.** The increased use of terrorist-listing mechanisms at the domestic and international levels has thereby complicated in certain respects humanitarian operations in those contexts. The well-documented general increase over the last few decades of financial and other resources earmarked for humanitarian aid and assistance has led, in turn, to the expansion of the humanitarian community and to an increase in the number of relief operations. While different humanitarian organizations take different approaches to conforming to humanitarian principles, a theme noted by a few respondents was that—despite these differences between organizations—local authorities, armed actors, and beneficiary communities often do not make these distinctions and instead tend to paint all “humanitarian” actors with the same brush.

The number and scope of counterterrorism regulations have grown in recent decades. International, regional, and domestic authorities have taken numerous steps to halt support to individuals and organizations designated as terrorists. To comply with the array of applicable Security Council decisions, UN member states must take numerous steps to ensure that their domestic legal frameworks adequately prohibit the provision of various forms of support to individuals and organizations designated as terrorists. Many states have given effect to these Security Council decisions by promulgating counterterrorism legislation that prohibits the provision of material support or resources, or engaging in financial transactions with, individuals and entities designated as “terrorists” or who commit acts of terrorism. **At the international, regional, and domestic levels, government and private donors provide financial and other forms of support to multifaceted initiatives aimed at preventing acts of terrorism.** Countering terrorism financing is one of the primary policy objectives of many governments, including those who are members of the Financial Action Task Force and those who have supported the UN Global Counterterrorism Strategy.

Two major categories of humanitarian donors emerged in the research: **governments and private and corporate foundations**. Three other types of entities also acted as donors for some of the contracts under review: UN system bodies, funds, programmes, and specialized agencies; intergovernmental organizations; and NGOs.

The contracts obtained as part of the research fell into three general (and sometimes overlapping) categories: (1) contracts between a donor and a humanitarian organization; (2) contracts between a donor, a humanitarian organization, and an implementing partner that is subcontracted or is a subgrantee of the grant between the donor and the primary humanitarian organization; and (3) contracts drawn from template partnerships or implementation agreements, such as those drafted (typically separately) by each UN agency or body and then used to contract with partners or other implementers. Most of the counterterrorism-related measures in the grant contracts reviewed as part of the research were **drawn from a template that the donor uses with multiple grantees**. Once finalized, these templates leave humanitarian organizations with little room for modifying the counterterrorism terms, as donors are reticent to renegotiate the terms of templates for individual grantees.

Among the clauses obtained for this research, **four general and often interrelated categories of sources of counterterrorism-related obligations** emerged: (1) international law-related sources; (2) a state's domestic counterterrorism-related laws and administrative regulations; (3) donor policies; and (4) a combination of multiple types of sources.

Many of the counterterrorism-related clauses in humanitarian grant and partnership agreement contracts obtained as part of this research derive from a particular state's domestic counterterrorism laws (civil, criminal, or both) or administrative regulations. In particular, **donors incorporate U.S., Canadian, Australian, and UK counterterrorism laws and regulations into contractual obligations on humanitarian organizations**. A few of the counterterrorism-related clauses under review did not expressly reference domestic or international law but rather stemmed from donor policies.

The level and type of obligation of effort entailed in the counterterrorism-related clauses varied between the contracts, **from context-specific standards to requirements to undertake all means necessary to ensure no diversion of aid or assistance**. Many of the counterterrorism-related clauses require organizations to use "reasonable efforts." Some of the clauses impose stringent standard-of-effort obligations that prohibit any benefit from accruing to individuals and organizations designated as terrorists.

One of the more striking characteristics of the contracts under review is the extent to which the counterterrorism-related clauses may be read to adopt—or reject or supplant—a particular **political framing of counterterrorism and broader security norms**. Some clauses from certain donors stated that both the grantor and the recipient are "*firmly committed to the international fight against terrorism (...)*." Taking a different approach,

two organizations negotiated clauses that frame their respective counterterrorism-related obligations in reference to international humanitarian law.

Many of the surveyed clauses require organizations to perform—sometimes as part of certifications—counterterrorism-related due diligence measures. These measures may include **screening of staff, partners, and, at times, beneficiaries, as well as monitoring and reporting on potential diversion**. With respect to Somalia, some U.S. government contracts require organizations to undertake “enhanced due diligence.”

Contracts reviewed for this report include flow-down requirements, which in general require the primary recipient **to ensure that any contracts entered into with other entities to implement the grant include the same counterterrorism-related obligations**. Many respondents noted that implementing partners rarely have the capacity—technical or monetary—to implement the counterterrorism measures required in the contracts. At least half a dozen interviewees criticized the imposition of flow-down clauses as “immoral,” under the logic that donors, who have a public policy objective of providing aid and who outsource the aid delivery, are imposing what are perceived to be overly onerous or impracticable counterterrorism measures that may endanger local implementing partners.

Many respondents perceived that **donors’ risk tolerance is decreasing**. As a result, donors are reportedly attempting to transfer risk onto humanitarian organizations. Humanitarian organizations called for increased discussion with donors concerning tolerable levels of risk across country contexts, as well as more sharing of risk.

The organizations that appeared to have the strongest negotiating power with donors were those that had **strong reputations and that framed their programming not in the language of counterterrorism or security but in terms of pursuing principled humanitarian action**, which entails extensive due diligence, risk analysis and assessment, and monitoring and evaluation to help ensure that aid and assistance reach the intended ultimate beneficiaries. Moreover, despite the perceived competition for limited funds, humanitarian organizations may be better positioned to negotiate the terms of contracts than they initially perceive.

Numerous humanitarian organizations identified **adverse impacts on their operations due, at least in part, to counterterrorism-related clauses**, whether the source of the impact was the obligation entailed in the clause or the general climate of concern arising out of the counterterrorism framing in the contract. The most commonly identified operational impacts stemming from these clauses were decisions not to undertake relief activities in areas where terrorist groups control territory and decisions not to seek funds from certain donors due to concerns that doing so would impose too high of a compliance burden or would potentially compromise the organization’s neutrality. Nearly all of the humanitarian organizations that took part in this research purportedly draw a “red line” at screening ultimate beneficiaries.

The increase in the size of UN pooled funds, especially the Central Emergency Response Fund (CERF) and the Common Humanitarian Funds (CHF), has the potential to have a significant impact on counterterrorism-related obligations of partner organizations. These pooled funds typically use a standardized project implementation agreement template across programs and countries. The standards in the template bind hundreds, if not thousands, of organizations that become subject to the terms of that template.

To comply with many of their screening-related counterterrorism obligations, most of the humanitarian organizations surveyed for this research employ **commercial software programs**. Training staff to properly and efficiently use the software was reportedly quite labor- and time-intensive. One organization has multiple full-time staff who spend the bulk of their time screening individuals with these software programs.

According to the interviews, the **U.S., Canada, Australia, and the U.K. appear to be requiring more robust and extensive counterterrorism-related measures** in humanitarian grant and partnership agreement contracts. A gap seems to be emerging between those donors, on the one hand, and other states—such as Denmark, Norway, Sweden, and Switzerland—which, in the contracts obtained as part of this research, did not include any counterterrorism-related measures. Many organizations mentioned that private foundations are increasingly scrutinizing counterterrorism measures in grant contracts.

A chasm emerged among respondents regarding whether to accept funds from donors who are, or may be, parties to the armed conflict where the organizations want to deliver aid and assistance. The primary concern voiced by respondents in this connection was that by accepting funds from a donor who is a party to the conflict, the humanitarian organization would be perceived by stakeholders, including beneficiaries and armed actors, as **taking a side in the conflict and thus not adhering to the principle of neutrality**.

Many grant officers and compliance officers, as well as regional and national coordinators, emphasized a **potential disconnect between their organizations' legal advisors and the people implementing the contracts**. Perceptions that general counsels had a relatively low level, if any, field experience contributed to the sense of disconnect among some interviewees. Due in part to the federated, decentralized nature of the majority of large humanitarian organizations, many of the respondents indicated that they do not have sufficient time to consider fully how best to approach drafting, negotiating, and implementing—and, especially, coordinating approaches to—counterterrorism-related clauses.

The growth and complexity of domestic, regional, and international counterterrorism laws and regulations have led many of the organizations interviewed for this project to **hire outside legal counsel** who are experts in areas of law that the humanitarian organizations' in-house counsel are not. More than a few Europe-based organizations voiced concern at expending (sometimes extensive) resources on U.S. legal counsel, for instance to help them navigate the licensing process with OFAC.

It appears that in at least four areas the humanitarian community may be approaching **potential inflection points** concerning how to address counterterrorism measures imposed not only through criminal and civil law but also through donor contracts.

Identify industry-wide standards? Humanitarian organizations are actively considering whether to undertake initiatives aimed at creating sector-wide approaches to regulation, contract clauses, and due diligence. A key area of discussion involves the merits and drawbacks of developing a model counterterrorism contract clause. It would appear that certain donors would not be particularly susceptible to such a clause unless the clause reflected relatively restrictive provisions. One potential approach to pursuing industry-wide standards may be to target engagement with donors that have the most restrictive approaches to counterterrorism measures, such as the U.S., Canada, Australia, and the UK. Since these donors are already setting the terms of the discussion, so to speak, it may be particularly valuable to engage with them. Another approach would be to engage with donors who have not imposed similar counterterrorism measures, such as the Netherlands, Norway, Sweden, and Switzerland. These donors may be in a strong position to help shape discussions with other donors and stakeholders regarding the importance of striking a balance that recognizes legitimate security concerns and the importance of principled humanitarian action.

Seek clarity or constructive ambiguity? Many of the dilemmas or areas of vagueness articulated in this report could potentially be addressed by governments giving greater clarity regarding expectations and standards. But that clarity may mean that some clauses could be read much more restrictively. The current negotiating environment that humanitarian organizations, which are operating with imperfect information, find themselves in presents a number of challenges to effectively negotiating counterterrorism clauses. For their part, governments are not always internally consistent—the counterterrorism agencies often have, in certain critical respects, fundamentally different orientations than the aid agencies—and thus it can be difficult to persuade government donors to modify their approaches across all sectors. Moreover, humanitarian organizations do not yet have the power to effectively bargain as a group, due not only to different conceptions of what is the best strategy but also out of a sense of competition for donors.

Identify and enforce red lines? Similarly, the question of whether humanitarian organizations should draw “red lines”—for instance, by agreeing to never screen ultimate beneficiaries—is highly complicated. As a legal matter, some jurisdictions attach criminal liability to the provision of material support or resources to designated terrorists, regardless of intent. Moreover, if a set of red lines is agreed to, then it becomes imperative to enforce those standards, including by allocating sufficient resources to community policing. In addition, even if the majority of organizations agree to never cross a red line, at least some organizations will likely choose not to adhere to that standard. More generally, establishing red lines raises questions about whether those lines adequately account for the diversion of the sector and whether the creation of a two-track

system (those who follow the red lines and those who do not) may entail more harms than benefits.

Pursue headquarters-based approaches? Given the legal complexity of counterterrorism-related contract clauses and the desire for organization-wide coherence, humanitarian organizations may elect to increasingly provide veto and ultimate decision-making powers to headquarters. Yet doing so would divest personnel who implement and manage projects in the field of the power to negotiate the terms of their engagements and would entrust important decisions in individuals who may not have sufficient understanding of field contexts.

II. GLOSSARY³

Agreement — The act of coming to a mutual decision, position, or arrangement. An agreement may be informal with no consideration or may be a formal legal arrangement supported by consideration.⁴

Certification — The act of executing a document in which a fact is formally attested.⁵

Contract — A promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.⁶

Due Diligence — A set of four cumulative elements: a statement of policy articulating the organization’s commitment to anti-diversion policies; periodic assessment of actual and potential impacts of organizational activities and relationships on humanitarian aid and assistance reaching intended beneficiaries; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance.⁷

Enhanced Due Diligence — The set of heightened anti-diversion prevention, deterrence, and response standards imposed on humanitarian organizations by the U.S. in relation to Somalia.⁸

Grant — An award of financial assistance in the form of money, or property in lieu of money, by a government, company, or other legal entity to an eligible grantee to be used for a particular purpose.⁹

Grantee — The person (including a legal entity) to which a grant is awarded and which is accountable for the use of the funds provided.¹⁰

³ The definitions in this Glossary were drafted in relation to the particular research and themes in this report.

⁴ As one commentator explains, “[a]lthough every contract is an agreement, not every agreement is a contract.” Bryan A. Garner, *Garner’s Dictionary of Legal Usage*, Oxford University Press, 2011, p. 41.

⁵ Derived from Bryan A. Garner, *Garner’s Dictionary of Legal Usage*, Oxford University Press, 2011, p. 145.

⁶ Restatement (Second) of Contracts § 1 (1981).

⁷ Derived in part from the definition of “human rights due diligence” in Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework,” UN Doc. A/HRC/14/27, April 9, 2010, para. 83. Compare this definition with, for example, the definition provided in ECHO, Guidelines for the award of Procurement Contracts within the frameworks of Humanitarian Aid Actions financed by the European Union (“Humanitarian Aid Guidelines for Procurement”), 31 May 2011, p. 13, available online at http://ec.europa.eu/echo/files/partners/humanitarian_aid/Procurement_Guidelines_en.pdf: “Due diligence refers to carrying out duties professionally, carefully and thoroughly, going well beyond the minimum effort”.

⁸ See below and Annex 2g.

⁹ Derived in part from United States Code of Federal Regulations, 29 CFR 97, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

Humanitarian Assistance — Aid and action designed to save lives, alleviate suffering, and maintain and protect human dignity during and in the aftermath of armed conflicts and other emergency situations.¹¹

Partnership — A voluntary joining together for business purposes by two or more persons (including legal entities) of money, goods, labor, and/or skill, upon an agreement that the gain or loss will be divided in a predetermined manner between them.¹²

“Sub” — A general term for a subcontractor, subgrantee, or other recipient of a grant who is not the primary recipient.

Subgrant — An award of financial assistance in the form of money, or property in lieu of money, made under a grant by a grantee to an eligible subgrantee.¹³

Subgrantee — The legal entity to which a subgrant is awarded and which is accountable to the grantee for the use of the funds provided.¹⁴

¹⁰ Derived from United States Code of Federal Regulations, 29 CFR 97, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

¹¹ Derived in part from Global Humanitarian Assistance, “Defining humanitarian assistance,” (undated) available online at: <http://www.globalhumanitarianassistance.org/data-guides/defining-humanitarian-aid>.

¹² Derived from Bryan A. Garner, *Garner’s Dictionary of Legal Usage*, Oxford University Press, 2011, p. 657.

¹³ Derived from United States Code of Federal Regulations, 29 CFR 97, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

¹⁴ *Id.*

III. ACRONYMS

1267 List — The list of individuals and organizations designated by the Sanctions Committee pursuant to the UN Security Council Resolution 1267 et seq. travel ban and asset freeze against al-Qaeda (and, formerly, the Taliban)

AusAID — Australian Agency for International Development (now part of the Australian Department of Foreign Affairs and Trade (DFAT))

CERF — The Central Emergency Response Fund established by the United Nations General Assembly in 2006

CHF — UN Common Humanitarian Funds (country level)

CIDA — Canadian International Development Agency (now part of the Canadian Department of Foreign Affairs, Trade and Development)

DFID — United Kingdom Department for International Development

EPLS — Excluded Parties List System (reportedly discontinued in 2012; now apparently part of the System for Award Management)

OFAC — United States Department of the Treasury, Office of Foreign Assets Control

OFDA — United States Agency for International Development, Bureau of Democracy, Conflict and Humanitarian Assistance, Office of Foreign Disaster Assistance

SAM — System for Award Management

SDN — Specially Designated Nations List of individuals and entities designated by OFAC

SIDA — Swedish International Development Cooperation Agency

UNHCR — United Nations High Commissioner for Refugees

UNICEF — United Nations Children’s Fund

UNSC — United Nations Security Council

USAID — United States Agency for International Development

WFP — World Food Programme

IV. ACKNOWLEDGEMENTS

This document has been produced, in part, with the financial assistance of the Norwegian Ministry of Foreign Affairs (NFMA). The views expressed herein should not be taken, in any way, to reflect the official opinion of the NMFA. The Norwegian Refugee Council (NRC) facilitated this financial assistance through the NFMA. The CHE Project also receives generous support from the Swiss Federal Department of Foreign Affairs (FDFA). The views expressed herein should also not be taken, in any way, to reflect the official opinions of the Swiss FDFA nor NRC. The CHE Project is grateful for the support of the NMFA, NRC, and the Swiss FDFA. The research undertaken by the CHE Project was completely independent, and the CHE Project alone is responsible for the content of the research and analysis reflected in the reports.

The CHE Project team received support from dozens of legal advisors, grant officers, policy advisors, security advisors, regional and national coordinators, logisticians, compliance officers, controllers, auditors, and others. These individuals provided their time, information, and materials—including over 80 sample counterterrorism-related contract clauses—to the research. (Not all of the clauses obtained for the research are included in the Annexes; selections for inclusion in the Annex were made with a view toward representing the complexity and variance of the clauses and avoiding duplication.) The CHE Project gratefully appreciates their support and assistance. The CHE Project team is indebted to Elizabeth Holland of Foley Hoag, LLP, for her thoughtful feedback and comments and to the staff of the Harvard Law School Library, who helped identify and locate numerous resources.

This independent research project was undertaken in part at the request of the Inter-Agency Standing Committee's Task Team on Revitalizing Principled Humanitarian Action and the CHE Project's Senior Law and Policy Working Group. The CHE Project team appreciates the support and assistance provided by both the IASC Task Team and the Working Group, including by identifying potential interviewees.

The CHE Project team is grateful to the participants at a private March 2014 Workshop at Harvard Law School who provided critical feedback on drafts of the reports on counterterrorism-related contract clauses and on anti-diversion policies of humanitarian organizations.

V. METHODOLOGIES

Without prescribing or proscribing certain approaches or responses, this report aims to identify and analyze key aspects of contemporary counterterrorism-related clauses in humanitarian grant and partnership agreement contracts. This report is a result of field and desk research, informal consultations, and other research activities. The CHE Project team sought counterterrorism-related contract clauses in humanitarian grants and partnership agreements from a range of organizations and stakeholders, including United Nations bodies, funds, programmes, and specialize agencies; international non-governmental organizations; local NGOs; foundations; donor governments; and intergovernmental organizations. The main body of primary sources underlying the report's analysis is the collection of over 80 counterterrorism-related contract clauses obtained by the CHE Project. The research for this report was undertaken simultaneously with research on a cognate project aimed at identifying and examining contemporary anti-diversion policies and practices of humanitarian organizations.¹⁵

Desk research examined extant analyses and evidence regarding counterterrorism-related contract clauses in humanitarian grants and partnership agreements, as well as associated topics. A researcher conducted nearly four-dozen interviews over the phone and in person; each interview ranged from 20 minutes to one hour. These interviews included questions relating both to the formulation, negotiation, and implementation of counterterrorism-related contract clauses in humanitarian grants and partnership agreements and to anti-diversion policies and practices of humanitarian organizations. The researcher conducted in-person interviews in Washington, D.C.; New York City; Geneva, Switzerland; and Nairobi, Kenya. The interviews focused on capturing information and analysis from senior humanitarian practitioners, general counsel and legal advisors, donors, security personnel, and grant officers regarding current approaches, challenges, and opportunities with respect to counterterrorism-based clauses in humanitarian grant and partnership agreement contracts and anti-diversion policies of humanitarian organizations. Another area of focus was the potential direct and indirect impact of counterterrorism-related clauses on humanitarian programming. Resources and analysis were also sought from external experts in various aspects of administrative law, regulation, and contract law.

To obtain critical feedback on drafts of the reports, in March 2014 the CHE Project hosted a private, one-day Workshop with participants from humanitarian INGOs and the UN Secretariat, as well as, for part of the day, a representative from USAID.

¹⁵ Counterterrorism and Humanitarian Engagement Project, "An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations," Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

VI. INTRODUCTION AND CONTEXT

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. Whether in the form of contract clauses or other binding obligations, counterterrorism measures may present a number of obstacles to humanitarian organizations. As the Assistant Secretary-General for Humanitarian Affairs and Deputy Relief Coordinator Kyung-wha Kang recently outlined, counterterrorism measures may adversely affect humanitarian actors by resulting in “halts or decrease in funding, blocking of projects, suspension of programs, planning or program design not according to needs, delays in project implementation, increased administrative procedures for procurement or vetting, and limitations on financial transactions.”¹⁶

A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.¹⁷ Contracts form the basis for the majority of grants—awards of financial assistance in the form of money, or property in lieu of money, by a government, company, or other legal entity to an eligible grantee to be used for a particular purpose¹⁸—provided to humanitarian organizations to undertake relief actions.¹⁹ These grant and partnership agreement

¹⁶ Assistant Secretary-General for Humanitarian Affairs and Deputy Relief Coordinator Kyung-wha Kang, remarks at the International Peace Institute, September 17, 2013, as quoted in International Peace Institute, “Egeland: Detoxify Counterterrorism Measures,” Panel Discussion, September 17, 2013, available online at: <http://www.ipinst.org/events/panel-discussions/details/476-egeland-detoxify-counterterrorism-measures.html>. Note, however, that MSF-USA has registered a level of disagreement with the notion that counterterrorism-related measures have posed immediate barriers to humanitarian action. Sophie Delaunay, Andres Romero, and Mary Vonckx, “Condemned to resist,” PHAP, February 10, 2014, available online at: <http://phap.org/articles/condemned-to-resist> (“Reflecting on the last forty years of delivering assistance in conflicts or unstable settings, it is difficult for MSF to establish a tangible correlation between the post-9/11 counterterrorism regimes and the recurring obstacles we face when trying to reach the most vulnerable and needy populations. Although it is undeniable that counterterrorism, as it stands today, forces aid organizations to navigate an increasing number of administrative and legal hurdles, in MSF’s experience, these are not an immediate barrier to action. Rather, it is the daily consideration of risk versus benefit in providing impartial care that drives our operational decisions, responsibilities, and ability to work. For our organization, the biggest challenge posed by the counterterrorism framework lies not in the potential liability it creates, but in its intrinsic contradiction with the core humanitarian principles of independence and impartiality of aid.”).

¹⁷ Restatement (Second) of Contracts § 1 (1981).

¹⁸ Derived from United States Code of Federal Regulations, 29 CFR 97, Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.

¹⁹ Contracts also form the legal basis for the broader range of activities that many humanitarian organizations undertake, such as assisting individuals and populations affected by natural disasters, food insecurity, and displacement. While the research for this report is limited in general to contracts used to provide humanitarian relief in relation to armed conflicts, an examination of contracts applicable in similar

contracts are immensely important to the efficient and effective operation of humanitarian action in situations around the world.

As part of its research and policy portfolio, including in its engagements with its Senior Law and Policy Working Group and with the Inter-Agency Standing Committee Task Team on Revitalizing Principled Humanitarian Action, the Counterterrorism and Humanitarian Engagement Project (CHE Project) identified a set of issues associated with counterterrorism-based clauses in humanitarian grant and partnership agreements contracts. In consultations with the CHE Project, humanitarian organizations and donors indicated that the proliferation of these clauses has created confusion and, in certain cases, seemingly posed an obstacle to the effective implementation of principled humanitarian action strategies across a range of diverse situations. A recent report commissioned by the UN Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council highlighted some initial concerns with these types of clauses.²⁰ Without providing legal advice or prescriptive guidance, the CHE Project seeks in this report—the first of its kind—to identify and develop analysis on current trends concerning the constellation of key legal, policy, and operational issues associated with counterterrorism-related clauses in humanitarian grants and partnership agreements.

A. Contracts: Key Background Considerations

Before going into these challenges, it is important to understand a few basic aspects of contracts. At the most basic conceptual level, contracts bind the parties to perform, or not perform, a certain act, or set of acts, that the parties have agreed to. Both parties must assent to the contract, and the contract must entail a consideration.

Contracts represent an important and necessary part of the daily operations of many organizations. Contracts allow an organization to reach agreements and enter into relationships with other individuals and entities, including donors, contractors, and subcontractors. The text of these agreements defines the nature of the relationship between the contracting parties, and organizations may agree to almost anything in a contract, with a few limitations.

Contracts with counterterrorism-related clauses are not equivalent to binding criminal, civil, and administrative counterterrorism-related laws. The distinction between contracts and these other sets of laws is important to understand. Typically, a contract binds only the parties of the contract to do, or not do, a certain thing in exchange for something of value—in the case of humanitarian organizations contracting with donors, the thing of value is usually financial assistance. For instance, a contract may require that a party

situations may also be useful, including as a point of comparison with contracts used for humanitarian relief operations.

²⁰ Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,” United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013, pp. 47–70, available online at: https://www.nrc.no/arch/_img/9682778.pdf.

screen its employees against a counterterrorism list in order to receive donor funds to undertake relief actions. If the party does not do so, then the donor may terminate the contract. Yet there are numerous counterterrorism-related legal obligations—both criminal and civil—incumbent on humanitarian organizations to fulfill irrespective of whether those obligations are included in a grant or partnership agreement contract.

Put another way, contracts constitute only part of the legal obligations of the parties. Parties to a contract also have non-contractual legal obligations, which exist irrespective of the terms of the contract. For instance, persons and organizations must comply with international and domestic law regardless of the terms of a contract. Moreover, contractual terms cannot usually alter or diminish a person's or an organization's legal obligations under international and domestic law. For that reason, it is important for contracting parties to ascertain the legal systems that apply to and constrain their actions. Some legal systems even purport to apply extraterritorially to individuals and entities; one prominent example of this kind of system is U.S. counterterrorism law, which seeks to constrain the actions of a broad category of persons or entities operating in the United States as well as abroad.

The penalty for not fulfilling the obligations entailed in a contract may be termination of the contract. Depending on the terms of the contract, the party who committed a breach of the contract may be required to pay restitution or otherwise make the other party whole. In comparison, the penalties for adhering to counterterrorism-related criminal, civil, and administrative laws can range from fines to imprisonment.

The CHE Project team sought full contracts but often received only the counterterrorism-related clause. This is a limitation to the research, analysis, and scope of observations. A contract cannot be fully understood without access to the “four corners of the document”—a lawyer's informal term meaning, essentially, that a contract cannot be understood unless the entire contract is available for review, since no single part of the contract can be effectively read in isolation from the remaining parts.

B. Key Trends concerning the Humanitarian Sector

This subsection and the following subsection provide a summary of some of the key contextual elements underlying the report's analysis of counterterrorism-related contract clauses in humanitarian grants and partnership agreements. The trend toward the increased inclusion of counterterrorism-clauses in such contracts arises against the backdrop of broader structural and historical changes, including within the humanitarian sector and with respect to counterterrorism frameworks.

At the outset, it bears emphasis that humanitarian organizations do not typically treat counterterrorism measures as a standalone set of concerns. Rather, counterterrorism measures are one of multiple fields of concern—anti-bribery, anti-corruption, anti-money-laundering, and anti-fraud are others—that humanitarian organizations take into

account when designing programs and implementing practices aimed at ensuring that humanitarian aid and assistance reach intended beneficiaries.²¹

1. The number and scope of operations where individuals and organizations designated as “terrorists” operate

Humanitarian organizations operate in a number of contexts where individuals and organizations designated as “terrorists” control access to territory and civilians, as well as local institutions. Recent and ongoing examples include Afghanistan, Colombia, Mali, Pakistan, the Philippines, Somalia, Syria, and the West Bank/Gaza. The increased use of terrorist-listing mechanisms at the domestic and international levels has thereby complicated in certain respects humanitarian operations in those contexts.²²

2. Growth and “professionalization” of the humanitarian sector

The well-documented general increase over the last few decades of financial and other resources earmarked for humanitarian aid and assistance has led, in turn, to the expansion of the humanitarian community and to an increase in the number of relief operations.²³ Humanitarian operations occur in all types of conflict situations, including those where state armed forces fight other state forces, where state forces fight organized armed groups (including “terrorist” groups), and where organized armed groups fight each other. Some commentators have noted that, partly as a result of the growth in the sector, the humanitarian community is increasingly seeking ways to “professionalize,” including with respect to programming, efficiency, and complexity of structures.²⁴ As part of this trend, humanitarian organizations have, often in conjunction with donors and other stakeholders, established policies, principles, and standards concerning their activities.²⁵

²¹ See generally Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

²² See, e.g., Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,” United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013, available online at: https://www.nrc.no/arch/_img/9682778.pdf; International Committee of the Red Cross, “International Humanitarian Law and the challenges of contemporary armed conflicts,” doc. 31IC/11/5.1.2, section VI, November 2011, available online at: <http://www.icrc.org/eng/resources/documents/report/31-international-conference-ihl-challenges-report-2011-10-31.htm>.

²³ United Nations Office for the Coordination of Humanitarian Affairs, “World humanitarian data and trends 2013,” p. 2, available online at https://docs.unocha.org/sites/dms/Documents/WHDT_2013%20WEB.pdf (noting that “The number of people requiring international humanitarian assistance and the cost of helping them has increased significantly over the last decade (...). Inter-agency appeals typically target 60-70 million people each year, compared with 30-40 million ten years ago. Funding requirements have more than doubled, to over US\$10 billion per year.” (internal reference omitted)).

²⁴ Peter Walker and Catherine Russ, “Professionalising the Humanitarian Sector: A scoping study,” 2010, available online at: http://fic.tufts.edu/assets/Professionalising_the_humanitarian_sector.pdf.

²⁵ See, e.g., Humanitarian Accountability Partnership, “The 2010 HAP Standard in Accountability and Quality Management,” 2010, available online at: <http://www.hapinternational.org/pool/files/2010-hap-standard-in-accountability.pdf>.

3. Interconnectedness of perceptions of different humanitarian organizations

While different humanitarian organizations take various approaches to conceptualizing and conforming to humanitarian principles, ranging from relatively strict to lax approaches, a theme noted by a few respondents was that—despite these differences between organizations—local authorities, armed actors, and beneficiary communities often do not make these distinctions and instead tend to paint all “humanitarian” actors with the same brush. For example, an organization mentioned that while it no longer takes U.S. funding for its Somalia operations, the organization was expelled out of Somalia by al-Shabaab due to the perceived “taint” from other organizations that did receive U.S. funding.

4. Perceptions of disparate treatment by donors and authorities of Muslim-identified or –affiliated humanitarian organizations

Some respondents expressed the opinion that humanitarian organizations with a perceived, imputed, or actual Muslim affiliation have, particularly since 9/11, been subject to higher levels of scrutiny than their non-Muslim-affiliated counterparts. Examples from interviewees of why this perception came about included donors’ imposition of higher due diligence requirements and significantly longer waits for responses to license applications.²⁶ One respondent dubbed the response by these organizations to these higher levels of scrutiny “defensive humanitarianism.”

C. Key Trends concerning Counterterrorism Regulations

The number and scope of counterterrorism regulations have grown in recent decades. International, regional, and domestic authorities have taken numerous steps to halt support to individuals and organizations designated as terrorists. In broad outlines, three of the most important themes in and trends concerning counterterrorism regulations to understand the impact of counterterrorism-related contract clauses on humanitarian organizations are sketched below.

1. Promulgation of international, regional, and domestic laws and policies

To comply with the array of applicable Security Council decisions, UN member states must take numerous steps to ensure that their domestic legal frameworks adequately prohibit the provision of various forms of support to individuals and organizations that

²⁶ See, e.g., Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,” United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013, pp. 108–111, available online at: https://www.nrc.no/arch/_img/9682778.pdf; American Civil Liberties Union, “Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the ‘War on Terrorism Financing,’” June 2009, available online at <https://www.aclu.org/files/pdfs/humanrights/blockingfaith.pdf>.

may undertake acts of terrorism.²⁷ Many states have given effect to these Security Council decisions by promulgating counterterrorism legislation that prohibits the provision of material support or resources, or engaging in financial transactions with, individuals and entities designated as “terrorists” or who commit acts of terrorism.²⁸ Many of these laws purport to apply extraterritorially (that is, outside of the territory of the legislating state), as well as to non-citizens. To trigger the application of some of these counterterrorism laws, the prohibited actions do not need to be undertaken with the intent to further the terrorist aims of the individual or organization.

2. Donor support to and awareness of counterterrorism frameworks

At the international, regional, and domestic levels, government and private donors provide financial and other forms of support to multifaceted initiatives aimed at preventing acts of terrorism. Countering terrorism financing is one of the primary policy objectives of many governments, including those who are members of the Financial Action Task Force and those who have supported the UN Global Counterterrorism Strategy.²⁹

²⁷ See, e.g., United Nations Security Council, Resolution 1267 (1999), UN doc. S/RES/1267, October 15, 1999; United Nations Security Council, Resolution 1269 (1999), UN doc. S/RES/1269, October 19, 1999; United Nations Security Council, Resolution 1333 (2000), UN doc. S/RES/1333, December 19, 2000; United Nations Security Council, Resolution 1368 (2001), UN doc. S/RES/1368, September 12, 2001; United Nations Security Council, Resolution 1373 (2001), UN doc. S/RES/1373, September 28, 2001; United Nations Security Council, Resolution 1390 (2002), UN doc. S/RES/1390, January 28, 2002; United Nations Security Council, Resolution 1455 (2003), UN doc. S/RES/1455, January 17, 2003; United Nations Security Council, Resolution 1526 (2004), UN doc. S/RES/1526, January 30, 2004; United Nations Security Council, Resolution 1617 (2005), UN doc. S/RES/1617, July 29, 2005; United Nations Security Council, Resolution 1624 (2005), UN doc. S/RES/1624, September 14, 2005; United Nations Security Council, Resolution 1735 (2006), UN doc. S/RES/1735, December 22, 2006; United Nations Security Council, Resolution 1822 (2008), UN doc. S/RES/1822, June 30, 2008; United Nations Security Council, Resolution 1904 (2009), UN doc. S/RES/1904, December 17, 2009; United Nations Security Council, Resolution 1916 (2010), UN doc. S/RES/1916, March 19, 2010; United Nations Security Council, Resolution 1989 (2011), UN doc. S/RES/1989, June 17, 2011; United Nations Security Council, Resolution 2083 (2012), UN doc. S/RES/2083, December 17, 2012; United Nations Security Council, Resolution 2129 (2013), UN doc. S/RES/2129, December 17, 2013.

²⁸ See, e.g., Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,” United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013, pp. 19-43, available online at: https://www.nrc.no/arch/_img/9682778.pdf.

²⁹ United Nations General Assembly, “The United Nations Global Counter-Terrorism Strategy Review,” UN doc. A/RES/66/282, July 12, 2012. See also Annex 5c (stating that “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 (...) other international standards, such as those of the Financial Action Task Force, relating to counter terrorism in particular the financing of terrorism.”).

3. Regulatory scrutiny and media attention

A seemingly decades-long trend—which appears to have accelerated after the terrorist attacks of September 11, 2001—has resulted in increased scrutiny by domestic regulatory authorities, such as charity commissions, and by the media of organizations whose actions may unknowingly, unintentionally, or inadvertently provide support to individuals and organizations designated as “terrorists.”

VII. CHARACTERISTICS OF COUNTERTERRORISM-RELATED CLAUSES

This section identifies the sources, scope, and key characteristics of counterterrorism-related clauses in humanitarian grant and partnership agreement contracts obtained as part of this research project. The clauses are categorized with a view toward identifying current trends as well as challenges and opportunities for strategic, sustained policy planning and stakeholder engagement in relation to these clauses.

A. Categories of Funders

Two major categories of donors emerged in the research: governments³⁰ and private and corporate foundations.³¹ Three other types of entities also acted as donors for some of the contracts under review:³² UN system bodies, funds, programmes, and specialized agencies;³³ intergovernmental organizations; and NGOs.

B. Categories of Contracts

The contracts obtained as part of the research fell into three general (and sometimes overlapping) categories:

1. Contracts between a donor and a humanitarian organization;
2. Contracts between a donor, a humanitarian organization, and an implementing partner that is subcontracted or is a subgrantee of the grant between the donor and the primary humanitarian organization; and

³⁰ Kate Mackintosh and Patrick Duplat, “Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action,” United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013, pp. 47–70, available online at: https://www.nrc.no/arch/_img/9682778.pdf.

³¹ Every humanitarian grant contract with funds from a U.S.-based private foundation obtained for this research project included a counterterrorism-related contract clause. Only one humanitarian grant contract with funds from a private foundation based outside of the U.S. obtained for this research project included a counterterrorism-related clause.

³² While each of those entities received funds from elsewhere, the bulk of the donations under review originated with donor governments or private foundations. Government donors directly or indirectly (such as through pooled funding mechanisms) channeled the funds to humanitarian organizations.

³³ Every humanitarian grant or partnership agreement contract obtained for this research with funds going to a United Nations system body, fund, programme, or specialized agency included a counterterrorism-related clause.

3. Contracts drawn from template partnerships or implementation agreements, such as those drafted (typically separately) by each UN agency or body and then used to contract with partners or other implementers.³⁴

Most of the counterterrorism-related measures in the grant contracts reviewed as part of the research were drawn from a template that donors use with multiple grantees. Once finalized, these templates reportedly leave humanitarian organizations with little room for modifying the counterterrorism terms, as donors are reticent to renegotiate the terms of templates for individual grantees.

C. Key Sources and Characteristics of Counterterrorism-related Clauses

This subsection outlines the sources and characteristics of counterterrorism-related measures in humanitarian grant and partnership agreement contracts obtained for this research. Readers seeking to examine the verbatim terms of the measures should refer to the Annexes, where the clauses are excerpted in full.

1. Sources of obligations

Among the clauses obtained for this research, four general and often interrelated categories of sources of counterterrorism-related obligations emerged:

1. International law, including counterterrorism-related UN Security Council resolutions, international conventions concerning terrorism,³⁵ and EU measures;
2. The domestic counterterrorism-related laws (criminal, civil, or both) and administrative regulations of a state;
3. Donor policies; and
4. Multiple combined sources.

³⁴ The importance of this third category should not be discounted. In numerous interviews, it became obvious that these template agreements—since they are used in hundreds, if not thousands, of donor relationships—shape the obligations of a disproportionate amount of organizations implementing humanitarian programming.

³⁵ While UN member states and UN bodies must carry out decisions of the UN Security Council, non-governmental organizations are not directly bound by UN Security Council decisions. NGOs may become bound by the obligations entailed in UN Security Council decisions by contracting into those obligations, or by being subject to domestic laws into which those obligations have been transferred. Interestingly, international laws regulating armed conflict were also referenced in some clauses (see, e.g., Annexes 2f and 6c). It appears that by including references to international humanitarian law the drafters of those clauses may have been attempting to ensure that the counterterrorism obligations in the clauses would be read in tandem with the IHL standards.

a. *International law*

Four general categories of international law-related sources were imposed on humanitarian organizations or were utilized by humanitarian organizations to balance counterterrorism-related obligations in the contracts obtained as part of this research: (1) UN Security Council decisions; (2) the UN Charter; (3) international covenants and protocols concerning terrorism; and (4) international humanitarian law.³⁶ Many contained multiple sources of international law-based obligations, sometimes alongside domestic legal obligations.

The most common type of international law-related sources of obligation in counterterrorism-related clauses in humanitarian grant and partnership agreement contracts were measures drawn from UN Security Council resolutions.³⁷ While UN member states and UN bodies must carry out decisions of the Security Council, non-governmental organizations are not directly bound by Security Council decisions. NGOs may become bound by the obligations entailed in a UN Security Council decision by contracting into those obligations or by being subject to the jurisdiction of a state that has incorporated those obligations into its domestic law. The following excerpt—which is similar to many clauses under review—demonstrates an example of UN Security Council-related measures being imposed on humanitarian organizations:

The Cooperating Partner shall screen its potential Cooperating Partners, contractors and subcontractors and use all possible means to ensure it does not knowingly work with any entity appearing on the New Consolidated List established and maintained by the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning *Al-Qaida and associated individuals and entities and/or the list of individuals and entities established and maintained by the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea*, and any other similar lists that may be established or endorsed by [Grantee], and made available to the Cooperating Partner, *or by the United Nations Security Council from time to time*, and that none of the funds provided hereunder are used to the benefit of individuals or entities associated with terrorism.³⁸

³⁶ The two clauses that reference international humanitarian law also reference other bodies of law or policies, and are therefore included in the section on clauses with multiple sources of types of obligations, below.

³⁷ Other types of international legal obligations include those relating to international conventions concerning terrorism; see, for instance, Annex 2b, which in defining the scope of obligation incumbent upon the contracting organization, includes in its definition of “terrorist act” any acts prohibited by a UN convention or protocol related to terrorism.

³⁸ Annex 1g (emphasis added); see also Annexes 1a–f, 2b–f, 3a–h, 4a–b, 5c, 6c, 7i.

b. Domestic laws and regulations

Many of the counterterrorism-related clauses in humanitarian grant and partnership agreement contracts obtained as part of this research derive from a particular state's domestic counterterrorism laws (civil, criminal, or both) or administrative regulations. In particular, donors reference or impose obligations from U.S.,³⁹ Canadian,⁴⁰ Australian,⁴¹ and U.K.⁴² counterterrorism laws and regulations.⁴³

c. Donor policies

A few of the counterterrorism-related clauses under review did not expressly reference domestic or international law but rather stemmed from donor policies.⁴⁴ (Many clauses mixed obligations from legal instruments with donor policies.)

d. Multiple sources of counterterrorism-related obligations

Many of the contracts under review include sources of counterterrorism-related legal and/or policy obligations from multiple types of sources, such as government donors' domestic criminal and civil laws and the UN Security Council 1267 list. At least one contract combines obligations drawn from U.S., U.K., and EU measures.⁴⁵ Interestingly, a few clauses includes obligations stemming from international humanitarian law, such as the provision stating that the organization will accord its activities not only with a donor's counterterrorism policy but also with the applicable sections of the Geneva Conventions.⁴⁶

2. Characteristics

Some of the key characteristics of counterterrorism-related clauses in humanitarian grant and partnership agreement contracts include the standard of effort, political framings,

³⁹ Annexes 2a–b, 2d–e.

⁴⁰ Annexes 3a, 3g–h.

⁴¹ Annex 4b.

⁴² Annexes 6a and 6c. Note that none of the DFID grants obtained for this research expressly impose UK counterterrorism-related legal obligations.

⁴³ For a survey of these states' domestic counterterrorism laws, as well as those of other major humanitarian donor states, see Kate Mackintosh and Patrick Duplat, "Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action," United Nations Office for the Coordination of Humanitarian Affairs and the Norwegian Refugee Council, 2013, pp. 19–43, available online at: https://www.nrc.no/arch/_img/9682778.pdf.

⁴⁴ See, e.g., Annexes 7c, 7f, 7i.

⁴⁵ Annex 6a; see also, e.g., Annexes 3g, 5c, 6c, 7i.

⁴⁶ Annex 2f; see also Annex 6c (stating that the "Partner shall at all times *act in accordance with humanitarian principles as enshrined in international humanitarian law and other relevant international instruments*. These principles include but are not limited to humanity, neutrality, independence and impartiality. In accordance with these principles, [Grantee] shall take reasonable measures in the prevailing circumstances to ensure that all funds, goods and resources are utilized for the benefit of the needy based on these principles." (Emphasis added.)).

due diligence measures (such as screening staff and partners—and, in some circumstances, ultimate beneficiaries—as well as monitoring and reporting on potential diversion), and imposing analogous obligations on partners. A few of the surveyed contracts also include counterterrorism-related termination clauses.

a. *Standard of Effort*

The level and type of obligation of effort entailed in the counterterrorism-related clauses varied, from context-specific standards to requirements to undertake all means necessary to ensure no diversion of aid or assistance.⁴⁷ Many of the counterterrorism-related clauses require organizations to use “reasonable efforts.”⁴⁸ At least one clause adds conditioning language such that the organization “shall take *reasonable measures in the prevailing circumstances*.”⁴⁹ Some of the clauses impose stringent standard-of-effort obligations that prohibit any benefit from accruing to individuals and organizations designated as terrorists. For instance, one provision requires that the recipient “will take *all precautions and institute all procedures necessary to prevent any portion of the Grant from being*” used to engage in, support, or promote violence, terrorist activity or related training, or radicalism.⁵⁰

b. *Political framing*

One of the more striking characteristics of the contracts under review is the extent to which the counterterrorism-related clauses may be read to adopt—or reject or supplant—a particular political framing of counterterrorism and broader security norms. On one end of the spectrum, some clauses from certain donors (the U.S., Australia, Canada, and a UN body) stated that both the grantor and the recipient are “*firmly committed to the international fight against terrorism (...)*.”⁵¹ In the same vein, another clause required the recipient to represent and warrant, in particularly broader terms, that “it does not support violence, terrorist activities, [or] radicalism (...).”⁵² On the other end of the spectrum,

⁴⁷ This variance reflected the spectrum of standards of effort identified by a commentator:

The orthodox view is that a contractual provision requiring *best efforts* imposes extraordinary duties of assiduity: a very high standard of care, regardless of whether the required efforts might be commercially reasonable. A provision requiring *reasonable efforts* is generally thought to impose a lesser standard of diligence. The two phrases—*commercially reasonable efforts* and *good-faith efforts*—are essentially needless variants of *reasonable efforts*. In truth, both *best efforts* and *reasonable efforts* are vague phrases, and purposely so. The application of these requirements to the actual situation gives the decision-maker a good deal of latitude.

Bryan A. Garner, *Garner’s Dictionary of Legal Usage*, Oxford University Press, 2011, p. 108 (all italics original).

⁴⁸ Annexes 1a, 1c–e, 2c, 2f, 3c, 4a, 7b, 7d.

⁴⁹ Annex 6c (emphasis added).

⁵⁰ Annex 7i (emphasis added).

⁵¹ Annexes 1d, 2c, 3b–e, 4a (emphasis added).

⁵² Annex 7i.

two organizations negotiated clauses that frame their respective counterterrorism-related obligations in reference to international humanitarian law—and, for one of those organizations, also in connection with humanitarian principles of humanity, neutrality, independence, and impartiality.⁵³

c. Due diligence

All of the organizations surveyed for this report engage in due diligence aimed at ensuring that aid and assistance reach intended beneficiaries. While there is no generally agreed upon definition within the humanitarian community, due diligence may be broadly conceived as set of four cumulative elements: a statement of policy articulating the organization’s commitment to the underlying policies; periodic assessment of actual and potential impacts of organizational activities and relationships on humanitarian aid and assistance reaching intended beneficiaries; integrating these commitments and assessments into internal control and oversight systems; and tracking and reporting performance.⁵⁴

As described in more detail below, many of the surveyed clauses require organizations to perform—sometimes as part of certifications—due diligence measures. These measures may include screening of staff, partners, and, at times, beneficiaries, as well as monitoring and reporting on potential diversion. With respect to Somalia, some contracts from the U.S. government require organizations to undertake “enhanced due diligence.” It bears emphasis that these contract-imposed due diligence obligations constitute only part of the package of due diligence measures humanitarian organizations undertake to ensure that aid and assistance reach intended beneficiaries.⁵⁵

i. Certifications, prohibited transactions, and screenings

When negotiating and drafting contracts, many humanitarian organizations frame counterterrorism-related due diligence obligations in the form of a certification.⁵⁶ Some donors, such as USAID, require recipients to certify before receiving an award (and, sometimes, during the grant period and after the conclusion of the grant) that they have

⁵³ Annexes 2f and 6c.

⁵⁴ Derived in part from the definition of “human rights due diligence” in Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, “Business and Human Rights: Further steps toward the operationalization of the ‘protect, respect and remedy’ framework,” UN Doc. A/HRC/14/27, April 9, 2010, para. 83. Compare with, for example, the definition provided in ECHO, Guidelines for the award of Procurement Contracts within the frameworks of Humanitarian Aid Actions financed by the European Union (“Humanitarian Aid Guidelines for Procurement”), May 31, 2011, p. 13, available online at http://ec.europa.eu/echo/files/partners/humanitarian_aid/Procurement_Guidelines_en.pdf: “Due diligence refers to carrying out duties professionally, carefully and thoroughly, going well beyond the minimum effort.”

⁵⁵ See Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

⁵⁶ Annexes 3e, 6a, 7h.

not ever (or at least not over the past ten years) provided, and will not provide, support or resources to terrorists or terrorist organizations.⁵⁷

Many of the certifications expressly or impliedly require organizations to screen staff and partners—such as financial institutions, individual contractors, subrecipients, subgrantees, and vendors—against domestic, EU, and/or UN counterterrorism lists. Some clauses require organizations to screen staff and partners against domestic, World Bank, and/or UN sanctions regimes or as part of import–export regulations.⁵⁸ (Note that not all screening measures are in the form of a certification.) In addition, some clauses expressly or impliedly require organizations, including organizations operating in relation to the West Bank and Gaza, to screen ultimate beneficiaries in order to ensure that no aid, assistance, or other support reaches individuals or organizations designated as terrorists.⁵⁹

ii. Monitoring and reporting potential diversion

Some donors require humanitarian organizations to monitor and report potential and actual diversion of resources, including to individuals or entities designated as terrorists, or the discovery of a general link to any individual associated with terrorism. For instance, an Australian clause stipulates that, “If, during the course of this Contract, the Contractor discovers any link whatsoever with any organization or individual associated with terrorism it must inform [the grantor] immediately.”⁶⁰ Another clause requires that, in addition to the recipient describing to the donor the event that resulted in diversion and the amount transferred, the organization must explain what safeguards and procedures are in place to avoid a reoccurrence and must provide “an explanation of the reasons for such transfer, including whether it was made or provided knowingly, voluntarily, accidentally, unintentionally, incidentally or by force.”⁶¹ This reporting requirement may effectively operate in a way that requires that the humanitarian organization to provide evidence of potentially criminal conduct to the government.

⁵⁷ Annexes 2b, 2d, 7f. Somewhat related to certification, USAID and the State Department are reportedly planning to roll out their respective pilot partner-vetting programs. Those programs will require humanitarian organizations operating in the five pilot countries to submit information on staff and certain partners to the government, which will run those individuals against secret intelligence databases. See generally Counterterrorism and Humanitarian Engagement Project, “Partner Vetting in Humanitarian Assistance: An Overview of Pilot USAID and State Department Programs,” Research and Policy Paper, November 2013, available online at: <http://blogs.law.harvard.edu/cheproject/files/2013/10/CHE-Project-Partner-Vetting-in-Humanitarian-Assistance-November-2013.pdf>; see also Neal Cohen, Robert Hasty, and Ashley Winton, “Implications of the USAID Partner Vetting System and State Department Risk Analysis and Management System under European Union and United Kingdom Data Protection and Privacy Law,” Counterterrorism and Humanitarian Engagement Project, Research and Policy Paper, March 2014, available online at: <http://blogs.law.harvard.edu/cheproject/files/2013/10/CHE-Project-US-Partner-Vetting-under-EU-and-UK-Data-Protection-and-Privacy-Law.pdf>.

⁵⁸ Annexes 1a–c, 1e, 1g, 2a, 2d, 2e, 3a–f, 3h, 4b, 6a, 7f–g, 7i.

⁵⁹ See, e.g., Annexes 3g, 5c, 7b–e, 7h.

⁶⁰ Annex 4b.

⁶¹ Annex 6a; see also, e.g., Annexes 4b and 5b.

iii. “Enhanced” due diligence

USAID requires organizations that receive U.S. funding and that operate under a particular OFAC license pertaining to emergency operations in Somalia to undertake “enhanced due diligence.”⁶² Such “enhanced due diligence” requires a range of measures directed at ensuring that al-Shabaab does not benefit from U.S. government resources. For instance, the “Grantee agrees that it and/or its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) will take *all reasonable steps to minimize knowing and voluntary payments or any other benefits to al Shabaab, or to entities controlled by al Shabaab, or to individuals acting on behalf of al Shabaab (...)*.”⁶³ Moreover, in “the event that the Grantee or its implementing partners (...) makes a payment or provides a benefit to excluded parties, the Grantee shall (...) within ten days after becoming aware of such payment or provision of benefit, notify the Agreement Officer in writing (...) of such payment or provision of benefit.”⁶⁴

d. Imposing obligations on and/or transferring obligations to “subs”

Many of the contracts reviewed for this report include flow-down requirements. Flow-down clauses in general require the primary recipient to ensure that any contracts (or other agreements) entered into with other entities in order to implement the grant include the same or analogous counterterrorism-related obligations. For example, a clause may require that an analogous counterterrorism-related provision “be included in all sub-contracts or sub-agreements entered into” under the agreement.⁶⁵ A significantly higher level of obligation is imposed on an organization required to ensure “that all sub grantees and subcontractors *use* the grant funds consistent with this Grant Agreement and the Proposal.”⁶⁶

e. Termination

All of the full contracts surveyed for this research include a termination clause. Such clauses identify the circumstances in which a party may terminate the contract. Some of the surveyed contracts include a counterterrorism-specific termination clauses, such as one clause providing that “[a]ny violation of this [counterterrorism] certification is grounds for immediate termination of this Agreement and return to the Grantor of all funds advanced to Grantee under it.”⁶⁷ As noted above, a key difference between the obligations entailed in contracts, on the one hand, and civil and criminal law, on the

⁶² Annex 2g. “Enhanced due diligence” is in certain respects a peculiar, and potentially tautological, term. Due diligence is by definition the diligence due to a specific matter or in a particular situation. For the level of diligence to be “enhanced” would seem to suggest that the non-“enhanced” level of diligence was insufficient (and therefore not actually the diligence “due”) in the circumstance.

⁶³ Annex 2g.

⁶⁴ Annex 2g.

⁶⁵ Annex 1a; see also, e.g., Annexes 1c, 1g, 2a, 2e, 3a, 3c, 3h, 6b.

⁶⁶ Annex 7b (emphasis added).

⁶⁷ Annex 7f; see also, e.g., Annexes 1e–g, 2d.

other hand, is that breach of a contract often allows one party to terminate the contract and seek restitution, while violation of the latter may result in fines and, in the case of a criminal conviction, imprisonment.

VIII. OBSERVATIONS

This section offers some observations about the themes, trends, and trajectories identified as part of the research. These observations fall into four interrelated general categories: (1) threshold issues, policy frameworks, and impacts; (2) the scope and implementation of counterterrorism-related contract obligations; (3) engagement with donors; and (4) organizational culture and staff resources. These categories are interconnected in the sense that each has the capacity to influence and shape the others. For instance, once an organization establishes how it will approach threshold issues, such as whether to screen ultimate beneficiaries, then the scope of that organization's contract obligations may shift, the organization may elect to engage donors and other stakeholders more or less robustly, and the organization may need to dedicate more resources to its compliance program. As another example, if an organization elects to establish a relatively rigorous standard of effort in complying with anti-terrorism-financing certifications, then the organization may contribute to the divergence (or convergence) of standards across the humanitarian sector, the organization may be held up as an example of best practices by donors, and the organization may need to hire external legal advisors to help discern the scope of its obligations.

A. Threshold Issues, Policy Frameworks, and Impacts

1. Approaches

The humanitarian organizations surveyed as part of this research indicated a range of approaches recognizing how best to frame their objectives and programs in light of donors counterterrorism concerns. Some organizations, seemingly by default, adopted the security-based language and framing of their donors. A few humanitarian organizations negotiated with donors to include seemingly countervailing obligations from international humanitarian law. Most organizations fall somewhere between these two poles.

2. Risk tolerance

Many respondents emphasized that donors' risk tolerance is decreasing, as donors reportedly attempt to transfer proportionally more risk, broadly construed, onto humanitarian organizations. Humanitarian organizations called for increased discussion with donors concerning tolerable levels of risk across country contexts, as well as for more sharing of risk.

3. Balancing security concerns with humanitarian principles

The organizations that appeared to have the strongest negotiating power with donors were those that had strong reputations and that framed their programming not in the language of counterterrorism or security but in terms of pursuing principled humanitarian action, which entails extensive due diligence, risk analysis and assessment, and

monitoring and evaluation to help ensure that aid and assistance reach intended beneficiaries. At least a few organizations thought that incorporating international humanitarian law, as a perceived counterbalance to robust counterterrorism laws, into contract clauses may provide a more workable set of obligations while also framing the issues in a more principled way.

4. Negotiating position

Despite the perceived competition for limited funds, humanitarian organizations may be better positioned to negotiate the terms of contracts than they currently perceive. Often lost amid technical legal or operational questions is the fact that government donors rely extensively on humanitarian organizations to provide aid and assistance in areas where government actors cannot, and thus humanitarian organizations have a level of negotiating power. It nonetheless bears emphasis that, irrespective of the terms of the contract, humanitarian actors continue to be bound by applicable criminal and civil counterterrorism laws.

5. Operational impacts

Numerous humanitarian organizations identified adverse impacts on their operations due, at least in part, to counterterrorism-related clauses, whether the source of the impact was the obligation entailed in the clause or the general climate of concern arising out of the counterterrorism framing in the contract. The most commonly identified operational impacts stemming from these clauses were decisions not to undertake relief activities in areas where terrorist groups control territory (in contexts such as Afghanistan, Pakistan, Somalia, and Syria) and decisions not to seek funds from certain donors (in particular, the U.S. and Canada) due to concerns that doing so would impose too high of a compliance burden or would potentially compromise the organization's neutrality. Other operational impacts identified by respondents included delayed or suspended program implementation due to administrative burdens; pressure to design programs not based on needs; increased administrative burdens to implement screening, procurement, and oversight of partners; delayed or lack of programming due to slow licensing procedures; and limitations or extensive delays on financial transactions. Finally, an organization noted that its security was potentially compromised by counterterrorism clauses when a group of armed actors overtook the organization's office in Afghanistan and had access to documents indicating that the organization had signed contracts requiring compliance with counterterrorism measures.

6. Screening ultimate beneficiaries

Nearly all of the humanitarian organizations that took part in this research purportedly draw a "red line" at screening ultimate beneficiaries. If that is in fact the threshold, and one that donors have agreed to, then it is a significant one, since it would not, strictly speaking, appear to reflect the legal prohibition under U.S. law against providing any material support or resources (with a few exceptions, such as medicine or religious

materials) to terrorists. While at least one clause indicates that the screening requirements are not intended to flow to ultimate beneficiaries, that clause has a limiting provision that effectively requires that ultimate beneficiaries are screened.⁶⁸

The surveyed organizations purportedly viewed screening ultimate beneficiaries as crossing a “red line” because doing so would violate humanitarian principles. Nonetheless, one organization mentioned that it does screen potential participants at trainings against U.S. government terrorist databases to comply with grant contracts. That humanitarian organizations do not systematically screen ultimate beneficiaries means in effect that those organizations cannot with total confidence guarantee that none of their aid or assistance is provided, if unknowingly or unintentionally, to an individual designated on a government or UN terrorism list. This seems to be the balance struck between the humanitarian community and donor governments so far—what one interviewee called the “don’t ask, don’t tell” approach. The (limited) exception is apparently West Bank/Gaza, where, according to interviews for this research, humanitarian organizations have screened ultimate beneficiaries in certain circumstances to ensure that assistance does not reach designated individuals who are members of Hamas.

How organizations actually undertake to discharge the screening requirements imposed in grant contracts varied enormously. The most common responses were, first, the use of commercial software programs, and, second, manually searching the SDN and UN lists. Many organizations reported that the administrative burden of these screening requirements can be quite substantial.⁶⁹ One organization indicated that, while it may provide verbal assurances to government donors that it will comply with all counterterrorism laws, the organization does not in fact undertake any screening, whether of their staff, implementing partners, or beneficiaries. In certain country contexts, including Somalia, Syria, and Afghanistan, some humanitarian organizations decided that donor-required screening measures were too burdensome or too politically contentious to abide, and the organizations elected to forego funding for programs in those contexts.

B. Scope and Implementation of Counterterrorism-related Contract Obligations

1. Levels of comprehension of counterterrorism-related obligations

One of the most striking aspects of the research was the extent to which humanitarian organizations and donors thought that they were required to fulfill only those counterterrorism-related obligations expressly included in the grant or partnership

⁶⁸ See, e.g., Annex 2b.

⁶⁹ See, e.g., Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, Annex 2, which excerpts an organization’s software-training program, available online at <http://blogs.law.harvard.edu/cheproject/>.

agreement contract. Moreover, a large number of the non-lawyers interviewed as part of this research indicated that they did not understand other fundamental aspects of the nature of contracts.

2. Variety of counterterrorism-related obligations

The scope and content of the obligations entailed in counterterrorism-related contract clauses in humanitarian grants and partnership agreements varied significantly. While many donors share the policy of seeking to ensure that their funds are not used to support acts of terrorism, the restrictions and obligations that donors impose on partners to reach that objective range from acknowledgements of certain legal regulations to extensive risk mitigation, “enhanced” due diligence, and screening of staff and partners. Humanitarian organizations’ responses to the requirements varied, with many organizations accepting the donors’ obligations. Faced with the requirement to engage in the type of “enhanced due diligence” entailed in Annex 2g to receive funds and licenses to operate in Somalia, some organizations accepted the additional measures while at least one organization elected not to receive the funds.

3. “Flow-down” clauses

Flow-down clauses elicited a range of responses from interviewees. On one end of the spectrum, some interviewees thought it was entirely reasonable and necessary to give effect to the organizations’ humanitarian objective of reaching those most in need for donors to require that all implementing partners undertake the same counterterrorism measures. On the other end of the spectrum, individuals voiced concerns about flow-down clauses. Many respondents noted that implementing partners rarely have the capacity—technical or monetary—to implement the counterterrorism measures required in the contracts. Interviewees stated that they know this, that the government donors knew this, and that the implementing partners knew this, and yet the obligations were still included in the contracts. At least half a dozen interviewees criticized the imposition of flow-down clauses as “immoral,” under the logic that donors, who have a public policy objective of providing aid and who outsource the aid delivery, are imposing what are perceived to be overly onerous or impracticable counterterrorism measures that may endanger local implementing partners.

4. Pooled funds and the “viral” effect of UN partnership agreement templates

The increase in the size of pooled UN funds, especially the Central Emergency Response Fund (CERF) and the Common Humanitarian Funds (CHF), has the potential to have a significant impact on counterterrorism-related obligations of partner organizations. These pooled funds typically use a standardized project implementation agreement template across programs and countries. The standards in the template bind hundreds, if not thousands, of organizations that become subject to the terms of that template. Currently, one of the pooled-funds templates includes counterterrorism-related

obligations drawn only from UN Security Council sanctions lists. Respondents noted, however, that at least one large donor government (Canada) has tried to insert its national counterterrorism list-checking requirements into a pooled-fund agreement template. Interlocutors stated that the inclusion of a national counterterrorism list-checking requirement into a pooled-fund template would create confusion among recipients, would set a precedent for other donors to insert their national standards into the agreements, and would not be practicable to implement for the vast majority of implementing partners. National requirements imposed by one donor in a template agreement could thus have significant effects by revising the requirements of all recipients of the pooled funds. In the same vein, other pooled fund donors would also be implicated by the inclusion of a different donor's national counterterrorism requirements in the template; if one donor had a principled objection to a particular set of obligations or framing approaches—for example, with respect to how “terrorism” is defined in light of another donor's national law—that objection would be pose a conflict with the approach of the donor who inserted the language into the template.

In addition to pooled-funds template agreements, the importance of partnership templates of UN system bodies, funds, programmes, and agencies—such as UNICEF, UNHCR, and WFP—should not be underestimated. As with the pooled-fund agreements, these UN partnership templates ultimately bind hundreds, if not thousands, of organizations implementing humanitarian relief projects. The variance in terms of scope of counterterrorism-related obligations entailed in the templates reviewed as part of this project is therefore quite significant. The research uncovered substantial variance in the content of counterterrorism-related obligations in templates from within certain UN system bodies, funds, programmes, and specialized agencies and in templates across such bodies. One interviewee noted that a UN template agreement that was supposed to be implemented across the UN has not yet been adopted by most UN bodies, funds, programmes, and specialized agencies.

5. Standard of effort

The standard of effort a humanitarian organization must employ to fulfill its counterterrorism-related contract obligations was one of the most important areas of the research. The standards of efforts uncovered for this research ranged enormously.⁷⁰ Some clauses appeared to hold humanitarian organizations to a standard of ensuring that no support or assistance whatsoever can be provided to anyone “associated with” terrorism—an extremely high standard in certain areas of, for example, Somalia and Syria. On the other end of the spectrum, some organizations had negotiated a significantly lower standard of effort, such as those requiring that the organization undertake reasonable steps to ensure that a very specific outcome did not occur.⁷¹ A few respondents

⁷⁰ See also Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

⁷¹ One commentator has summarized the relevant concerns in this way:

emphasized that even if an organization fulfilled the contract’s requirements to meet a certain standard of effort—whether the standard is “reasonable” or “all possible measures”—the organization may still violate counterterrorism laws that prohibit aid or assistance from reaching designated terrorists.

6. Emergency derogations

None of the counterterrorism-related contract clauses under review for this research included an emergency derogation provision allowing the organization to lessen its obligations for a predetermined period of time in response to an unforeseen emergency. Perhaps because humanitarian organizations already generally act in emergency situations (such as armed conflicts), the contract negotiators and drafters may have considered there to be no need for emergency derogations. This is in contrast, however, to some other areas of anti-diversion, such as anti-bribery and anti-fraud, where emergency derogations may be considered.⁷²

7. “Associated with” terrorism provisions

Numerous organizations raised ethical and operational concerns relating to contract provisions prohibiting transactions with individuals or organizations “associated with” terrorism. While some of the “associated with” terrorism contract provisions were relatively narrowly drafted—for instance, by limiting the group of “associated” people to those individuals listed by the UN Security Council—other “associated with” terrorism provisions were more broadly drafted and could be read to include a wider range of potential actors. A respondent noted that it is unclear whether these broader “associated with” terrorism provisions are meant to prohibit, for instance, transactions with people who dig latrines that are later used by designated terrorists, with family members of designated terrorists, or with cash-for-work program staff who construct houses or other buildings that are subsequently used by designated terrorists.

8. Commercial software programs

To comply with many of their screening-related counterterrorism obligations, most of the humanitarian organizations surveyed for this research employ commercial software

As noted, the majority view is for courts to consider *best efforts* as imposing a higher standard than *reasonable efforts*. But others treat the two as synonymous. Perhaps the safest course is, when possible, to use a *best-efforts* provision when insisting on an opposite number’s performance—and to use a *reasonable-efforts* provision for one’s own client’s performance. Yet the phrases are fuzzy, the judicial decisions irreconcilable, and the effects admittedly uncertain.

Bryan A. Garner, *Garner’s Dictionary of Legal Usage*, Oxford University Press, 2011, p. 108 (italics original).

⁷² See Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, available online at <http://blogs.law.harvard.edu/cheproject/>.

programs.⁷³ Training staff to properly and efficiently use the software is reportedly quite labor- and time-intensive. One organization has multiple full-time staff who spend the bulk of their time screening individuals with these software programs. Numerous organizations, especially those with presences in Europe, indicated that they were concerned about whether the commercial software programs—and screening more generally—allowed them to comply with EU data protection and privacy concerns.⁷⁴

C. Engagement with Donors

1. Perceived gap between sets and types of donors

According to the interviews, the U.S., Canada, Australia, and the U.K. appear to be requiring much more robust and extensive counterterrorism-related measures in humanitarian grant and partnership agreement contracts. A gap seems to be emerging between those donors, on the one hand, and other states—such as Denmark, Norway, Sweden, and Switzerland—which, in the contracts obtained as part of this research, did not include any counterterrorism-related measures. A number of respondents voiced particularly strong concerns about the approach of the Canadian government, including that Canada reportedly attempted to insert its domestic counterterrorism list-checking requirements into UN partnership template agreements.

A few organizations mentioned that private foundations are increasingly scrutinizing counterterrorism measures in grant contracts. One organization detailed how some foundations' boards are requiring stricter counterterrorism measures due apparently to fear that the board could be liable for dispersing funds that are not sufficiently covered by counterterrorism-related assurances under U.S. law. Private foundations are, according to interviewees, more likely to allow a humanitarian organization to modify the terms of the contract compared to donor governments and UN bodies and agencies. With some private foundations, counterterrorism measures reportedly took months to negotiate. One humanitarian organization indicated in an interview that it could “remain principled” with private donors, which in that organization's experience are more likely to welcome tailored clauses.

⁷³ For an overview of how one organization instructs its personnel to use the software, see Counterterrorism and Humanitarian Engagement Project, “An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations,” Research and Policy Paper, May 2014, Annex 2, available online at <http://blogs.law.harvard.edu/cheproject/>. Confusingly, one of the commercial screening programs reportedly provides an “enhanced due diligence” options, which is effectively a more expensive package that includes additional lists of individuals, organizations, and institutions that will be screened.

⁷⁴ See generally Neal Cohen, Robert Hasty, and Ashley Winton, “Implications of the USAID Partner Vetting System and State Department Risk Analysis and Management System under European Union and United Kingdom Data Protection and Privacy Law,” Counterterrorism and Humanitarian Engagement Project, Research and Policy Paper, March 2014, available online at: <http://blogs.law.harvard.edu/cheproject/files/2013/10/CHE-Project-US-Partner-Vetting-under-EU-and-UK-Data-Protection-and-Privacy-Law.pdf>.

2. Donors who are parties to certain conflicts

A chasm emerged among respondents regarding whether to accept funds from donors who are, or may be, parties to the armed conflict where the organizations want to deliver aid and assistance. The primary concern voiced by respondents in this connection was that by accepting funds from a donor who is a party to the conflict, the humanitarian organization would be perceived by stakeholders, including beneficiaries and armed actors, as taking a side in the conflict and thus not adhering to the principle of neutrality. During the interviews, respondents raised concerns about staff safety in relation to these funding considerations, especially in regard to Afghanistan.⁷⁵

D. Organizational Culture and Staff Resources

1. Internal roles and approaches

Across the board, respondents indicated an extremely high level of respect for their colleagues. Yet many grant officers and compliance officers, as well as regional and national coordinators, emphasized a potential disconnect between their organizations' legal advisors and the staff implementing the contracts. Perceptions that general counsels had a relatively low level, if any, field experience contributed to a sense of disconnect among some interviewees.

2. Multifaceted portfolios

Due in part to the federated, decentralized nature of the majority of large humanitarian organizations, many of the respondents indicated that they do not have sufficient time to consider fully how best to approach drafting, negotiating, and implementing counterterrorism-related clauses. A near-constant theme among general counsel, grant officers, and policy advisors who took part in this research was a desire for more time and resources to think critically about the challenges and opportunities concerning counterterrorism-related clauses.

3. External legal advisors

Many of the surveyed humanitarian organizations, even large organizations, do not have full-time general counsel. The growth and complexity of domestic, regional, and international counterterrorism laws and regulations have led many of the organizations interviewed for this project to hire outside legal counsel who are experts in areas of law that the humanitarian organizations' in-house counsel (where they exist) are not. More than a few Europe-based organizations voiced concern at expending (sometimes

⁷⁵ Ashley Jackson, "Humanitarian negotiations with armed non-state actors: key lessons from Afghanistan, Sudan and Somalia," HPG Policy Brief, ODI/HPG, Number 55, March 2014, available online at: <http://www.odi.org.uk/sites/odi.org.uk/files/odi-assets/publications-opinion-files/8847.pdf>.

extensive) resources on U.S. legal counsel, for instance to help them navigate the licensing process with OFAC.

IX. POTENTIAL INFLECTION POINTS

While the humanitarian community has been aware of the increase in counterterrorism-related clauses in contracts, the community as a whole has faced challenges in developing strategic approaches to this issue. These challenges stem in part from a lack of information about the content of those clauses, including which donors were imposing what standards. This report aims to provide some relevant information and context to engaging with these clauses among humanitarian organizations, donors, and beneficiary communities.

During the research, interviewees and other interlocutors raised a range of perceived dilemmas and possible solutions relating to the documented impacts of counterterrorism measures on humanitarian organizations. It appears that in at least four areas the humanitarian community may be approaching potential inflection points concerning how to address counterterrorism measures imposed not only through criminal and civil law but also through donor contracts.

Should humanitarian organizations attempt to identify industry-wide counterterrorism standards?

Humanitarian organizations are actively considering whether to undertake initiatives aimed at creating sector-wide approaches to regulation, contract clauses, and due diligence. A key area of discussion involves the merits and drawbacks of developing a model counterterrorism contract clause. It would appear that certain donors would not be particularly susceptible to such a clause unless the clause reflected relatively restrictive provisions. One potential approach to pursuing industry-wide standards may be to target engagement with donors that have the most restrictive approaches to counterterrorism measures, such as the U.S., Canada, Australia, and the UK. Since these donors are already setting the terms of the discussion, so to speak, it may be particularly valuable to engage with them. Another approach would be to engage with donors who have not imposed similar counterterrorism measures, such as the Netherlands, Norway, Sweden, and Switzerland. These donors may be in a strong position to help shape discussions with other donors and stakeholders regarding the importance of striking a balance that recognizes legitimate security concerns and the importance of principled humanitarian action.

Should humanitarian organizations seek more clarity or constructive ambiguity?

Many of the dilemmas or areas of vagueness articulated in this report could potentially be addressed by governments giving greater clarity regarding expectations and standards. But that clarity may mean that some clauses could be read much more restrictively. The current negotiating environment that humanitarian organizations, which are operating with imperfect information, find themselves in presents a number of challenges to effectively negotiating counterterrorism clauses. For their part, governments are not

always internally consistent—the counterterrorism agencies often have, in certain critical respects, fundamentally different orientations than the aid agencies—and thus it can be difficult to persuade government donors to modify their approaches across all sectors. Moreover, humanitarian organizations do not yet have the power to effectively bargain as a group, due not only to different conceptions of what is the best strategy but also out of a sense of competition for donors.

Should humanitarian organizations identify and enforce “red lines”?

Similarly, the question of whether humanitarian organizations should draw “red lines”—for instance, by agreeing to never screen ultimate beneficiaries—is highly complicated. As a legal matter, some jurisdictions attach criminal liability to the provision of material support or resources to designated terrorists, regardless of intent. Moreover, if a set of red lines is agreed to, then it becomes imperative to enforce those standards, including by allocating sufficient resources to community policing. In addition, even if the majority of organizations agree to never cross a red line, at least some organizations will likely choose not to adhere to that standard. More generally, establishing red lines raises questions about whether those lines adequately account for the diversion of the sector and whether the creation of a two-track system (those who follow the red lines and those who do not) may entail more harms than benefits.

Should humanitarian organizations focus on developing approaches to counterterrorism at headquarters?

Given the legal complexity of counterterrorism-related contract clauses and the desire for organization-wide coherence, humanitarian organizations may elect to increasingly provide veto and ultimate decision-making powers to headquarters. Yet doing so would divest personnel who implement and manage projects in the field of the power to negotiate the terms of their engagements and would entrust important decisions in individuals who may not have sufficient understanding of field contexts.

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**XI. ANNEXES:
EXCERPTS OF COUNTERTERRORISM-RELATED CLAUSES IN
HUMANITARIAN GRANT AND PARTNERSHIP AGREEMENT
CONTRACTS**

ANNEX 1: CLAUSES FROM THE UNITED NATIONS SYSTEM

ANNEX 1A

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: general use clause

12.1 Consistent with numerous United Nations Security Council resolutions relating to terrorism and in particular, the financing of terrorism, [Awardee] and its Cooperating Partners will seek to ensure that resources received under this Agreement, whether in cash or in kind, are not used, directly or indirectly, to provide support to terrorist entities or individuals.

12.2 In accordance with this policy, the Cooperating Partner agrees to employ all reasonable efforts to ensure that such resources (a) are not knowingly transferred directly or indirectly or otherwise used to provide support to the any individual or entity associated with terrorism as designated on the list maintained by the Security Council Committee established pursuant to Security Council Resolution 1267 (1999) and 1989 (2011) (available at <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>); or (b) any other similar lists that may be established by the United Nations Security Council, including the list of individuals and entities maintained by the Security Council Committee established pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea; and/or (c) are not used in any other manner that is prohibited by a resolution of the United Nations Security Council adopted under Chapter VII of the Charter of the United Nations.

12.3 A provision analogous to Article 12.2 shall be included in all sub-contracts or sub-agreements entered into by the Cooperating Partner under this Agreement.

ANNEX 1B

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: indeterminate

Special Provisions relating to Management and Expenditure of the Cash Transfer

[Grantee] agrees to apply the highest reasonable standard of diligence to ensure that the supplies and equipment and money provided by [Grantor] under this Agreement (a) are not used to provide support to individuals or entities associated with terrorism; (b) are not transferred by Partner to any individual or entity on the list maintained by the Security Council Committee established pursuant to resolution 1267 (1999), available at <http://www.un.org/Docs/sc/committees/1267>; and (c) are not used, in the case of money provided by [Grantor], for the purpose of any payment to persons or entities, or for any import of goods, if such payment or import is prohibited by a decision of the United Nations Security Council taken under Chapter VII of the Charter of the United Nations;

ANNEX 1C

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: general use clause

The Service Provider agrees to undertake all reasonable efforts to ensure that none of the funds received from [Grantor] under this Agreement are used to provide support to individuals or entities associated with terrorism, as included in the list maintained by the Security Council Committee established pursuant to resolution 1267 (1999) located at <http://www.un.org/sc/committees/1267/consolist.shtml>. This provision must be included in all subcontracts or sub-agreements entered into under this Agreement.

ANNEX 1D

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: indeterminate

A. 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 to seek to ensure that none of its funds are used, directly or indirectly, to provide support to individuals or entities associated with terrorism. In accordance with this policy, Grantee undertakes to use reasonable efforts to ensure that none of the Grantor funds provided under this grant agreement are used to provide support to individuals or entities associated with terrorism. Specifically, Grantee undertakes to use reasonable efforts to ensure that none of the funds provided to it by Grantor are transmitted to any entity or individual who has directly or indirectly threatened the peace, security, or stability of Burma, has committed human rights abuses in Burma, engaged in arms-trade activities with North Korea, the Government of North Korea or the Government.

ANNEX 1E

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: general use clause

Use of Funds

The Partner agrees to employ all reasonable efforts to ensure that such resources

(a) are not knowingly transferred directly or indirectly or otherwise used to provide support to any individual or entity associated with terrorism as designated on the list maintained by the Security Council Committee established pursuant to Security Council Resolution 1267 (1999) and 1989 (2011) (available at <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>);

(b) any other similar lists that may be established by the United Nations Security Council, including the list of individuals and entities maintained by the Security Council Somalia and Eritrea; and/or,

(c) are not used in any other manner that is prohibited by a resolution of the United Nations Security Council adopted under Chapter VII of the Charter of the United Nations.

(...)

Termination

[Grantor] may terminate this Agreement with cause at any time with immediate effect by giving written notice to the Partner. For this purpose, cause is defined as: At any time, if the Partner is sanctioned by the UN Security Council Committee on Sanctions pursuant to resolutions 751 (1992), 1267 (1999), 1907 (2009) 1989 (2011), or any other resolutions or that the Partner has been evidenced supporting, directly or indirectly, individuals and entities associated with those sanctioned by the Committee or any other involved any other manner that is prohibited by a resolution of the United Nations Security Council adopted under Chapter VII of the Charter of the United Nations.

ANNEX 1F

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: indeterminate

The Contractor is therefore required to disclose to [Grantor] whether its company, or any of its affiliates, is subject to any sanction or temporary suspension imposed by the World Bank Group or any other International or UN Organisation at the time of execution of this contract and throughout the duration of the contract period. The Contractor recognises that a breach of this provision will entitle [Grantor] to terminate its supply contract with the Contractor.

ANNEX 1G

Grantor: United Nations System Body, Fund, Programme, or Specialized Agency

Recipient: NGO

Geographic scope: general use clause

12. ANTI-TERRORISM MEASURES; ADDITIONAL CONDITIONS

12.1 Consistent with numerous United Nations Security Council resolutions, including S/RES/1267 (1999), S/RES/1269 (1999), S/RES/1368 (2001), S/RES/1373 (2001), and S/RES/1844 (2008), [Grantee] is firmly committed to the international fight against terrorism and, in particular, against the financing of terrorism. It is the policy of [Grantee] that none of its funds are used, directly or indirectly, to support individuals or entities associated with terrorism.

12.2 The Cooperating Partner shall screen its potential Cooperating Partners, contractors and subcontractors and use all possible means to ensure it does not knowingly work with any entity appearing on the New Consolidated List established and maintained by the Security Council Committee pursuant to resolutions 1267 (1999) and 1989 (2011) concerning Al-Qaida and associated individuals and entities and/or the list of individuals and entities established and maintained by the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea, and any other similar lists that may be established or endorsed by [Grantee], and made available to the Cooperating Partner, or by the United Nations Security Council from time to time, and that none of the funds provided hereunder are used to the benefit of individuals or entities associated with terrorism.

12.3 The Cooperating Partner shall include in its agreements with its Cooperating Partners, contractors and subcontractors hereunder a clause requiring that the recipient screens its potential Cooperating Partners, contractors and subcontractors as per Clause 12.2 above and uses all possible means to ensure that none of the funds provided under those arrangements are used to benefit individuals or entities associated with terrorism.

12.4 Any additional conditions and due diligence requirements applicable to the activities of the Cooperating Partner and its Cooperating Partners, contractors and subcontractors, whether related to anti-terrorism policies or other concerns, which are acknowledged and agreed by the Cooperating Partner under this Agreement, shall be set forth and included in this Agreement as Annex 5 (the “Additional Conditions and Due Diligence Requirements”).

12.5 The Cooperating Partner acknowledges and agrees that its failure to comply with any of the obligations laid out in this Article and Annex 5, shall be considered a material breach that shall trigger [Grantee's] right to terminate the Agreement immediately.

12.6 Without prejudice to the above, the Cooperating Partner understands and agrees that at no time shall any payments made in violation of this Article or Annex 5 be reimbursable by [Grantee] or otherwise paid with funds provided by [Grantee] hereunder.

12.7 In the event that the Cooperating Partner requires the services of any subcontractors, it shall obtain the prior written approval and clearance of [Grantee] unless otherwise provided in the Agreement. With respect to any case of subcontracting, the Cooperating Partner shall not be relieved of any of its obligations under the Agreement, including without limitation those laid out in this Article and Annex 5.

12.8 The Cooperating Partner understands and acknowledges that itself, its Affiliated Entities, employees, partners and/or subcontractors may be subject to legal restrictions or requirements imposed in one or more legal systems affecting their operations in certain countries including but not limited to those of the country in which they are respectively organized. It is incumbent upon the Cooperating Partner to determine the nature of these restrictions and requirements and to ensure compliance with the same, including but not limited to obtainment of any necessary licenses and submission of reports to regulatory bodies. The Cooperating Partner shall bear the sole responsibility for any failure to comply with any such restrictions and requirements.

ANNEX 2: CLAUSES FROM THE U.S. GOVERNMENT

ANNEX 2A

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

Recipient: NGO

Geographic scope: indeterminate

6. Post-Award Compliance: U.S. Department of State Standard Terms and Conditions for Federal Assistance Awards are incorporated by reference and made part of this Notice of Award. Electronic copies containing the complete text are available at: <http://fa.statebuy.state.gov>, under Resources select Notice of Awards (T&Cs) to access the domestic or overseas terms and conditions applicable to the Recipient. The Recipient and any sub-recipient, in addition to the assurances and certifications made part of the Notice of Award, must comply with all applicable terms and conditions during the project period.

(...)

8.C.2 – Program Management e. The Recipient is reminded that U.S. Executive Order and U.S. law prohibits transactions with, and the provision of resources and support to, individuals and organizations associated with terrorism. It is the legal responsibility of the Recipient to ensure compliance with these Executive Orders and laws. This provision must be included in all sub-contracts/sub-awards issued under this agreement.

(...)

U.S. Department of State Standard (overseas) Terms and Conditions. As Above: incorporated by reference into USDS grants.

(...)

16. TERRORISM

Blocking Property and Prohibiting Transactions Who Commit, Threaten To Commit, or Support Terrorism, Executive Order 13224 October 1, 2009

Executive Order 13224 designated 27 individuals and entities that commit or pose a significant risk of committing terrorist acts and authorized the Secretary of State to designate additional individuals and entities.

The Order also authorized the Secretary of the Treasury to designate additional individuals and entities that provide support or services to, are owned or controlled by, act for or on behalf of, or are “otherwise associated with,” an individual or entity who has been designated in or under the order. All property and interests in property of the individual or entity in the United States or in the possession or control of United States persons are blocked. The order prohibits all transactions and dealings in blocked property or interests in the United States or by United States persons, and also prohibits transactions with, and provision of support for, individuals or entities listed in or subject to the Order.

The recipients should be aware of Executive Order 13224 and the names of the individuals and entities designated thereunder. A list of these names can be found at the web site of the Excluded Parties List System (EPLS). The web site is: <http://www.epls.gov>

The recipients are reminded that U.S. Executive Order and U.S. laws prohibit transactions with, and the provision of resources and support to, individuals and organizations associated with terrorism. It is the legal responsibility of the recipient/contractor to ensure compliance with these Executive Orders and laws.

ANNEX 2B

Grantor: United States, Department of Agriculture, Commodity Credit Corporation

Recipient: NGO

Geographic scope: general use clause

Item IV - Certification Regarding Terrorist Financing

By signing this Agreement, the Cooperating Sponsor provides the certification set forth in the "Foreign Agricultural Service Terrorist Financing Certification for Food Aid Grant Agreements, April, 2005," Attachment D, which is attached hereto and made a part of this agreement. (...)

ATTACHMENT D FOREIGN AGRICULTURAL SERVICE TERRORIST FINANCING CERTIFICATION FOR FOOD AID GRANT AGREEMENTS APRIL 2005

I. The Cooperating Sponsor, to the best of its current knowledge, certifies that it 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, as herein defined. For the purposes of this certification:

a. "Material support and resources" means 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, transportation, and other physical assets, except medicine or religious materials.

b. "Terrorist act" means-

(i) an act prohibited pursuant to one of the 12 United Nations Conventions and Protocols related to terrorism (see UN terrorism conventions Internet site: <http://untreaty.un.org/English/Terrorism.asp>);
or

(ii) an act of premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents;
or

(iii) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

c. "Entity" means a partnership, association, corporation, or other organization, group or subgroup.

II. The following steps may enable the Cooperating Sponsor to comply with its obligations under paragraph 1, above:

a. Before providing any material support or resources to an individual or entity, the Cooperating Sponsor will verify that the individual or entity

(i) does not appear on the master list of Specially Designated Nationals and Blocked Persons, which list is maintained by the U.S. Treasury's Office of Foreign Assets Control (OFAC) and is available online at OFAC's website: <http://www.treas.gov/offices/cotffcofac/sdn/tllsdn.pdf>;

(ii) is not included in any supplementary information concerning prohibited individuals or entities that may be provided by Commodity Credit Corporation or the United States Department of Agriculture to the Cooperating Sponsor; and

(iii) has not been designated by the United Nations Security (UNSC) sanctions committee established under UNSC Resolution 1267 (1999) (the "1267 Committee") [individuals and entities linked to the Taliban, Usama bin Laden, or the Al Qaida Organization] by referring to the consolidated list available online at the Committee's website: <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

b. Before providing any material support or resources to an individual or entity, the Cooperating Sponsor will consider all information about that individual or entity of which it is aware and all public information that is reasonably available to it or of which it should be aware.

c. The Cooperating Sponsor will also implement reasonable monitoring and oversight procedures to safeguard against assistance being diverted to support terrorist activity.

III. References in this Financing Certification to the provision of material support and resources shall not be deemed to include the furnishing of funds or commodities to the ultimate beneficiaries of assistance, such as recipients of food, medical care, micro-enterprise loans, shelter, etc., unless the Cooperating Sponsor has reason to believe that one or more of these beneficiaries commits, attempts to commit, advocates, facilitates, or

participates in terrorist acts, or has committed, attempted to commit, facilitated or participated In terrorist acts.

IV. The Cooperating Sponsor's obligations under paragraph I are not applicable to the procurement of goods or services by the Cooperating Sponsor that are acquired in the ordinary course of business through contract or purchase, e.g., utilities, rents, office supplies, gasoline, etc., unless the Cooperating Sponsor has reason to believe that a vendor or supplier of such goods and services commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.

ANNEX 2C

Grantor: United States Agency for International Development

Recipient: United Nations System Body, Fund, Programme, or Specialized Agency

Geographic scope: general use clause

14. TERRORIST FINANCING CLAUSE (UN) (APR 2011) 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 the recipient are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism. It is the policy of [Grantor] to seek to ensure that none of its funds are used, directly or indirectly, to provide support to individuals or entities associated with terrorism. In accordance with this policy, the recipient undertakes to use reasonable efforts to ensure that none of the [Grantor's] funds provided under the award are used to provide support to individuals or entities associated with terrorism.

ANNEX 2D

Grantor: United States Agency for International Development

Recipient: NGO

Geographic scope: general use clause

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, as that term is defined in paragraph 3.

2. The following steps may enable the Recipient to comply with its obligations under paragraph 1:

a. Before providing any material support or resources to an individual or entity, the Recipient will verify that the individual or entity does not

(i) appear on the master list of Specially Designated Nationals and Blocked Persons, which list is maintained by the U.S. website: <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn/pdf> or

(ii) is not included in any supplementary information concerning prohibited individuals or entities that may be provided by USAID to the Recipient

b. Before providing any material support or resources to an individual or entity, the Recipient also will verify that the individual or entity has not been designated by the United Nations Security (UNSC) sanctions committee established under UNSC Resolution 1267 (1999) (the “1267 Committee”) [individuals and entities linked to the Taliban, Usama bin Laden, or the Al Qaida Organization]. To determine whether there has been a published designation of an individual or entity by the 1267 Committee, the Recipient should refer to the consolidated list available

online at the Committee's website:
<http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>.

c. Before providing any material support or resources to an individual or entity, the Recipient will consider all information about that individual or entity of which it is aware and all public information that is reasonably available to it or of which it should be aware.

d. The Recipient also will implement reasonable monitoring and oversight procedures to monitoring and oversight procedures to safeguard against assistance being diverted to support terrorist activity.

3. For purposes of this Certification

a. "Material support and resources" means 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, transportation, and other physical assets, except medicine or religious materials.

b. "Terrorist act" means-

i. An act prohibited pursuant to one of the 12 United Nations Conventions and Protocols related to terrorism (see UN terrorism conventions [Internet site: http://untreaty.un.org/Enligh/Terrorism.asp](http://untreaty.un.org/Enligh/Terrorism.asp)); or

ii. An act of premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents; or

iii. any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, it to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

c. "Entity" means a partnership, association, corporation, or other organization, group or subgroup.

d. References in this Certification to the provision of material support and resources shall not be deemed to include the furnishing of USAID funds or USAID-financed commodities to the ultimate beneficiaries of USAID assistance, such as recipients of food, medical care, micro-

enterprise loans, shelter, etc., unless the Recipient has reason to believe that one or more of these beneficiaries commits, attempts to commit, advocated, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist acts.

e. The Recipient's obligations under paragraph 1 are not applicable to the procurement of goods and/or services by the Recipient that are acquired in the ordinary course of business through contract or purchase, e.g., utilities, rents, office supplies, gasoline, etc., unless the Recipient has reason to believe that a vendor or supplier of such goods and services commits, attempts to commit, advocates, facilitates, or participates in terrorist acts, or has committed, attempted to commit, facilitated or participated in terrorist act.

This Certification is an express term and condition of any agreement issued as a result of this application, and any violation of it shall be grounds for unilateral termination of the agreement by USAID prior to the end of its term.

ANNEX 2E

Grantor: United States Agency for International Development

Recipient: NGO

Geographic scope: indeterminate

PREVENTING TERRORIST FINANCING (AUGUST 2013)

a. The recipient must not engage in transactions with, or provide resources or support to, individuals and organizations associated with terrorism including those individuals or entities that appear on the Specially Designated Nationals and Blocked Persons List maintained by the U.S. Treasury (online at: <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>) or the United Nations Security designation list (online at: http://www.un.org/sc/committees/1267/aq_sanctions_list.shtml).

b. This provision must be included in all subagreements, including subawards and contracts issued under this award.

ANNEX 2F

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

Recipient: NGO

Geographic scope: indeterminate

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.

ANNEX 2G

Grantor: United States Agency for International Development

Recipient: NGO

Geographic scope: Somalia

1.6 PROCUREMENT AND CONTRACTING

(a)(6)(B) Prohibited Sources

“Prohibited source” means countries to which assistance is prohibited by the annual appropriations acts of Congress or other statutes, or those subject to other executive branch restrictions, such as applicable sanctions administered by the U.S. Treasury Department’s Office of Foreign Assets Automated Directives System, ADS 310 (<http://transition.usaid.gov/policy/ads/300/310mac.pdf>). In no event may funds provided under this Agreement be used for the procurement of commodities and services (including restricted commodities described in paragraph [d] below, and transportation, engineering, and construction services described in paragraph [c] below) from prohibited sources, unless the Agreement Officer provides specific prior written approval to the contrary.

(...)

1.13 SPECIAL PROVISIONS

(...)

(e) U.S. Economic Sanctions

The U.S. Department of the Treasury’s Office of Foreign Assets Control (OFAC) administers economic sanctions prohibiting certain transactions involving the country in which the program supported by this Agreement will occur. However, OFAC has issued a license which will permit the Recipient to engage in certain transactions that would otherwise be prohibited. The Recipient shall comply with OFAC’s sanctions regulations and the limitations and requirements in the OFAC license which is set forth in Attachment 5 of this Agreement and made a part hereof, or, if applicable, the Recipient’s own OFAC license.

(...)

(j) Somalia Program Enhanced Due Diligence

1. The Grantee agrees that it and/or its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) will take all reasonable steps to minimize knowing and voluntary payments or any other benefits to al Shabaab, or to entities controlled by al Shabaab, or to individuals acting on behalf of al Shabaab (collectively, “excluded parties”). Such payments or other benefits would include:

(a) cash facilitation fees or other similar fees at roadblocks, ports, warehouses, airfields or other transit points to excluded parties;

(b) purchases or procurement of goods or services from excluded parties; and

(c) payments to al-Shabaab as the de facto municipal authority.

2. The Grantee and its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) agree to exercise enhanced due diligence when providing assistance to Somalia under this agreement to avoid such payments or benefits to excluded parties.

3. In the event that the Grantee or its implementing partners (including contractors, grantees, sub-contractors and sub-grantees) makes a payment or provides a benefit to excluded parties, the Grantee shall, in accordance with 22 CFR 226.51 (f) and within ten days after becoming aware of such payment or provision of benefit, notify the Agreement Officer in writing, with a copy to the AOR, of such payment or provision of benefit. This notification shall include the following information

(a) Factual description of each such event;

(b) Amount of funds expended or other benefit provided for each such event;

(c) Safeguards and procedures, including management and oversight systems, that were in place to help avoid the occurrence of such event; and

(d) Explanation of the reasons for each such payment or each such benefit provided, including whether it was made or provided knowingly, voluntarily, accidentally, unintentionally, incidentally, or forced.

ANNEX 3: CLAUSES FROM THE CANADIAN GOVERNMENT

ANNEX 3A

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

Recipient: NGO

Geographic scope: indeterminate

10.6 Anti-Terrorism

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 or <http://www.publicsafety.gc.ca/prg/ns/le/cle-eng.aspx>;

10.6.2 The Organization is responsible to consult the list in order to keep itself current of the listed terrorist groups during the period of the Agreement;

10.6.3 The Organization shall include a corresponding provision in any sub-contract or subagreement that the Organization enters into for the purposes of the Project.

10.7 International Sanctions

10.7.1 The Organization declares and guarantees that the funding for the purposes of the Project will not knowingly be used, either directly or indirectly, in dealing with countries or persons subject to economic sanctions. Details on existing sanctions can be found at: <http://www.international.gc.ca/sanctions/index.aspx?lang=eng&view=d>;

10.7.2 The Organization is responsible to consult the list in order to keep itself current of the listed countries/persons subject to economic sanctions during the period of the Agreement;

10.7.3 The Organization shall include a corresponding provision in any sub-contract or subagreement that the Organization enters into for the purposes of the Project.

ANNEX 3B

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

Geographic scope: Afghanistan

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.

8.3 [Grantee] agrees that the [Grantor's] funds will be used as described in Annex A. [Grantee] will also disburse the funds only to Implementing Partners listed in annex A. [Grantee] will make its best efforts to provide this list of Implementing Partners to [Grantor] before the signature of this Arrangement. If the list of implementing Partners is not available before signature of this Arrangement, [Grantee] will provide it as soon as the information is available.

8.4 Any change to the list of Implementing Partners will be submitted to [Grantor] 30 days before disbursing funds to the proposed new partner. In such instance, upon [Grantor's] request, [Grantor] and [Grantee] will consult to determine the appropriate course of action, if any.

ANNEX 3C

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

Geographic scope: general use clause

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 laws 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.

8.3 [Grantee] agrees that the Grant will be used as described in Annex A. [Grantee] will also disburse the funds only to implementing partners listed in annex A. [Grantee] will make its best efforts to provide this list of implementing partners to [Grantor] before the signature of this Arrangement. If the list of implementing partners is not available before signature of this Arrangement, [Grantee] will provide it as soon as the information is available.

8.4 Any change to the list of implementing partners will be submitted to [Grantor] thirty (30) days before disbursing funds to the proposed new implementing partner. In such instance, upon [Grantor's] request, [Grantor] and [Grantee] will consult to determine the appropriate course of action, if any.

8.5 [Grantee] will include in its funding agreements with implementing partners a clause requesting that the recipient uses all reasonable efforts to ensure that no funds provided under the agreement are used to benefit individuals or entities associated with terrorism.

ANNEX 3D

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

Geographic scope: general use clause

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. 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.

ANNEX 3E

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

Geographic scope: general use clause

Terrorist Financing

1. Consistent with numerous United Nations Security Council resolutions, including S/RES/1269 (1999), S/RES/1368 (2001), and S/RES/1373 (2001), both [Donor] and [Recipient] are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism.
2. [Recipient] will screen potential Implementing Partners to ensure it does not knowingly work with any party and entity appearing on the New Consolidated List established and maintained by the UN Security Council's 1267 Committee.
3. [Recipient] will also disburse the funds only to Implementing Partners listed in annex to this Grant Arrangement. [Recipient] will make its best efforts to provide this list of Implementing Partners to [Donor] before the signature of this Arrangement.
4. If the list referred to in Sub-paragraph 3 is not available before signature, [Recipient] will provide it as soon as the information is available. Any change to the list of Implementing Partners will be submitted to [Donor] as soon as the information is available. In such instance, upon [Donor's] request, [Donor] and [Recipient] will consult to determine the appropriate course of action, if any.
5. [Recipient] will include in any subsequent funding arrangements, agreements or contracts using [Donor's] funds a clause requiring further Implementing Partners not to use the funding provided hereunder to benefit terrorism.
6. In consultation with [Recipient], [Donor] may request participation as an observer in the [Recipient's] monitoring and evaluation of the Project/Program, in accordance with the [Recipient's] applicable guidelines and procedures.
7. In the event that an Implementing Partner is not included in the UN Security Council's 1267 list, however during the course of the implementation of the Project/Program, is deemed to conduct terrorism activities, [Donor] and [Recipient] will consult to determine the appropriate course of action.

ANNEX 3F

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

Geographic scope: general use clause

Anti-Terrorism

1. Consistent with numerous United Nations Security Council resolutions, including S/RES/1269 (1999), S/RES/1368 (2001), and S/RES/1373 (2001), both [Donor] and [Recipient] are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism.
2. [Recipient] will screen potential Implementing Partners to ensure it does not knowingly work with any party and entity appearing on the New Consolidated List established and maintained by the UN Security Council's 1267 Committee.
3. [Recipient] will also disburse the funds only to Implementing Partners listed in Annex A, it being understood that if the list of [Recipient] Implementing Partners for the Programme is not available before signature, [Recipient] will provide it as soon as the information is available. Any change to the list of Implementing Partners will be provided to [Donor] as soon as the information is available. If [Donor] has any concerns in relation to an Implementing Partner in connection with this Paragraph XV, [Donor] and [Recipient] will consult to determine the appropriate course of action, if any.
4. [Recipient] will include in any subsequent funding arrangements, agreements or contracts using the Grant funds a clause requiring further Implementing Partners not to use that funding provided hereunder to benefit terrorism.
5. The Signatories will continue to discuss the list of [Recipient] Implementing Partners for the Programme throughout the term of this Arrangement.

ANNEX 3G

Grantor: Canadian Department of Foreign Affairs, Trade and Development

Recipient: NGO

Geographic scope: West Bank and Gaza

Compliance with this Agreement and Laws. Funding under this Agreement is subject to the [Grantee's] compliance with the terms of this Agreement, any Additional Donor Requirements, and all applicable national and international laws and regulations. The [Grantee] certifies that it has not knowingly provided and will not knowingly provide, in violation of applicable laws, material support or resources to any individual or organization that advocates, plans, sponsors, engages in, or has engaged in an act of violence against applicable national laws, international laws and UN resolutions.

ANNEX 3H

Grantor: Canadian Department of Foreign Affairs, Trade and Development

Recipient: NGO

Geographic scope: West Bank and Gaza

13 Anti-Terrorism

13.1 The organization, its directors and officers hereby represent that, in fulfilling their obligations pursuant to this Grant Agreement, they shall conduct themselves and act in a manner consistent with Canada's Anti-Terrorism Act (S.C. 2001, c.41), Canada's Building Resilience Against Terrorism counter-terrorism strategy, and in particular shall implement the anti-terrorist measures listed in Annex A of this Grant Agreement.

13.2 If applicable, the Organization shall include a corresponding provision in any sub-agreements that the Organization enters into with entities to which the Organization makes available the grant funding for the purposes of the Project.

ANNEX 4: CLAUSES FROM AUSTRALIAN GOVERNMENT

ANNEX 4A

Grantor: Australian Agency for International Development (now part of the Australian Department of Foreign Affairs and Trade (DFAT))

Recipient: United Nations System Body, Fund, Programme, or Specialized Agency

Geographic scope: general use clause

Consistent with UN Security Council Resolutions relating to terrorism, including UNSC Resolution 1373 (2001) and 1267 (1999) and related resolutions, both the donor and the recipient are firmly committed to the international fight against terrorism, and in particular, against the financing of terrorism. It is the policy of the donor to seek to ensure that none of its funds are used, directly or indirectly, to provide support to individuals or entities associated with terrorism. In accordance with this policy, the recipient undertakes to use all reasonable efforts to ensure that none of the donor funds provided under this grant agreement are used to provide support to individuals or entities associated with terrorism [sic] if, during the course of this Agreement, the recipient discovers a link with any organization or individual associated with terrorism it must inform the donor immediately.

ANNEX 4B

Grantor: Australian Agency for International Development (now part of the Australian Department of Foreign Affairs and Trade (DFAT))

Recipient: NGO

Geographic scope: general use clause

The Contractor must in carrying out its obligations under this Contract comply with those laws in relation to organizations and individuals associated with terrorism, including 'terrorist organizations' as defined in Division 102 of the Criminal Code Act 1995 (Cth) and listed in regulations made under that Act and regulations made under the Charter of the Act 1945 (Cth). The Contractor must ensure that funds provided under this Contract do not provide direct or indirect support or resources to organizations and individuals associated with terrorism. If, during the course of this Contract, the Contractor discovers any link whatsoever with any organization or individual associated with terrorism it must inform [the grantor] immediately.

ANNEX 5: CLAUSES FROM THE UNITED KINGDOM GOVERNMENT

ANNEX 5A

Grantor: United Kingdom, Department of International Development

Recipient: NGO

Geographic scope: general use clause

12 - Information on Employees/Sub-contractors

12(1) the grantee shall provide to the Authority (the FCO) upon request and to the extent permitted by the Data Protection Act 1998 any and all information regarding each of its employees and sub-contractors (including confidential personnel information) as the Authority may require in order to carry out any checks which the Authority (in its absolute discretion) deems necessary.

ANNEX 5B

Grantor: United Kingdom, Department for International Development

Recipient: NGO

Geographic scope: indeterminate

4.5. If at any stage the [Grantee] should become aware of, or suspect, any misappropriation or diversion of funds or possible fraud or corruption relating to the project/programme activities funded by the [Grantor's] grant, the [Grantee] must report the matter immediately to [the Grantor]. (...)

19. [Grantor] may commission independent due diligence assessments of [Grantee's] capacity and procedural appropriateness to implement and effectively manage the grant.

ANNEX 5C

Grantor: United Kingdom, Department for International Development

Recipient: NGO

Geographic scope: general use clause

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.

ANNEX 6: CLAUSES FROM NON-GOVERNMENTAL ORGANIZATIONS

ANNEX 6A

Grantor: NGO

Recipient: NGO

Geographic scope: Syria

1.1.1. Terrorism, Sanctions and Export Controls.

1.1.1.1. [SUB] is reminded that (i) [NGO] is a U.S. organization, (ii) the Funds under this Agreement are from [NON-US DONOR GOVERNMENT] and (iii) the U.S. and the E.U. currently impose a high degree of control over transactions with Syria generally because of civil war there. More particularly, the U.S. and E.U. prohibit organizations and their implementing partners from donating, contributing or otherwise providing funds, goods or services to the Syrian Government and terrorist groups like the Al-Nusrah Front or other persons identified on the U.S. Office of Foreign Assets Control's ("OFAC") Specially Designated Nationals and Blocked Persons List (the "SDN List") found at <http://sdnsearch.ofac.treas.gov/default.aspx>. As such, pursuant to U.S. and E.U. executive orders, laws and regulations, including but not limited to the U.S. Syrian Sanctions Regulations, the E.U. Syrian Sanctions Regulations, the U.S. Export Administration Regulations and the E.U. Export Regulations (collectively, the "Sanctions Laws"), [NGO] and [SUB] must not expend Funds in violation of these Sanctions Laws.

1.1.1.2. [SUB] as an implementing partner of [NGO] hereby certifies and covenants that [SUB] and its implementing partners, including its contractors, grantees, sub-contractors and sub-grantees (collectively, the "Implementing Partners"), have not made and will not (a) make any payments or conveyance of any other benefits to any person or organization on the SDN List or similar lists kept by the U.K. Treasury Department or any person or organization that is directly or indirectly owned 50% or more by any person or organization on such lists (collectively, the "Prohibited Parties") or (b) export into Syria any items controlled by the U.S. or the E.U. pursuant to the Sanctions Laws.

1.1.1.3. For purposes of compliance with the Sanctions Laws regarding export controls, [NGO] will procure all technology required under this Agreement on behalf of [SUB], including but not limited to computers, software, GPS units, cell phones and satellite phones (collectively, the "Controlled Items") and export such Controlled Items to [SUB] in Syria pursuant to applicable licenses issued to [NGO] by the U.S. Department of Commerce. Note that the Budget does not list Controlled Items as allowable

expenses. As such, [SUB] is hereby prohibited from procuring such Controlled Items with the Funds inside or outside of Syria and must specifically request [NGO] in writing to procure such Controlled Items to be considered an allowable cost.

1.1.1.4. In the event that [SUB] or any of its Implementing Partners make payments or convey any other benefits to a Prohibited Party or export controlled items into Syria, immediately after becoming aware of such transfer, conveyance or export, [SUB] shall immediately notify [NGO] in writing of such event with the following information: (i) description of the event; (ii) amount transferred during such event; (iii) safeguards and procedures (including management and oversight systems) in place to help avoid the re-occurrence of such event; and (iv) an explanation of the reasons for such transfer, including whether it was made or provided knowingly, voluntarily, accidentally, unintentionally, incidentally or by force.

ANNEX 6B

Grantor: NGO

Recipient: NGO

Geographic scope: general use clause

Grantee is and will be in compliance with, and will cause its sub-grantees, sub-contractors, affiliates and agents to comply with, United States economic sanctions, import/export Regulations, anti-bribery Regulations, anti-terrorism Regulations and anti-money laundering Regulations, including but not limited to the USA PATRIOT Act, the Regulations administered by the United States Treasury Department's Office of Foreign Assets Control and Executive Order 13224.

ANNEX 6C

Grantor: NGO

Recipient: NGO

Geographic scope: general use clause

Partner recognizes that governments and intergovernmental organizations have an internationally recognized right and obligation to defend populations from terrorist attack, and that they undertake various legal measures to ensure that funds and resources do not directly or indirectly benefit groups and individuals listed pursuant to various sanctions regimes.

Partner shall at all times act in accordance with humanitarian principles as enshrined in international humanitarian law and other relevant international instruments. These principles include but are not limited to humanity, neutrality, independence and impartiality. In accordance with these principles, [Grantee] shall take reasonable measures in the prevailing circumstances to ensure that all funds, goods and resources are utilized for the benefit of the needy based on these principles.

(...)

The Partner undertakes to comply with all applicable laws (including any applicable anti-terrorism laws) and to maintain ethical business practices. Also, and more specifically the Partner will take reasonable measures to prevent any transactions with or diversion of goods and services to individuals and entities designated by the United Nations Security Council's Sanctions Committee (UNSCSC), the United States Government, the United Kingdom Government, the [government of the partner] and the European Community (such designated individuals and entities as amended from time to time under the "Consolidated List.")

ANNEX 7: CLAUSES FROM PRIVATE AND CORPORATE FOUNDATIONS

ANNEX 7A

Grantor: Foundation

Recipient: NGO

Geographic scope: general use clause

Anti-Terrorism. You hereby confirm that [Grantee] complies with all U.S. anti-terrorism laws and regulations, including Executive Order 13224 and the Global Terrorism Sanctions Regulations set forth in 31 CFR Part 594.

ANNEX 7B

Grantor: Foundation

Recipient: NGO

Geographic scope: general use clause

Prohibited Uses of Grant Funds:

You are prohibited from using grant funds for the activities listed below:

(...)

(b) Anti-Terrorism: You confirm that [Awardee] is familiar with all U.S. anti-terrorism laws and regulations, including U.S. Executive Orders, prohibiting the provision of resources and support to individuals and organizations associated with terrorism and all the terrorist related lists promulgated by the U.S. Government. You will use reasonable efforts to ensure that you do not support or promote terrorist activity or related training, or money laundering.

(c) Subcontracting: Grant funds are intended to support [Awardees'] implementation of the Project. You have the exclusive right to select sub grantees and subcontractors for the Project. You are responsible for ensuring that all sub grantees and subcontractors use the grant funds consistent with this Grant Agreement and the Proposal.

ANNEX 7C

Grantor: Foundation

Recipient: NGO

Geographic scope: general use clause

6. Prohibited Uses. Grantees will not use any portion of the Grant Funds: (...) c. To support or conduct, directly or indirectly, violence or terrorist activity of any kind.

(...)

9. Export Control. Grantee agrees to comply with all applicable export control laws and regulations and trade sanctions programs.

ANNEX 7D

Grantor: Foundation

Recipient: NGO

Geographic scope: indeterminate

Anti-Terrorism

You confirm that you are familiar with the U.S. Executive Orders and laws prohibiting provision of resources and support to individuals and organizations associated with terrorism and the terrorist related lists promulgated by the U.S. Government. You will use reasonable efforts to ensure that you do not support or promote terrorist activity or related training, or money laundering.

ANNEX 7E

Grantor: Foundation

Recipient: NGO

Geographic scope: general use clause

21.1 Prohibited Parties and Transactions. [Grantor] is funded by a United States non-profit foundation with a policy requiring it to comply with all applicable laws, including economic sanctions and trade restrictions imposed by the United States government. [Grantor] has undertaken to provide its US donor with any information relevant to its potential involvement with any party that may be the target of such sanctions and restrictions. Accordingly, Contractor shall provide [Grantor] with ninety days' advance notice of the names and addresses of any member of a Contractor Group which may be any of the following:

(A) The target of, or owned or subject to control by any country, institution, organization, entity or Person that is the target of, economic sanctions and trade restrictions imposed by the United States government.

(B) Debarred or otherwise excluded or declared ineligible to participate in U.S. government contracts or contracts, grants or other programs financed in whole or in part by the U.S. government.

(C) Listed by the U.S. Departments of Commerce or State as an entity with which U.S. Persons may not engage in export or re-export related transactions.

(D) As used herein, the term "Contractor Group" means Contractor, Contractor's affiliates, subcontractors and directors, officers, employees and other personnel of all of them, and any person acting on behalf of any of them in connection with any subject matter of the Contract, including employment benefits (including salary, wages and insurance); medical attention; immigration requirements; food; lodging and transportation, and life saving personal protective equipment.

ANNEX 7F

Grantor: Foundation

Recipient: NGO

Geographic scope: indeterminate

8. Grant Restrictions. (...)

Grantee certifies that it has not provided and will not provide support or resources to any individual or entity that advocates, plans, sponsors, engages in, or has engaged in terrorist activity; or to anyone who acts as an agent for such an individual or entity. Support or resources include currency or other financial instruments, financial services, lodging, training, safe houses, false documentation or identification, communication equipment, facilities, weapons, lethal substances, explosives, personnel, transportation, and any other services or physical assets. Any violation of this certification is grounds for immediate termination of this Agreement and return to the Grantor of all funds advanced to Grantee under it.

ANNEX 7G

Grantor: Foundation

Recipient: NGO

Geographic scope: indeterminate

G. SPECIAL PROVISIONS

1. Compliance with U.S. Executive Orders and U.S. Law

[Grantee] is reminded that U.S. Executive Orders and U.S. law prohibit transactions with, and the provision of resources and support to, individuals and organizations associated with terrorism. It is the legal responsibility of the Recipient to ensure compliance with these Executive Orders and laws. One of the applicable Executive Orders is Executive Order 13224. The text of the E.O. is provided in Attachment 5; a list of the names of individuals and entities designated there under can be found at the web site of the Office of Foreign Assets Control (OFAC) within the Department of Treasury - <http://treasury.gov/offices/enforcement/lofac/sanctions/terrorism.html> This list is updated periodically, therefore, you are required to obtain and review the updated list at the time of procurement of goods or services.

ANNEX 7H

Grantor: Foundation

Recipient: NGO

Geographic scope: general use clause

I certify that [Grantee] is in compliance with all statutes, executive orders, and regulations restricting or prohibiting U.S. persons from engaging in transactions and dealings with countries, entities, or individuals subject to economic sanctions administered by the U.S. Department of the Treasury's Office of Foreign Assets Control. [Grantee] is aware that a list of countries subject to such sanctions, a list of Specially Designated Nationals and Blocked Persons subject to such sanctions, and overviews and guidelines for each such sanction program can be found at <http://www.treasury.gov/resource-center/sanctions/Pages/default.aspx>. If [Grantee] becomes noncompliant at any time subsequent to completing this certification, it will notify the [Grantor] immediately.

ANNEX 71

Grantor: Foundation

Recipient: NGO

Geographic scope: general use clause

11. Anti-Terrorism and Prohibited Activities

11.1 The Recipient covenants and agrees that it will not use any portion of the Grant to engage in, support or promote violence, terrorist activity or related training or radicalism of any kind whether directly through its own activities and programs or indirectly through its support of, or cooperation with, other persons and organisations engaged in such activities, and will take all precautions and institute all procedures necessary to prevent any portion of the Grant from being so used.

11.2 The recipient represents and warrants that:

(a) it does not support violence, terrorist activities, radicalism or appear on lists of individuals or organisations identified by the United Nations or European Union as associated with terrorism;

(b) none of its directors, officers any other key staff members support violence or terrorist activities and it does not employ any other individuals that support violence or terrorist activities;

(c) none of its affiliates or subsidiaries support violence, terrorism or radicalism, it does not engage in transactions of any kind with vendors, contracting organisations or any other entities to support violence or terrorist activities, and it does not otherwise disburse any of its funds as grants or in any other form to individuals or entities to support violence or terrorist activities; and

(d) it has reviewed the lists of individuals or organisations identified by the United Nations or the European Union as associated with terrorism and (i) none of its directors, officers, other key staff members or employees appears on those lists; and (ii) none of its affiliates or subsidiaries, vendors, other contracting organisations, grantees or other entities with which it has directly or indirectly been involved appear on those lists.

ABOUT

The Project on Counterterrorism and Humanitarian Engagement (CHE Project) is based at 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 perspectives and approaches.

The Counterterrorism and Humanitarian Engagement Project receives generous support from the Swiss Federal Department of Foreign Affairs.

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