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COUNTERTERROR STUDIES REVEAL GROWING CONCERN FOR HUMANITARIAN ORGANIZATIONS

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A. INTRODUCTION

The Harvard Law School/Brookings Project on Law and Security published two research and policy papers on counterterrorism in May 2014. The papers are entitled *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts* (the "Counterterrorism Clause Study") and *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations* (the "Anti-Diversion Study"), and explore the increase in anti-terrorist financing procedures for both grantees and grantors as a result of donor concern with legal and regulatory compliance. This *Anti-Terrorism and Charity Law Alert* provides a summary of the findings in both studies.

B. THE COUNTERTERRORISM CLAUSE STUDY

The Counterterrorism Clause Study[1] discusses counterterrorism-related clauses imposed by donor organizations, including the United Nations, governments and private donors, in humanitarian grant and partnership agreement contracts in order to ensure that donor organizations' funds are not used to finance terrorism. The Study notes that this proliferation of counterterrorism clauses has caused confusion and, in certain circumstances, become an obstacle to effectively implementing principled humanitarian action

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[1] Available online at: <http://blogs.law.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Counterterrorism-related_Humanitarian_Grant_Clauses_May_2014.pdf>.

strategies. As such, the Counterterrorism Clause Study examines legal, policy, and operational trends associated with such counterterrorism clauses.

Organizations that breach counterterrorism clauses may be subject to typical contract remedies, including damages and specific performance. However, the penalties associated with non-compliance with counterterrorism-related criminal, civil and administrative laws are more severe, and can range from fines to imprisonment. In this regard, humanitarian organizations effectively have counterterrorism obligations to fulfill irrespective of whether they are contained in donor organization-imposed counterterrorist clauses. As such, humanitarian organizations do not typically treat counterterror as a standalone issue when designing their programs and implementing practices, but consider it in conjunction with similar issues, such as anti-bribery, anti-corruption, and anti-money laundering.

Most of the counterterrorism measures examined in the Counterterrorism Clause Study were drawn from a template that donor organizations used for multiple grantees. Four general categories of sources for counterterrorism clauses were identified: (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. Regarding those clauses derived from a particular state's domestic laws and regulations, the Counterterrorism Clause Study found that clauses tended to incorporate American, Canadian, Australian, and UK counterterrorism legislation.

Of particular note was the extent to which many counterterrorism clauses could be interpreted as adopting, rejecting or supplanting a particular political framing of counterterrorism and broader security norms. For example, the Counterterrorism Clause Study examined nine different agreements with clauses that stated that both the grantor and recipient are "*firmly committed to the international fight against terrorism…*". Many contracts also required the humanitarian organizations to ensure that any contracts entered into with partners to implement the grant include the same counterterrorism clauses. These flow-down requirements were found to be particularly problematic, as many implementing partners did not have the technical or financial capacity to implement the required counterterrorism measures. Additionally, humanitarian organizations largely considered the flow-down requirements to be "immoral", arguing that donor organizations, whose public policy objective is to provide aid, impose overly onerous or impracticable counterterrorism measures

that may endanger local implementing partners. They further felt that, as donor organizations' risk tolerance decreased, donor organizations were attempting to transfer risk onto humanitarian organizations.

The Counterterrorism Clause Study found that the templates used by donor organizations left little room for humanitarian organizations to modify the terms, and donor organizations were often reluctant to renegotiate or modify the terms. In this regard, humanitarian organizations that had strong reputations and that framed their programming in terms of pursuing principled humanitarian action, rather than in terms of counterterrorism or security, tended to be the organizations that had the strongest negotiating power with donor organizations.

Humanitarian organizations reported that their operations were adversely affected, at least in part, due to counterterrorism clauses. Most commonly, humanitarian operations were affected as a result of organizations deciding not to engage in relief activities in terrorist-controlled territory. Humanitarian operations were also significantly affected by organizations' decisions not to seek funds from certain donor organizations where doing so would impose a high compliance burden or compromise the neutrality of the organization. For example, taking funds from a donor organization who is a party to a conflict could lead stakeholders to perceive that the organization is taking a side in the conflict.

The Counterterrorism Clause Study concludes by examining four "potential inflection points". The first point questions whether industry-wide standards should be identified and developed with the assistance of either donor organizations with restrictive counterterrorism approaches (*e.g.* as in the U.S., Canada, Australia and U.K.) or donor organizations who have not imposed counterterrorism measures (*e.g.* as in the Netherlands, Norway, Sweden and Switzerland). The second point asks whether to seek clarity or constructive ambiguity when drafting counterterrorism clauses. The third point asks whether or not to identify and enforce red-lines (*e.g.* refusal to screen ultimate beneficiaries). The final point asks whether organizations' headquarters should be given more power to implement and manage projects in the field through a headquarters-based approach.

C. THE ANTI-DIVERSION STUDY

Similar to the findings in the Counterterrorism Clause Study, the Anti-Diversion Study[2] found that governments and private donors are using grants and partnership agreements to increasingly impose anti-diversion obligations on humanitarian organizations. Anti-diversion obligations encompass "measures involved in the formulation and implementation of policies aimed at ensuring to the extent feasible in the prevailing circumstances that humanitarian aid and assistance reach intended beneficiaries." The Anti-Diversion Study identified three interrelated fields of anti-diversion, including anti-bribery and anti-corruption; anti-fraud and anti-money laundering (AML); and anti-terrorism financing (ATF) obligations.

Although many humanitarian organizations already have internal policies that cover these obligations, the Anti-Diversion Study stated that the "anti-diversion" framing, along with the fact that some donor organizations are now imposing different and often heightened standards, raises challenges and concerns for humanitarian organizations. In this regard, the Anti-Diversion Study examines and analyses key aspects of anti-diversion policies and practices.

All humanitarian organizations studied by the Anti-Diversion Study had implemented an anti-fraud and AML policies, and a large majority indicate that these policies long preceded their anti-bribery/corruption and ATF programs. All organizations also indicated that they had increased resources dedicated to fighting fraud and money laundering in recent years. Most organizations also indicated that they had stronger concerns over other forms of diversion than over ATF. Further to this, they believed that, in the last five to ten years, donor organizations' anti-diversion requirements have been focused disproportionately on ATF.

As a result of the increasing complexity of relevant laws and regulations, many organizations have been faced with significant administrative burdens. Particularly, one concern voiced by almost all humanitarian organizations that were studied was that, while their overhead contributions remained flat or decreased, donor organizations were demanding more due diligence, reporting and risk mitigation. Alongside this, humanitarians faced increased scrutiny by external authorities and from the media in relation to the anti-diversion fields. As a result, the Anti-Diversion Study reported a large increase in humanitarian organizations using fee-based list-checking commercial software in order to comply with anti-diversion

[2] Available online at: <http://blogs.law.harvard.edu/cheproject/files/2013/10/CHE_Project_-_Anti-Diversion_Policies_of_Humanitarian_Organizations_May_2014.pdf>

policies. Many organizations also had multiple full-time staff members whose jobs were dedicated solely to anti-diversion, and the requirement to screen staff, partners, and, sometimes, ultimate beneficiaries against the numerous lists of designated entities was a largely time-consuming and burdensome task. Further, most of the studied organizations implemented both internal and external auditing systems.

Humanitarian organizations also faced similar challenges to those outlined in the Counterterrorism Clause Study. Namely, humanitarian organizations faced the same flow-down requirements, and were required by their partnership agreement contracts with donor organizations to ensure that their partners and "subs" complied with the same anti-diversion obligations. The humanitarian organizations expressed concern about a lack of clarity from donor organizations as to what constituted a "sub". Additionally, many donor organizations attempted to impose standards drawn from commercial sectors. As such, many anti-diversion policies were not framed specifically in terms of humanitarian principles, but rather in terms of complying with best business practices. This showed a lack of consideration of the important distinctions between humanitarian organizations and commercial entities. For example, humanitarian organizations differ from commercial entities, as they must be able to interact with armed actors, and sometimes even designated terrorists, in order to gain access to deliver humanitarian assistance.

D. CONCLUSION

Both the Counterterrorism Clause Study and the Anti-Diversion Study examine issues that are indicative of an environment that has become increasingly focused on anti-diversion and counterterrorism. As a result of increasing scrutiny, there has been a trend of donor organizations passing on risk and increasing compliance burdens for humanitarian organizations. This has led to increased costs and a shift in focus of resources for many organizations. Both studies will be of interest to humanitarian organizations, regardless of whether they are already facing these issues or may face them in the future.