

Counterterrorism and Humanitarian Engagement: Current Issues

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Presentation to Voice

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Outline

- Countervailing Trajectories
- Legal Frameworks
 - Countervailing trajectories
 - How has the UNSC Dealt with Counterterrorism?
 - Looking at the US CT System
 - Key elements of the EU Framework
- Current and Potential Responses

Counterterrorism Concerns

“‘Material support’ is a valuable resource by definition. Such support frees up other resources within the [terrorist] organization that may be put to violent ends. It also importantly helps lend legitimacy to foreign terrorist groups—legitimacy that makes it easier for those groups to persist, to recruit members, and to raise funds—all of which facilitate more terrorist attacks.”

—Chief Justice Roberts, writing on behalf of the majority, U.S. Supreme Court, *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010)

“Charities were a source of money and also provided significant cover, which enabled [al-Qaeda] operatives to travel undetected under the guise of working for a humanitarian organization.”

—9/11 Commission Report, p. 171

Two Countervailing Trajectories

1. International legal and policy frameworks and norms, as well as domestic policies, recognizing and promoting the importance of and engagement with non-state entities in terms of ensuring and facilitating humanitarian access and assistance
2. International and domestic laws (both criminal and civil), as well as administrative regulations and policies, restricting (and in some cases criminalizing) engagement with certain “terrorist” groups

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International Law and Policy

Supporting Engagement/Access

- Obtaining humanitarian access
- Coordinating and delivering humanitarian assistance
- Caring for the wounded and sick in the field
- Promoting and disseminating IHL norms

Legal and Policy Developments promoting Humanitarian Engagement

- UN Security Council Resolutions
 - E.g., 1612 (2005) and its Monitoring and Reporting Mechanism
- UN General Assembly Resolutions
 - E.g., A/RES/46/182
- UN Secretary-General Reports
 - E.g., Protection of Civilians
- Human Rights Treaties
 - E.g., ICESCR, CRC, Kampala Convention

Parallel Policy and Regulatory Developments

- **UN Counterterrorism and Arms Embargo Regimes**
 - 1267 (1999) *et seq.*; 1373 (2001) *et seq.*; 1916 (2010) *et seq.*; Due diligence
- **Domestic and regional counterterrorism criminal and civil laws and regulations**
 - U.S.: *Holder*, 2339A/B, EO 13,224 (OFAC), etc.
 - EU, UK, Australia, Canada, etc.

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U.S. Counterterrorism Regime

- Criminalization of material support or resources
- International Emergency Economic Powers Act (IEEPA) and Executive Order 13224 (OFAC)
- Administrative Regulations (e.g., USAID's Anti-Terrorism Certification and Partner Vetting System)
- Terror Exclusion Lists (Immigration and Removal)

U.S. Counterterrorism Regime

- **Prohibition of Material Support to Foreign Terrorist Organizations (FTOs)**

18 U.S.C. § 2339(B)

(a) Prohibited Activities.—

(1) Unlawful conduct.— Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life. To violate this paragraph, a person must have knowledge that the organization is a designated terrorist organization (as defined in subsection (g)(6)), that the organization has engaged or engages in terrorist activity (...), or that the organization has engaged or engages in terrorism (...).

Defining “material support”

Definition of “material support or resources”

18 U.S.C. § 2339(A)

(b) **Definitions.**— As used in this section—

(1) the term “material support or resources” means any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials;

(2) the term “training” means instruction or teaching designed to impart a specific skill, as opposed to general knowledge; and

(3) the term “expert advice or assistance” means advice or assistance derived from scientific, technical or other specialized knowledge.

Material Support: Extraterritoriality

18 U.S.C. § 2339(B)

(d) Extraterritorial Jurisdiction.—

(1) In general.— There is jurisdiction over an offense under subsection (a) if—

(A) an offender is a national of the United States (...) or an alien lawfully admitted for permanent residence in the United States (...);

(B) an offender is a stateless person whose habitual residence is in the United States;

(C) after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States;

(D) the offense occurs in whole or in part within the United States;

(E) the offense occurs in or affects interstate or foreign commerce; or

(F) an offender aids or abets any person over whom jurisdiction exists under this paragraph in committing an offense under subsection (a) or conspires with any person over whom jurisdiction exists under this paragraph to commit an offense under subsection (a).

(2) Extraterritorial jurisdiction.— There is extraterritorial Federal jurisdiction over an offense under this section.

Partner Vetting

- USAID PVS and State Department RAM:
 - Requires all recipients to certify that funds do not assist terrorist activity
 - Requires recipients to obtain information about certain partners
 - “Key Personnel”
 - Personal information into classified security database
 - Antecedents: Gaza/West Bank and Afghanistan
 - Pilot phase
 - Proposed rollout: Guatemala, Kenya, Lebanon, the Philippines, and Ukraine
 - Concerns



USAID | WEST BANK/GAZA

FROM THE AMERICAN PEOPLE

AMENDED AND RESTATED MISSION ORDER NO. 21

Subject: Anti-Terrorism Procedures

References: Executive Order 13224 (September 24, 2001)
Section 559 of the FY 06 Foreign Operations Appropriations Act
Section 3 of P.L. 109-446
18 U.S.C. §§ 2339A and 2339B
AAPD 04-14 (September 24, 2004)
AAPD 02-04 (March 20, 2002)

Effective Date: October 3, 2007

I. PURPOSE

The purpose of this Mission Order is to describe and update procedures to ensure that the Mission's assistance program does not inadvertently provide support to entities or individuals associated with terrorism.

II. LEGAL AUTHORITIES

On September 24, 2001, shortly after the terrorist attacks of September 11th, President Bush issued Executive Order 13224, which blocks property and interests in property of individuals and entities that are designated as committing or posing a significant risk of committing terrorist acts. The Order prohibits all transactions and dealings in blocked property or interests in the U.S. or by U.S. persons. It also prohibits transactions with, and provision of support for, individuals or entities designated in or subject to the Order.

Initially, 28 individuals and entities were designated under E.O. 13224. The Order authorized the Secretary of State to make additional designations. It also authorized the Secretary of 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 that has been designated in or under the Order.

E.O. 13224 is just one of several statutes, regulations and Executive Orders pertaining to terrorism. Others include Sections 2339A and 2339B of Title 18 of the U.S. Code, which prohibit the provision of material support or resources for terrorist acts or to designated foreign terrorist organizations, and Executive Orders 12947 (January 23, 1995) and 13099 (August 20, 1998), which prohibit transactions with terrorists who threaten to disrupt the Middle East peace process.

Hundreds of individuals and entities have been designated under these and other statutes, regulations and Executive Orders. A complete list of designated parties can be found online at <http://www.treas.gov/offices/eotffc/ofac/sdn/t11sdn.pdf>. The list includes several Palestinian

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**MISSION ORDER
USAID MISSION FOR AFGHANISTAN**

ADS Series 200 Programming Policy	Mission Order 201.05	Supplements Mission Order 201.03	Responsible Office RLA
References: Executive Order 13224 Title 18 US Code 2339A and 2339B Mission Order 201.03		Subject: National Security Screening (Non-U.S. Party Vetting)	Effective Date: On the date signed below

I. PURPOSE

The purpose of this Mission Order is to describe procedures intended to minimize the risk that the Mission's programs do not provide, even inadvertently, support to Prohibited Parties (as defined herein). This Mission Order supplements Mission Order 201.03 (Terrorist Finance Risk Assessment, dated October 2009) and replaces Mission Order 201.04 in its entirety.

II. DEFINITIONS

As used in this Mission Order, including the Appendices:

"Award" means any contract, grant, guarantee, cooperative agreement, or any other instrument that acts as any of the same awarded by USAID. Unless the context otherwise requires, an Award includes Sub-awards, as defined below.

"Awardee" means any individual or organization that receives an Award. Unless the context otherwise requires, an Awardee includes Sub-awardees, as defined below.

"CO" or "AO" means the Contract or the Agreement Officer, as applicable.

"Information Form" means the form attached as Appendix B that initiates a vetting request.

"Key Individuals" means the individuals defined in Appendix A.3 below. The definition of Key Individuals is not the same as "key personnel" under a contract, grant or cooperative agreement.

"Non-U.S." means (a) for natural persons, any individual who is not (1) a U.S. citizen or (2) a permanent legal resident of the United States; and (b) for organizations, any entity that is more than 50% owned in equity stake (or equivalent thereof) by one or more non-U.S. individual(s) or non-U.S. organization(s).

"Parastatal" means any organization funded or owned by the state but otherwise functions as a private sector enterprise. For the purposes of this Mission Order, Parastatals include, but are not

**USAID Information Form Continuation Sheet for Part I, Section 6: List of Individuals
(Use additional continuation sheets as necessary):**

B. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth** village/town/city: state/county/province: country:	Date of birth** (Example: 3 May, 1979)	Title in organization (Example: President/Vice President/CFO):
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:**
Current employer and job title:		Occupation:
Address of residence** village/town/city: state/county/province: country:		Citizenship(s):** (Afghans: Tribal Affiliations, Father's Name and Grandfather's Name)
Email: Phone:		Is the individual a U.S. citizen or legal permanent resident?*" Yes <input type="checkbox"/> No <input type="checkbox"/>
C. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth** village/town/city: state/county/province: country:	Date of birth** (Example: 3 May, 1979)	Title in organization (Example: President/Vice President/CFO):
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:**
Current employer and job title:		Occupation:
Address of residence** village/town/city: state/county/province: country:		Citizenship(s):** (Afghans: Tribal Affiliations, Father's Name and Grandfather's Name)
Email: Phone:		Is the individual a U.S. citizen or legal permanent resident?*" Yes <input type="checkbox"/> No <input type="checkbox"/>
D. Name (As in passport or other government-issued photo ID):**		Government-issued photo ID number, type of ID and country of issuance:**
Place of birth** village/town/city: state/county/province: country:	Date of birth** (Example: 3 May, 1979)	Title in organization (Example: President/Vice President/CFO):
Other names used (may include nicknames, pseudonyms not listed under "Name"):**		Gender:**
Current employer and job title:		Occupation:
Address of residence** village/town/city: state/county/province: country:		Citizenship(s):** (Afghans: Tribal Affiliations, Father's Name and Grandfather's Name)
Email: Phone:		Is the individual a U.S. citizen or legal permanent resident?*" Yes <input type="checkbox"/> No <input type="checkbox"/>

Program Name:	Agency	Date Implemented	Type	Situation	Entities and Organizations that Require Vetting				
					U.S. Citizens	Sub-Recipients	PIOs	Vendors	Beneficiaries
<i>Partner Vetting Program (PVS)</i>	USAID	Ongoing	Pilot	Guatemala, Kenya, Lebanon, Philippines, and Ukraine	Yes	In many circumstances	No Explicit Exception	In certain circumstances	In certain circumstances
<i>Risk Analysis and Management (RAM)</i>	U.S. State Department	Ongoing	Pilot	Guatemala, Kenya, Lebanon, Philippines, and Ukraine	Yes	In many circumstances	Unknown	Unknown	Unknown
<i>Mission Order 21</i>	USAID's West Bank/Gaza Mission	2003	Permanent	West Bank/Gaza	No	1st-tier subcontracts in excess of \$25,000 and all subgrantees	No	In certain circumstances	In certain circumstances
<i>Mission Order 201.5</i>	USAID's Afghanistan Mission	2011	Permanent	Afghanistan	No	All awards in excess of \$25,000	No	In many circumstances	In certain circumstances
<i>State Department Vetting in Afghanistan</i>	U.S. State Department in Afghanistan	2012	Permanent	Afghanistan	No	Unknown	Unknown	Unknown	Unknown

US Partner Vetting: EU Data Protection and Privacy Concerns

- EU laws raise concerns regarding:
 - Data processing required for the PVS and RAM programs
 - Transfer of personal data obtained for purposes of the PVS and RAM programs out of the European Economic Area

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EU Council Framework Decision on Combatting Terrorism (2002)

Defines “terrorism” as:

A range of intentional acts or threats to commit these acts, such as attacks on life, seizure of aircraft, kidnapping or hostage taking, “which, given their nature or context, may seriously damage a country or an international organization where committed with the aim of seriously intimidating a population, or unduly compelling a Government or international organization to perform or abstain from performing any act, or seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organization” (Article 1).

EU Council Framework Decision on Combatting Terrorism (2002)

- Member States required to criminalize a range of acts related to terrorist groups and activities, as well as inciting, aiding and abetting, and attempting any of the same.
- NB: Offense of “*participating in the activities of a terrorist group*”
 - Defined to include “supplying information or material resources, or ... funding its activities in any way, with knowledge of the fact that such participation will contribute to the criminal activities of the terrorist group”.
 - Requires knowledge that the resources provided will contribute to criminal acts.
 - No exceptions for humanitarian activities.

EU Counterterrorism Sanctions

- Implementing UNSCR 1373, the EU adopted the Council Common Position of 27 December 2001
 - Ordered the freezing of assets and the prevention of resources being made available to “persons, groups and entities involved in terrorist acts”.

EU Counterterrorism Sanctions, Cont'd

- Council Common Position of 27 December 2001 (cont'd)
 - The relevant list was established by Regulation (EC) 2580/2001 and is reviewed every six months.
 - EU regulations are directly applicable in all EU Member States.
 - Sanctions apply not only within the territory of the EU but also to any EU national and to any legal person or entity incorporated or constituted under the law of an EU country or doing business within the EU.
 - EU Member States determine penalties to be imposed for violation of the sanctions regimes.
 - Hamas included on the EU list since 2003 and is therefore subject to sanctions from all EU members.

EU Counterterrorism Sanctions, Exemptions

- Exemptions can be made available under specific conditions and procedures (e.g. funds necessary for basic expenses, including payments for foodstuffs, rent or mortgage, medicines and medical treatment).
- In *M (FC) & Others v HM Treasury*, the ECJ issued a preliminary ruling that payment of social security benefits to spouses of individuals designated under EU Regulation 881 /2002 would not fall within the sanctions regime imposed by the EU.
- The ECJ didn't adopt US "fungibility" reasoning; ECJ said: "...it is hard to imagine how those funds could be turned into means that could be used to support terrorist activities, especially because the benefits at issue are fixed at a level intended to meet only the strictly vital needs of the persons concerned".

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Current and Potential Responses

- Current practices in due diligence and risk mitigation
 - Dilemmas in vetting, contracting, etc.
 - CHE Project on counterterrorism clauses in humanitarian funding and partnership agreements
 - Terminology and scope
 - “Viral” spread of clause language
- Unified standards?
- Obfuscation
- Raising awareness
- Principled non-compliance?
 - What activities are at the core of humanitarian practice and are also clearly legally problematic?
- Lobbying for legislative change
- Exemptions built into sanctions
- Licenses: exemptions from existing sanctions
- Reliance on (non-binding) government statements?