

**PROGRAMME
HUMANITAIRE &
DÉVELOPPEMENT**

How will the international counterterrorism architecture evolve in the next 5 years and in what way does it affect humanitarian action?

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INTRODUCTION

Legislation and military initiatives under the umbrella of the Global War on Terror¹ have proliferated since its inception following the September 11 attacks. The expanded web of conventions, laws and institutions have created a complex and multi-layered system designed to prevent terrorist acts and minimize the impact of potential terror actors.

There are a plurality of approaches that are undertaken to mitigate the threat of terrorism including militarily, in covert actions and through the rule of law. Having a variety of different approaches allows governments to employ the most efficacious tactics in their fight to combat terrorism depending on the context but it also enables them to take advantage of the lack of transparency and at times, obfuscate international and human rights laws by employing a multitude of different approaches. This phenomenon, termed substitution² has added further complication to the counterterrorism system as the diversity of approaches that are enacted not only exists between states but within a single state's response.

Overlapping legal frameworks at international, regional and national level create a highly intricate series of regulations and guidelines. In addition to counter-terror legislation emanating from a variety of sources there are also a plurality of enforcement mechanisms. Though this multi-stakeholder system has created a complex and sometimes uncoordinated approach to counterterrorism, the absence of an agreed definition of terrorism at international (and even national) level is foundational to the lack of coherence.

The definition of what constitutes terrorism is highly political and, is informed by the political and social conditions of the governments making the determination. Terrorism is a pejorative term whose definition has been adapted over centuries to reflect shifts in social and political dynamics to encompass a variety of concepts. There are over one hundred legal definitions of terrorism³ and the diverse interpretation of the term has resulted in an inconsistent international legal structure. As a result of the variety in definitions of the term terrorism, and other interpretational liberties, an unconsidered appraisal of the rule of law on paper can overstate the level of harmonization in the approaches of states. The practical application of law and subsequent amendments to the legal code mean that international conventions and laws with a common origin can have very different result.

Prior to 9/11 counterterrorism legislation was relatively limited and predominantly focused in a few countries as a reaction to terrorist threats. However, the attacks in 2001 triggered the rapid

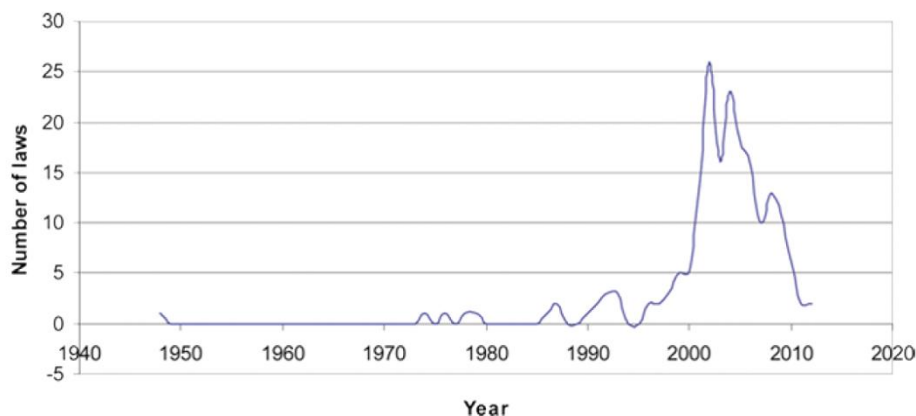
¹ The Global War on Terror refers to international military and covert actions taken by the United States and their allies in response to the attacks on September 11th. Since then, this moniker has evolved to include actions taken to combat other groups identified as terrorist organizations, predominantly in the Middle East and Sub-Saharan Africa. The legislative action taken by partners in the Global War on Terror to limit terrorist financing and prosecute terror offenses are also included in this agenda. The determination of whether the Global War on Terror constitutes a War in the legal sense has provoked much reflection on the role of the laws of War in this endeavor.

² Roach, Kent (2014) *Comparative Counter Terrorism Law*, Cambridge University Press, Cambridge pg. 11

³ Hoffman, Bruce (2006) *Inside terrorism*, 2 ed., Columbia University Press, New York. Chapter 1

proliferation in specific counterterrorism legislation designed to give states the power to target the Al Qaeda network⁴ and attempt to forestall further attacks.⁵

This trend of intensified counterterrorism legislation has led to a massive increase in the number of countries with counterterrorism provisions; now leaving states that do not in the minority. Though OECD countries continue to have the highest density of regulations the practice has spread. Only 31 states had specific counterterrorism legislation prior to 9/11 whereas in 2014 109 states had some form of dedicated counterterrorism law⁶. While the trend of new legislation has dropped significantly since its peak in 2001/2002 there are continual modifications in the parameters of counter-terror legislation through revisions and amendments which iteratively change the counterterrorism landscape and the role of actors involved which continues to be shrouded in opacity.



Trends counterterrorism legislation⁵

Counterterrorism and Humanitarian Action

Though not directly targeted by the majority of counterterror legislation, the counterterrorism architecture has had a significant impact on the ability of humanitarian organizations to deliver principled humanitarian aid. Both national and international counterterrorism legislation has been fully integrated in the UN system and the approach of most donors in funding work in fragile states. Though some donors offer exemptions to the provisions that they create, such exceptions do not alter the obligations of NGOs to abide by the laws to which they are subject. Counterterror legislation and the implementation of corresponding guidelines has provoked challenges in funding, partnership, compliance, access, relationships with local communities and freedom of speech for NGOs and civil society organizations⁷.

⁴ Spurred by United Nations (2001) [UN Security Council Resolution 1373](#), UN Security Council Resolution 2178

⁵ Elena Pokalova (2015) *Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?*, Terrorism and Political Violence, 27:3, 474-496, pg. 477

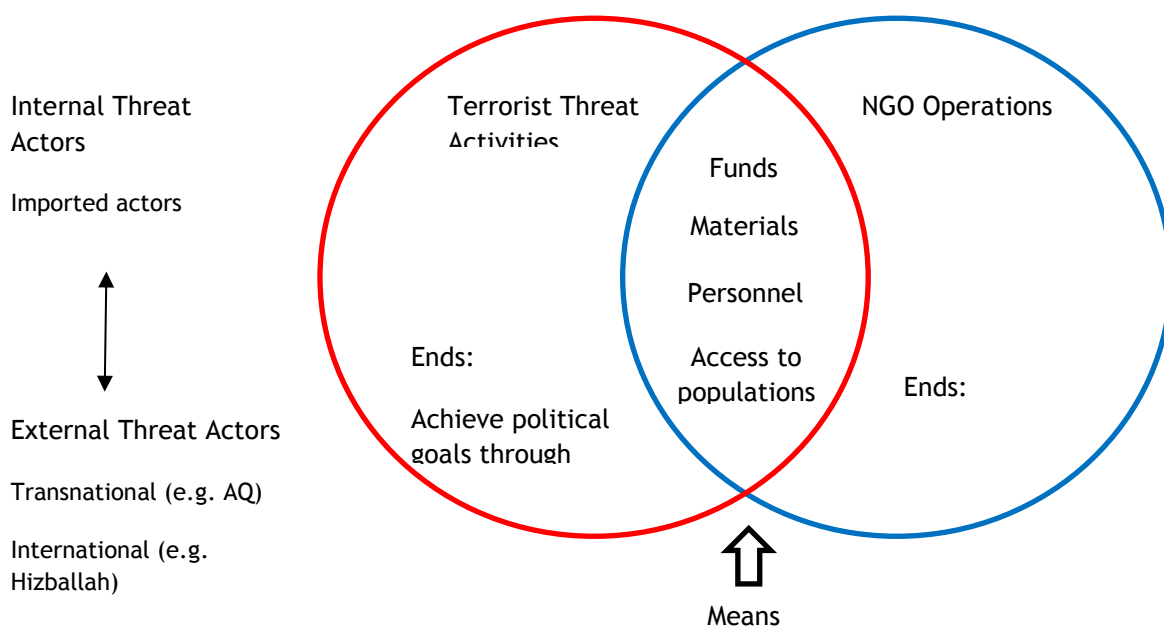
⁶ *Ibid*, pg. 478

⁷ For more analysis please see Pantuliano, Mackintosh, Elhawary and Metcalfe (Oct. 2011) *Counter-terrorism and humanitarian action: Tensions, impact and the way forward*, Humanitarian Policy Group, Overseas Development Institute, London, UK or Burniske, Modirzadeh and Lewis (Nov. 2014) *Counterterrorism laws and regulations: What aid agencies need to know* Humanitarian Practice Network, Overseas Development Institute, London, UK

NGOs struggle to meet the costs associated with the inclusion of the counterterror agenda in the humanitarian space. Financial costs include screening software, legal counsel and staff training to meet compliance but also staff time in challenging legislatures, donors and international organizations on the encroachment of counterterror objectives on humanitarian principles. The balance between complying with counterterror legislation while maintaining the space for principled implementation is extremely delicate. The consequences of a breach in counterterror legislation can be severe with financial penalties and irreparable reputational damage for organizations. However, the threat to independence and neutrality from full and unchallenged compliance also has consequences – most seriously in the perception of NGOs as an arm of state policy and the corresponding threat to acceptance and risks for staff safety.

In addition to the broader counterterror legislation to which NGOs are subject, some specific provisions focused on terrorist financing have also been developed to address the potential cooption of non-profit organizations. The application of Recommendation 8 (updated in June 2016) of the International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation⁸ which refers to the terrorist link with non-profit organizations has been uneven⁹ however, the logic underpinning terrorist abuse of NGOs highlights the nature of the perceived threat.¹⁰

The Terrorist Threat to Non-Profit Organizations



Source: Financial Action Task Force (2014) *Risks of Terrorist Abuse in Non-Profit Organisations*⁹

This structure demonstrates the commonality of means required to implement both NGO and terrorist activities purporting that NGOs are included as actors within the counterterrorism agenda since they

⁸ Financial Action Task Force (2016) *The FATF Recommendations: International Standards on Combatting Money Laundering and the Financing of Terrorism & Proliferation* pg. 54

⁹ Center on Global Counterterrorism Cooperation et al. (2013), *To Protect and Prevent: Outcomes of a Global Dialogue to Counter Terrorist Abuse of the Nonprofit Sector*, CNGCC, United States, p.v.

¹⁰ Taken from Financial Action Task Force (2014) *Risk of Terrorist Abuse in Non-Profit Organizations*, pg. 28

have both a commonality of means and occupy much of the same geographic space in fragile areas as both “internal” and “external” threat actors. The potential for resources provided for humanitarian aid (both financial and in-kind) to be repurposed by terrorist groups has not only informed the standards of the provisions that directly target NGOs in the counterterror sphere but also the interpretation of how the wider body of law applies to humanitarian actors.

The burden of impact of counterterror legislation is allocated disproportionately across the sector with many Islamic organizations coming under greater scrutiny from western stakeholders and local organizations at higher risk of being politically targeted under counterterror legislation if they act contrary to the government agenda. For large, international NGOs the most frequently cited concern with the counterterror legislation is the requirement to screen staff, partners and occasionally, beneficiaries¹¹. However, restrictions in the transfer of funds to conflict zones, the additional reporting burden from donors and concerns aid diversion have also impacted on operational INGOs.

The impact of the myriad of adaptations that are required to integrate the counterterrorism provisions goes beyond the administrative, financial and reputational costs of compliance to undermine the ability of NGOs to continually deliver aid in areas affected by conflict where the high level of vulnerability mandates their intervention.

SUMMARY OF KEY ACTORS IN THE SYSTEM

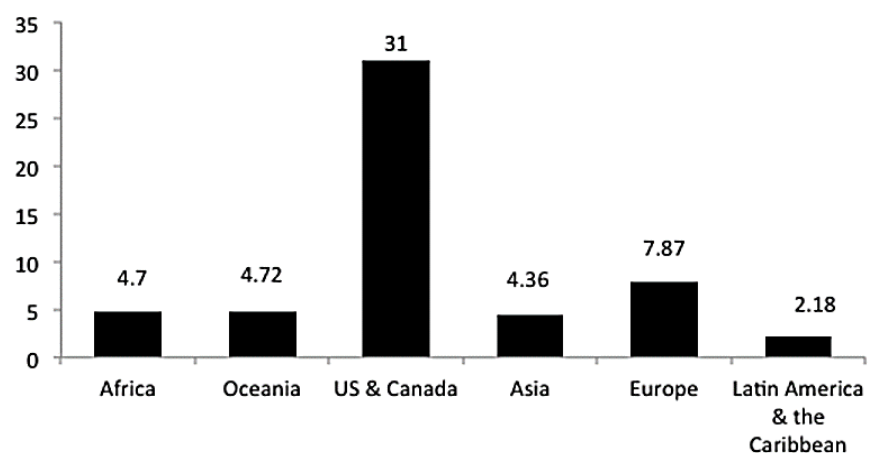
The global counterterrorism architecture is defined by four key groups of actors – western governments, governments of countries bordering conflict or in terror hotspots, terrorist organizations and states supporting terrorism.¹²

Western Governments

Western governments are the most determinant actors in setting the agenda and global approach of counterterrorist legislation.

Not only do Western governments have the greatest number of counterterror laws they are also critical in driving Security Council resolutions, international conventions and committees and have a

Average Number of Counterterrorist Laws per Country by Region of the World, 1850-2009



¹¹ Counterterrorism and Humanitarian Efforts: Source: Shor (2011) *Constructing a Global Terrorism Database*¹²
Policies and Practices of Humanitarian Organizations, Research and Policy Paper

¹² Shor, Evan (2011) *Constructing a Global Counterterrorist Legislation Database: Dilemmas, Procedures, and Preliminary Analyses*, Journal of Terrorism Research

disproportionate degree of influence on them – for example the G7 were central in creating the Financial Action Task Force and expanding its mandate.¹³

United Nations

The United Nations has been instrumental in advancing the goals articulated by the Global War on Terror in mandating states to adopt counterterror legislation at national level and codifying counterterrorism offenses in international law through resolutions and conventions¹². Though the involvement of UN agencies in the realm of counterterrorism predates the attacks of 9/11 the role of the UN as a mechanism for international cooperation and forced diffusion has intensified since 2001. The passage of UN Security Resolutions 1267 (1999) 1373 (2001), 1456 (2003), 1566 (2004) and 2178 (2014) marked a shift in the role of the UN in counterterrorism as Security Council resolutions are binding on all UN member states unlike previous conventions which allowed states the option to not participate. The UN has been a powerful vehicle through which the counterterrorism agenda has been advanced –with the sponsorship of Western governments.

In addition to the more direct influence on the system as a whole, western countries influence is also spread through diffusion, where existing policy influences the behavior of other states¹⁴. Neo-institutionalists support the concept of diffusion where states emulate the behavior of other states, particularly in complex situations with a high degree of uncertainty, which can lead to behavioral convergence¹⁵. This can be concretely demonstrated by the spread of the British government's definition of terrorism outlined in the UK Terrorism Act 2000¹⁶ which heavily influenced the definition adopted by Commonwealth states¹⁷ (Canadian adaptations to the British definition were also highly influential). Western governments are the primary actors in the international counterterrorism architecture – mostly notably the United States which is recognised as a leader in the field especially by partners in Global War on Terror which has been the framework through which most advancements in counterterrorism have been structured since its inception in 2001. This dominance and the continual evolution of the most elaborate legal system is likely unlikely to be challenged in the near term.

Governments of countries in terror hotspots

The approaches of governments of countries bordering conflict or in terror hotspots are both highly changeable and influential in the international counterterrorism architecture. Diffusion is not limited to the influence of western states; Egypt created the extremely broad and vague definition of terrorism that was subsequently adopted by the Arab Convention on the Suppression of Terrorism which has influenced the nature of the global response. Unlike most western governments, where the legal structures that proliferated after 9/11 had precursors that defined the trajectory and approach as well as more robust culture of rule of law, the evolution of the legislative counterterrorism frameworks in

¹³ For a more detailed list please see UN General Assembly (2016) *Activities of the United Nations system in implementing the United Nations Global Counter-Terrorism Strategy*, Annex 1: Supplementary information: development of the normative and legal framework

¹⁴ Elena Pokalova (2015) *Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?*, *Terrorism and Political Violence*, 27:3 474-496 pg. 481.

¹⁵ Shor, Filkobski, Bloom, Alkilabi, Su (2016) *Does Counterterrorist legislation hurt human rights practices? A longitudinal cross-national analysis*, *Social Science Research* 58, pg. 107

¹⁶ UK Parliament (2000) *Terrorism Act 2000* Part I, paragraph 2

¹⁷ Roach, Kent (2014) *Comparative Counter Terrorism Law*, Cambridge University Press, Cambridge pg. 15

many states in zones of terror are much more politically reactive, expansive and potentially abusive. As actors, states in terror hot spots can be highly influential in expanding the subject of counterterrorism legislation which could inspire new comers to the field and inform the trend of behavioural conformity from a legal standpoint.

Terrorist groups

The nature of counterterror legislation is reactive – and frequently an overreaction. There is a feedback loop in between the actions of terrorist groups and governments charged with defending their targets. Though the tactics of terrorist groups are not often sufficiently unique enough to provoke a shift in legislation, adaptations in tactics of terrorist groups can trigger a major change. The “whac-a-mole” approach to counterterrorism responses¹⁸ are largely driven by a desire to continually adapt the counterterror structure to respond to the evolving threat. As a result, terrorist groups can be a major player in determining the direction of the legislative response though their direct influence is rarely realized.

States sponsors of terrorism

States that sponsor terrorism are increasingly rare however¹⁹, the use of terrorist groups as an arm of foreign policy where military intervention is impractical or inefficient continues to be a logical option²⁰. States often attempt to conceal any involvement they have in the support of terrorism as the legal ramifications of it can be severe (from sanctions to military interventions) and their relationship with neighbouring and western states can be determined by their categorisation. Similar to terrorist organisations themselves the behaviour of state sponsors of terrorism rarely provoke a change to the already expansive legislative framework however, a change in behaviour from the status-quo could necessitate an immediate response from both western governments and governments affected by any specific terrorist acts linked back to a state sponsor.

The role of each of the different actors as expounded above have the potential to challenge the dominance of western governments in the system – either by providing a majority different approach to counterterrorism legislation or by provoking a significant shift in the current frameworks by changing the status-quo.

DRIVERS OF CHANGE IN COUNTERTERROR ARCHITECTURE

In addition to the interaction between the actors there are several key drivers of change in the legislative response to counterterrorism; the structure and tactics of terrorist groups, the historical precedent of western legislation, the evolution in the approach of governments in terror hotspots, the degree of regional cooperation and dynamics of human mobility.

Each driver will be analysed in turn to assess its impact on the overall structure and a five year outlook of the counterterrorism architecture will be explored.

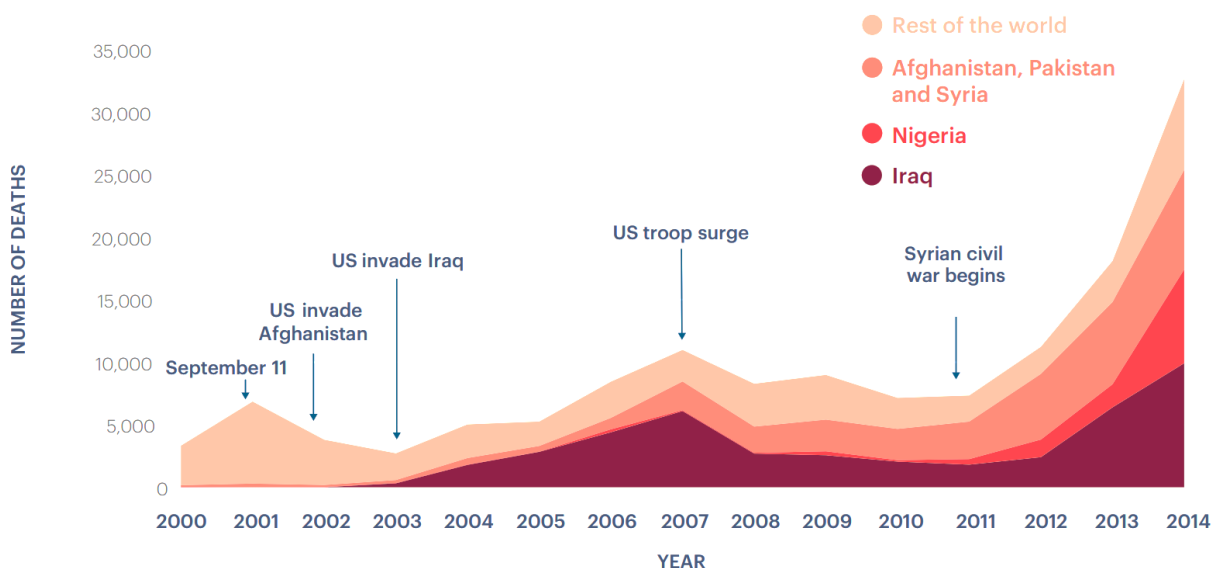
¹⁸ Peritz, Aki (August 2015) *What whac-a-mole can teach us about how to fight terrorism*, Foreign Policy

¹⁹ Just three states are listed as *State Sponsors of Terrorism* by the US State Department: Iran, Syria, Sudan

²⁰ Martin, Gus (2016) *Understanding Terrorism: Challenges Perspectives and Issues*, Sage, California pg. 86

1. Structure and tactics of terrorist groups

Groups that are designated as terrorist organizations by states and international organizations are not monolithic. They are not shaped by the tactics that they employ but by their objectives, culture, operating environment and ideology. Though there is great disparity, it is evident that there has been a shift in the structure and tactics of terrorist groups. Terrorism as a phenomenon has been increasingly violent and, while there has been a dramatic spread in the number of countries where attacks have occurred (jumping from 59 to 100 countries experiencing an attack between 2013 and 2015), there has been a simultaneous concentration in the escalation of fatalities in several countries: Nigeria, Iraq, Afghanistan, Pakistan and Syria up to 2014²¹. Early data from 2015 indicates a 12% drop in the fatality rate of terrorism worldwide due to a reduction in attacks in Iraq, Pakistan, and Nigeria however, in the same period attacks increased in either prevalence or fatality in Afghanistan, Bangladesh, Egypt, the Philippines, Syria, and Turkey²². Given this concentration, the growth in reactive counterterrorist legislation will likely be concentrated in the countries neighboring these hotspots as well as western countries.



Source: Global Terrorism Index 2015²³

In spite of the dramatic increase of the rate of fatality of terrorist attacks the tactics employed by groups active since 9/11 have been relatively low tech and uncoordinated. The ability to carry out a technologically advanced attack coordinated across multiple targets requires financing, a stable base for training and likely international communication which dramatically increases the opportunity for interception. The current trend is towards an increase in the volume of attacks with limited sophistication.

²¹ Friedman, Uri (July 2016) *Is Terrorism Getting Worse*, The Atlantic

²² Schwartz, Beth (June 2016) *2015 Global Terrorism Database*, National Consortium for the Study of Terrorism and Responses to Terrorism

²³ Friedman, Uri (July 2016) *Is Terrorism Getting Worse*, The Atlantic

In addition to the evolution of terrorism tactics, the politico-economic decentralization²³ of terrorist groups is creating more horizontal structures, less dependent on external funds, underpinning the shift in tactics to an increase in low tech attacks which can achieve significant damage with few resources. Decentralization and networked approaches are, in part, an adaptation of terrorist groups to be more elusive and to limit the impact of decapitation tactics²⁴ where the heads of an organization are targeted. This approach makes it more difficult to forestall attacks which is likely to result in future efforts to counterterrorism focusing on network analysis and the spread of radicalization through increased surveillance, monitoring and limitations on the freedom of movement.

While the terrorist attacks that prompted the Global War on Terror were carried out by an organization with a structure, membership and an ego – Al Qaeda - ISIS has not demonstrated the same pretention, they engage in mass-marketing²⁵. This is reflected in scale of attacks in Iraq and the spread to Europe and the United States with the rise in the independent attacker phenomenon. The evolution in the structure of terrorism has given rise to the complementary, soft-power approaches of Countering Violent Extremism – which has proliferated as a narrative without a clear articulation as to what is included within the concept. The crux of Countering Violent Extremism is in improving the relationship between communities and states and tackling the underlying grievances that are associated with radicalization²⁶; it is likely to continue to grow as an agenda over the course of the outlook²⁷.

Attacks as a trigger

Copy-cat attacks (following a pattern or mold) do not tend to provoke a legislative reaction. However, attacks with unprecedented fatality or those that employ tactics beyond the norm – including biological or chemical weapons, cyber-attacks or agro-terrorism could necessitate an immediate reaction. Counterterrorism regulation when created in the aftermath of an attack tends to be an overreaction, more repressive and more reactionary²⁶. However, such regulation is also commonly normalized which results in a more extreme legal climate than would have been possible without an attack as a catalyzer.

Outlook on evolution²⁸

- Predominance of low tech, less ambitious attacks
- Continuation in existing zones of terror, with a further concentration in Syria and Iraq
- Radicalization through high technology transfers to increase the rate of independent attacks in line with organizational decentralization
- Increased pressure on surveillance, network monitoring and information sharing
- Countering Violent Extremism will grow as a priority, informing the broader counterterrorism agenda

²³ Schneider, Bruck, Meierrieks (2014) *The Economics of counterterrorism: A survey*, Journal of Economic Surveys 29(1) 131-157 pg. 145

²⁴ *Ibid* pg. 154 and Jones and Solomon (July 2015) *Terrorism: A Radical Shift*, Financial Times

²⁵ Brill, Steven (Sept 2016) *Is American Any Safer?*, The Atlantic

²⁶ Anyadike, Obi (2016) *Does Countering Violent Extremism work?* IRIN, Nairobi

²⁷ UN Secretary General (2015) *Plan of Action to Prevent Violent Extremism*, General Assembly A/70/674

²⁸ Shor et al (2014) *Terrorism and state repression of human rights: A cross-national time-series analysis* International Journal of Comparative Sociology 55(4) pg. 306

2. The historical precedent of western counterterror legislation

Prior to 9/11 the majority of the counterterror legislation was created in response to terrorist attacks however, after the boom in legislation following the 9/11 attacks, new policy is more likely driven by path dependence²⁹. This means that states are more prone to adopt counterterror legislation if they already have a history of doing so; as a result the antecedent legal frameworks have a significant impact on the creation of new policy. The majority of western states have some form of counterterror legislation and while the creation of new legislation has slowed since the peak in the early 2000s the body of law that addresses counterterrorism is continually evolving and will likely continue to do so. This iterative expansion in the counterterrorism legal framework makes the applicable regulations increasingly difficult to track and compounds the lack of transparency already surrounding much of the regulations and enforcement of counterterrorism law.

Path dependence as an explanatory phenomenon is particularly useful when analyzing counterterrorism as it encapsulates the shift from using threat analysis underpinning changes in counterterrorism initiatives to vulnerability analysis, where policy is more reactive to the weaknesses or perceived gaps in the existing legislation or strategy opposed to any shift in threat or the likelihood of attacks. The attitudinal shift to using vulnerability analysis as the impetus for designing the legal system means that states consistently attempt to consider every eventuality which could result in increased terrorist action no matter the likelihood of it coming to fruition and, often, disregarding the efficacy of the action. This is more likely to be affected by the public threat perception and the pressure on governments to be taking action even as a placebo. This system means that counterterror legislation is likely to continue to become increasingly stringent regardless of the threat level in western countries.

44% of the expenditure of United States domestic security forces is on counterterrorism, in the UK counterterror initiatives account for 81% of MI5's budget³⁰. In spite of this investment there have been few studies on the questionable efficacy of many of these efforts and those of other states. However, the most effective policies seem to include thwarting terrorist financing and preventing access to border crossings as well as targeted foreign interventions to deny terrorist groups safe havens and increase state legitimacy in zones of terror³¹. Counterterrorism legislation, particularly post 2001³², has heavily focused on financial legislation and, with concerted international leadership, financial regulations are an area of strong convergence. This has resulted in a more thorough system of oversight to monitor financial transactions and a corresponding shift to increasingly risk-averse behavior from financial institutions³³. This trend is likely to continue as the degree of financial scrutiny is normalized and could be iteratively advanced over the course of the outlook. An area of increasing contention is whether or not there is an obligation for private companies (notably telecommunications) to share information with government entities; this is likely to continue over the course of the outlook and will

²⁹ This theory has been statistically explored by Elena Pokalova using logistic regression models to test drivers of counterterror legislation. For details on the models that were built please see - Elena Pokalova (2015) *Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?*, Terrorism and Political Violence, 27:3 474-496

³⁰ Brill, Steven (Sept 2016) *Is American Any Safer?*, The Atlantic

³¹ Freese, Rebecca (Feb 2014) *Evidence Based Counterterrorism or Flying Blind? How to Understand and Achieve What Works, Perspectives on Terrorism*, Vol. 8, Issue 1

³² Shor, Evan (2011) *Constructing a Global Counterterrorist Legislation Database: Dilemmas, Procedures, and Preliminary Analyses*, Journal of Terrorism Research 2(3)

³³ For details please see: Zarate, Juan (2013) *Treasury's War*, Public Affairs

predominantly affect the private sector as governments attempt to increase their ability to access information.

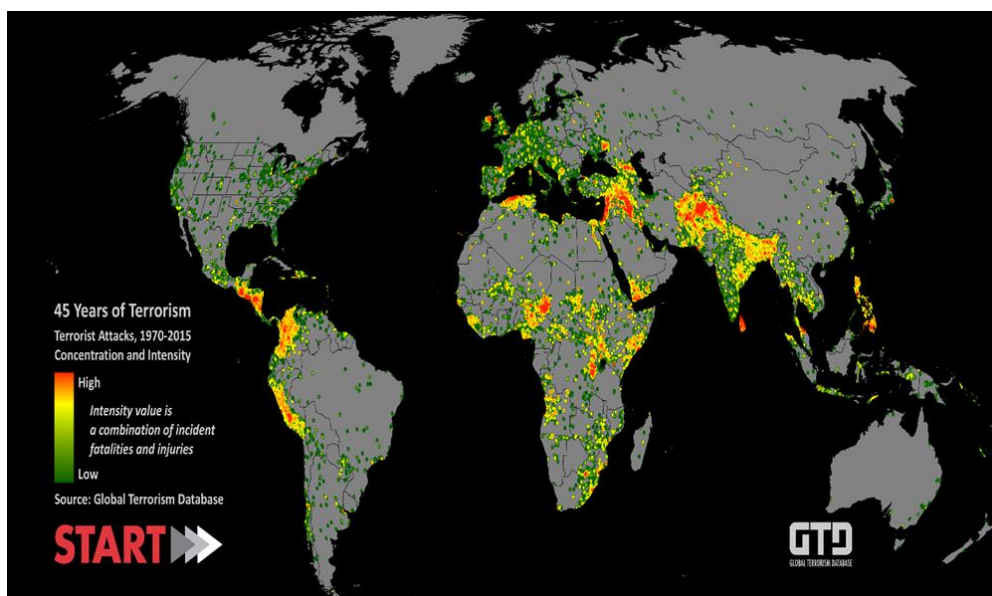
Using path dependency, the nascent research which puts more emphasis on the rule of law as having a greater impact on reducing the influence of terrorist groups and applying notions of behavioral convergence there is likely to be a concentration of legislative amendments and iterative revisions to strengthen the financial oversight and surveillance capacities in many western states over the course of the outlook.

Outlook on evolution

- Countries with existing bodies of legislation are likely to see continual iterative change intensifying their regulatory structures
- There will continue to be limited transparency as a result of both structural and cultural impediments
- Dominance of the terrorism in domestic security narrative will result in public pressure for increased vulnerability opposed to threat based legislation
- The focus of moves in counterterror legislation will focus on private companies (likely telecommunications and financial)
- Cyber security will play an ever greater role in the system and legislation is could be used to increase government powers to this end

3. The approach of governments in terror hotspots

The approach of governments in terror hotspots is more diverse than those from western states. There is a larger variation in the level of democracy (governments with weak rule of law tend to take a more militaristic approach) and economic development (countries with fewer resources do not have the same capacities for response) which drives variation however, both diffusion and path dependence also operate on governments in terror hotspots leading to a degree of behavioral convergence.³⁴



³⁴ START (2015) *45 Years of Terrorism*, Global Terrorism Database

Source: START (2015) Global Terrorism Database³⁴

In addition to path dependence another variable has been identified as a key indicator of a likely expansion in counterterror legislation – being a partner in the Global War on Terror³⁵. Post 9/11 it was made clear from the international community that creating counterterror legislation was the preferred action (opposed to the inclusion in the criminal code)³⁶. Taken together with UN resolutions requiring legislative action, being aligned with the Global War on Terror opened avenues to resources to combat domestic and regional terror threats which helped spur the adoption of new legislation. The acceptance of US leadership in this endeavor has resulted in greater diffusion of US legislative approaches to combatting terrorism which persist and offer an indicator of future action. This trend could be replicated with the creation of the Global Coalition against Daesh, especially as pertains to foreign fighters.

While legislation classified as counter-terrorism is likely to continue to spread (Saudi Arabia³⁷ and China³⁸) significant change can also be expected in amendments to the parameters of existing counterterrorism legislation. One of the most efficacious ways of changing existing counterterrorism legislation is through amending the definition as has been done in several countries including Pakistan³⁹, Egypt⁴⁰, Tunisia, Cameroon, and was attempted in Kenya in 2014⁴¹. Even more than western states where the incidence of terrorist attacks are relatively rare, governments of states in zones of terror are pushed by heightened insecurity and its effect on public opinion. This can lead to the creation of legislation that is outsized to the threat that is faced and can be a political tool that is ripe for abuse. Structuring counterterror laws to include opposition parties or groups challenging the government has been a common practice. Counterterror legislation has been used to repress political opposition, stifle free speech and curtail civil society.

The expansion of counterterrorism legislation in states in or bordering terrorist zones is likely to continue – driven by path dependence, international pressure or opportunities, the continued prevalence of terrorist attacks and as a tool of political repression. The expansion of the number of players in the international counterterrorism architecture each of which will a new system of legislation and policy through their contextualized understanding of counterterrorism will compound the complexity of the system.

Outlook on evolution

³⁵ This theory has been explored by Elena Pokalova using logistic regression models to test drivers of counterterror legislation. For details on the models that were built please see - Elena Pokalova (2015) *Legislative Responses to Terrorism: What Drives States to Adopt New Counterterrorism Legislation?*, Terrorism and Political Violence, 27:3. Partners in the Global War on Terror in this case refer to those contributing the International Security Assistance Force.

³⁶ Ford, Joylon (2011) *African counter-terrorism legal frameworks a decade after 2001*, Institute for Security Studies pg. 8

³⁷ Human Rights Watch (2014) *Saudi Arabia: New Terrorism Regulations Assault Rights*

³⁸ Mitchell, Tom (2015) *China approves controversial antiterrorism law*, Financial Times

³⁹ Parvez and Rani (2015) *An Appraisal of Pakistan's Anti-Terrorism Act*, United States Institute of Peace, also through the Protection of Pakistan Act passed in 2014

⁴⁰ Ryan Suto (December 2014) *Egypt's New Anti-terrorism Law*, The Atlantic

⁴¹ The Security Laws of Amendment Act that passed in 2014 was originally proposed with an amended definition of terrorism but it was removed in a high court challenge. The powers of the government were still significantly expanded. Knudsen, Devin (2015) *A New Wave Of African Counterterrorism Legislation: Contextualizing The Kenyan Security Laws*, Georgetown Journal of International Affairs

- Growth in counterterror legislation will be focused in zones of terror (potentially stronger among the Global Coalition)
- Iterative change will continue to alter and, for the most part, strengthen counterterrorism legislation over the course of the outlook
- Challenges from political opposition, civil society or the judiciary in states in terror zones will continue to provide a challenge to greater state power
- As more states create expansive definitions of terrorism behavioral convergence could result in a shift of the international system to a more politicized framework

4. Regional Cooperation

The competing forces of convergence and divergence in counterterrorism legislation are best expressed in the struggle for a harmonized regional approach⁴². The benefits to building regional coherence are many fold; it would reduce the likelihood of terrorism being treated as political crime⁴³, it could increase the efficacy of counterterror monitoring and prevention, it could streamline information sharing between counterterror agencies and it would provide much needed clarity to the public and private sector stakeholders included within the system. The inability of states and regional bodies to agree on the definition of terrorism or coordinate their legislative responses to it results in incoherence in efforts to limit the influence of terrorist groups, reduce their access to resources and punish attackers. Given the challenges to collective action⁴⁴ and that the domain of counterterrorism is centered in national security the forces of divergence are rarely overcome and are unlikely to be over the course of the outlook.

While many regional organizations have made commitments to a regional approach to counterterrorism, implementation of these initiatives has been irregular⁴⁵. Though steps have been taken by a plurality of regional organizations including the Intergovernmental Authority on Development (IGAD) in East Africa⁴⁶ and ASEAN in Asia⁴⁷ the furthest advancement towards a coordinated responses to terrorism has taken place in Europe. The adoption of the Framework Decision of the European Union 2002/2008 outlined a definition that was adopted by all but three member states and required members to align their legislative responses to terrorist offenses⁴⁸. The EU also created a union wide strategy⁴⁹, several supranational bodies and a multitude of policies relating to coordination of counterterrorism. However, even this most advanced regional system has been hampered as some states decline to harmonize and contrary regulations within the EU (such as around

⁴² Roach, Kent (2014) *Comparative Counter Terrorism Law*, Cambridge University Press, Cambridge pg. 5

⁴³ *Ibid* pg. 52

⁴⁴ Schneider, Bruck, Meierrieks (2014) *The Economics of Counterterrorism: A survey*, Journal of Economic Surveys 29(1) 131-157 pg. 154

⁴⁵ This can be explained by a “decoupling” between what states say and what is actually done. Some counterterror legislation/conventions could be designed to send a message opposed to actually affect a change in doing business. Shor, Filkobski, Bloom, Alkilabi, Su (2016) *Does Counterterrorist legislation hurt human rights practices? A longitudinal cross-national analysis*, Social Science Research 58, pg. 107

⁴⁶ Shierff, Uke, Adams (2015) *Consolidating Cooperation under Regional Integration: A Theoretical Approach to Curbing Terrorism and Maintaining Peace and Security among IGAD Member States*, ISSN 2277-0852; Volume 4, Issue 3, pp. 48-54

⁴⁷ ASEAN (2013) *ASEAN Convention on Counterterrorism*

⁴⁸ Council of Europe Framework Decision (2002/475/JHA) amending (2008/919/JHA). The definition was not adopted by the UK, Germany or Italy.

⁴⁹ Council of the European Union, The European Union Counter-Terrorism Strategy, 30 November 2005

data protection, particularly in France), compromise the efficacy of the initiatives⁵⁰ and emphasize the difficulty in creating a multi-national system.

There is an open commitment to greater coordination but the translation into a harmonized legislative approach has been limited. Effective counterterror coordination is more likely to succeed if it is embedded within an existing military or security alliance opposed to a broader regional arrangement predicated on economic or social integration. Voluntary fora such as the Global Counterterrorism Forum (GTCF) where coordination is encouraged and supported between member states but not mandated and, does not require legislative harmonization will continue to be an active space for discussion though the impact of such initiatives will depend on the political will of its members. Over the course of the outlook sporadic bursts in coordination are likely to occur but may not translate into permanent arrangements. Regional progress could be a game changer in the dynamics of counterterrorism if it goes beyond symbolic rhetoric to substantial legislative and definitional alignment.

Outlook on evolution

- Arrangements based around alliances rather than a comprehensive regional approach could have a greater chance of efficacy⁵¹
- Regional arrangements which focus on cooperation rather than harmonization could add a layer of bureaucracy
- Progress towards regional harmonization will likely be slow and European states are likely to continue to be the most integrated

5. Human mobility and interconnectedness

The growing interconnectivity of the world – the internet, modern communications, trade and migration, is purported to contribute to the spread of violence across national borders⁵². Internationalized networked approaches from terrorist groups improves their chances of diversifying income and increasing their reach through trans-national action. This trend is unlikely to change as it is concurrent with the phenomenon of decentralization and the objective of creating maximum violence with minimum resources. Transnational terrorism will continue to occur making human mobility a driver of future legislation.

Though the link between counterterrorism and human mobility predates the rise of ISIS, the number of foreign fighters traveling to the Middle East to fight with ISIS could provoke new swathes of counterterror law⁵³. Between 26,000 and 31,000 foreign fighters from over 86 countries are believed to have traveled to the Middle East to fight with extremist groups⁵⁴. As rate human mobility has generally

⁵⁰ EU policies and guidelines on information sharing that are within in its counterterror legislation can be contrary to the obligations of companies and organizations under the EU's data protection act which prohibits the transfer of personal information. For more details please see: European Court of Justice Ruling (2014) Judgement ECLI:EU:C:2014:238

⁵¹ Such as the new agreement between China, Tajikistan, Pakistan and Afghanistan. Bhattacharjya, Samhati (Aug. 2016) *China forms anti-terror alliance with Pakistan, Tajikistan and Afghanistan*, International Business Times

⁵² Schneider, Bruck, Meierrieks (2014) *The Economics of counterterrorism: A survey*, Journal of Economic Surveys 29(1) 131-157, pg. 102

⁵³ UN (2014) *Security Council Resolution 2178*, Roach, Kent (2014) *Comparative Counter Terrorism Law*, Cambridge University Press, Cambridge pg. 744

⁵⁴ Soufan Group (Dec. 2015) *Foreign Fighters: An Updated Assessment of the Flow of Foreign Fighters into Syria and Iraq*

increased, it is becoming more obstructed. One of the avenues that states are using to restrict mobility is through counterterrorism law; travel restrictions include the detention of non-citizens and revocation of passports⁵⁵. Restrictions on human mobility can be used to try to stop people traveling to zones of terror and returning from them, especially through the use of watch-lists (or no-fly lists) which swelled post 9/11 from dozens of names to tens of thousands. The criteria for how governments decide to add a person to a watch-list are unclear (the bar is notoriously low and requires little if any evidence), persons add to the watch-list are not notified and there is little to no recourse to challenge a watch-list designation⁵⁶. The use of watch-lists is likely to continue as a tool for countering terrorism which will have far reaching consequences.

In addition to greater limits on travel, counterterror legislation is also likely to target the tools for self-radicalization, including monitoring internet sites mobilizing recruitment⁵⁷. This will also likely be complemented with more investments in efforts to counter violent extremism with communities in Western countries, transit routes used for international migration and zones of terror. Given the scale of the foreign fighter issue it is likely to be an area of growth in counterterror legislation worldwide.

The migration crisis in Europe together with an increase in the number of attacks on European soil are likely translate to a greater intersection of counterterrorism and immigration laws and policies. Similarly countries with large refugee populations such as Kenya, have been employing counterterror language to justify the closure of borders and return of foreign refugees⁵⁸. Security concerns worldwide have provoked reactionary responses from governments which are likely to use counterterror legislation to affect not only the ability of nationals from terror zones to travel internationally but also those who visit⁵⁹.

Outlook on evolution

- Human mobility will continue and will likely driver of further counterterrorism legislation, particularly for countries with a large displaced population and the European Union
- Travel restrictions for visitors as well as nationals to/from states in terror hotspots will increase – including with the increased use of watch-lists
- Rates of migration and displacement in the global south could accelerate the path of counterterror legislation in developing countries bordering conflict
- The connection of counterterrorism with migration will likely underpin the trend to securitize the migration issue

The drivers associated with the proliferation of counterterror legislation indicate that it is likely to proliferate at national, regional and international level with limited harmonization.

⁵⁵ Roach, Kent (2014) *Comparative Counter Terrorism Law*, Cambridge University Press, Cambridge pg. 13

⁵⁶ Ackerman, Spencer (2014) *How the US's terrorism watchlists work - and how you could end up on one*, the Guardian

⁵⁷ Roach, Kent (2014) *Comparative Counter Terrorism Law*, Cambridge University Press, Cambridge pg. 747

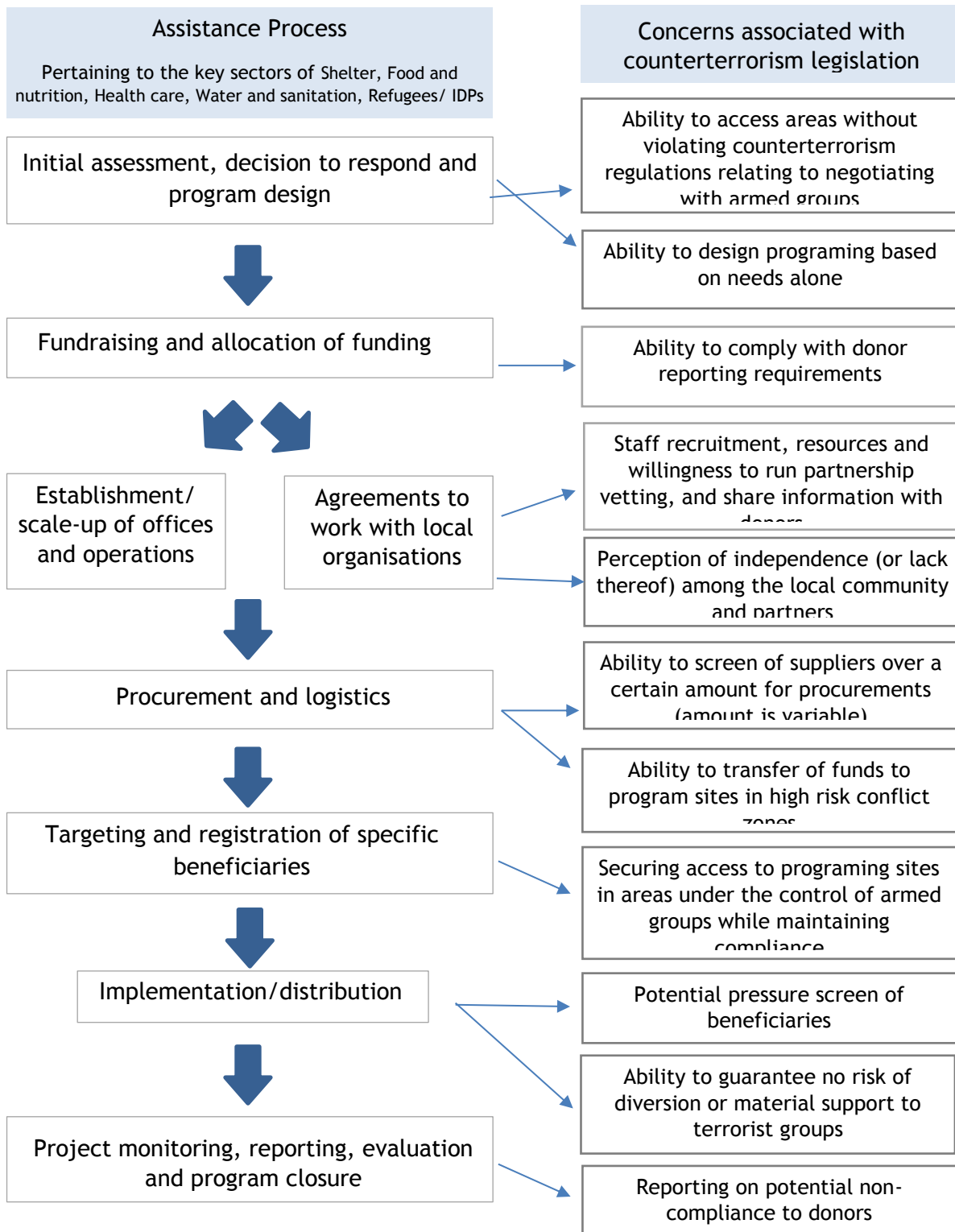
⁵⁸ Editorial Board of the Washington Post (2016) *Closing the world's largest refugee camp in Kenya could fan the flames of terrorism*, Washington Post

⁵⁹ United States, Department of Homeland Security (2016) *DHS Announces Further Travel Restrictions for the Visa Waiver Program*

IMPACT ON HUMANITARIAN ACTION

The lack of harmonization in counterterror legislation leads to a lack of transparency and understanding in the regulations that are applied to humanitarian action from the international community⁶⁰ and national governments in areas of operation. The variability in legislation results in inconsistent standards having to be applied to different programs even within the same country office.

⁶⁰ For a summary of applicable counterterror legislation in donor countries please see Mackintosh and Duplat (2013) *Study of the Impact of Donor Counter - Terrorism Measures on Principled Humanitarian Action*, Annex I: Table of comparison - National and regional counter-terrorism law and sanctions, UNOCHA and Norwegian Refugee Council

Map of assistance with the implications of counterterrorism⁶¹


⁶¹ Adapted from Pete Ewins, Paul Harvey, Kevin Sage, and Alex Jacobs, (July 2006) *Mapping the Risks of Corruption in Humanitarian Action*, in Counterterrorism and Humanitarian Engagement Project, (May 2014) *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations*, Research and Policy Paper

Risks of non-compliance

The most concerning legislation relates to provisions surrounding deliberately or inadvertently providing material support to designated terrorist groups. Both Australia and New Zealand provide an exemption from culpability for humanitarian action⁶² however, the majority of governments have lower bars in considering intent and the United States does not include any allowances for motivations⁶³. The clauses of material support often encompass actions considered fundamental to humanitarian action – including the provision of emergency medical aid. The conditions of material support vary however, the United States Supreme Court set a high bar in a ruling affirming that “material support meant to promote peaceable, lawful conduct can be diverted to advance terrorism in multiple ways”⁶⁴. Arguments that any support to terrorist groups and those associated with them frees resources to be expended on terrorist activities places NGOs operating in areas with active terrorist groups at continual risk of violating counterterror legislation through programing in almost every sector.

In addition to material support provisions many states also have a complex system of sanctions which prohibits making any resources available to designated terrorist groups. While violations of sanctions regulations are easier to commit (as there are multiple layers of sanctions and no intentionality required) the penalty for the provision of resources or support to terrorist groups⁶⁵ is higher. The complex, multi-layered nature of counterterrorism legislation means that there is often overlapping jurisdiction between different states and agencies. This is an additional complication for humanitarian organisations who, with headquarters in different states and global programing, could find themselves subject to varied and even conflictual legislation. Though prosecutions of humanitarians are extremely rare, the criminal penalty of violating counterterror legislation varies but can up to twenty years in prison and a multi-million dollar fine⁶⁶.

In addition to counterterror legislation which directly affects NGOs and indirectly affects their ability to provide humanitarian aid through restrictions on private sector enterprises which are essential to doing business in high-risk areas – such as banks and companies managing financial transfers, donors integrate counterterror provisions in contracts signed with NGOs. Donors are reactive to their national legislative environment and as a result there is significant diversity in the approach of major donors⁶⁷; though there are some areas of behavioural convergence these tend to be towards the most prescriptive systems. Clauses in donor contracts flow through grants such that they affect all organisations in a consortium and all sub-contractors or sub-grantees. The language in many

⁶² Chatham House (2015) *UK Counterterrorism Legislation: Impact on Humanitarian, Peacebuilding and Development Action*, International Law Programme and International Security Department Roundtable Summary

⁶³ Attempts to introduce measure to lessen the restrictions for humanitarian organizations e.g. H.R. 3526 (113th): Humanitarian Assistance Facilitation Act of 2013 have died in Congress.

⁶⁴ Holder vs Humanitarian Law Project 130 St. Ct. 2705 (2010) from Pantuliano, Mackintosh, Elhawary and Metcalfe (Oct. 2011) *Counter-terrorism and humanitarian action: Tensions, impact and the way forward*, Humanitarian Policy Group, Overseas Development Institute, London, UK

⁶⁵ For example: the UK criminalizes “action taken for the benefit of a prescribed organization” in the Terrorism Act 2000 and the US has criminalized providing “material support” in the 1994 Violent Crime and Control Act. For more information please see: see Pantuliano, Mackintosh, Elhawary and Metcalfe (Oct. 2011) *Counter-terrorism and humanitarian action: Tensions, impact and the way forward*, Humanitarian Policy Group, Overseas Development Institute, London, UK

⁶⁶ Mackintosh and Duplat (2013) *Study of the Impact of Donor Counter - Terrorism Measures on Principled Humanitarian Action*, UNOCHA and Norwegian Refugee Council

⁶⁷ For more information please see Counterterrorism and Humanitarian Engagement Project, (2014) *An Analysis of Contemporary Counterterrorism-related Clauses in Humanitarian Grant and Partnership Agreement Contracts research and policy paper*

contractual clauses in donor agreements can be extremely vague – for example including persons “associated” with terrorist groups without clear explanation of who this includes⁶⁸. As a result there is a high-level of uncertainty for NGOs. There is also a degree of misunderstanding between what NGOs are exempt from: clauses in contracts that are signed with donors do not exculpate NGOs from having to abide by counterterror law to which they are subject.

The complexity of the counterterrorism system which includes a multitude of actors with little harmonization in their approaches results in high levels of confusion which has led to NGOs being unaware of the legislation that they are in a position to violate. It has also resulted in a lack of transparency between NGOs and between NGOs and donors as organisations are extremely reticent to share experiences which could potentially contravene counterterrorism law or policy publically⁶⁹. A lack of understanding and resources dramatically increases the criminal, financial and reputational risks of non-compliance for NGOs in high risk areas.

The effect of so much uncertainty, the lack of transparency and the continual threat of criminal proceedings against staff has resulted in a “chilling effect” on NGOs where they self-police to extent that they limit their engagement in high risk enterprises for fear of contravening regulations⁷⁰. This risk averse stance means that the multilayered web of counter-terror legislation is even more restrictive than was intended by governments and has an influence greater than the sum of its parts.

Cost of compliance

Though the risks of non-compliance are high there are also significant costs to NGOs for full compliance. The co-option of humanitarian organizations into the War on Terror through the expectation that they subordinate the primacy of their principles to the foreign and security policy of donor governments and governments in areas of operations fundamentally undermines their neutrality, impartiality, independence and prerogative to provide aid based on need alone.⁷¹⁷²

Partner Vetting System

In 2012, USAID and the U.S. Department of State were congressionally mandated to pilot a Partner Vetting System (PVS)⁷², the primary objective of which is to assess the efficacy of vetting mechanisms to prevent the financing of terrorism (individuals or groups) through the provision of humanitarian aid. This pilot is testing vetting processes and assessing the impact on USAID programing in five countries (Guatemala, Kenya, Lebanon, the Philippines, and Ukraine). PVS has raised two major concerns for NGOs: the instrumentalization of the humanitarian aid and the potential violation of privacy laws⁷³. In 2016, there is no decision to implement a worldwide Partner Vetting System.

Though some donors have required a commitment to the War on Terror⁷³ the majority of the challenges to humanitarian principles are less explicit. By requiring NGOs to screen partners and suppliers against

⁶⁸ Norwegian Refugee Council (2015) *Risk management toolkit in relation to counterterrorism measures* Geneva, NRC pg. 11

⁶⁹ Pantuliano, Mackintosh, Elhawary and Metcalfe (Oct. 2011) *Counter-terrorism and humanitarian action: Tensions, impact and the way forward*, Humanitarian Policy Group, Overseas Development Institute, London, UK

⁷⁰ Burniske, Modirzadeh and Lewis (Nov. 2014) *Counterterrorism laws and regulations: What aid agencies need to know* Humanitarian Practice Network, Overseas Development Institute, London, UK

⁷¹ USAID (Sept. 2015) *State Partner Vetting System Pilot Program*

⁷² Counterterrorism and Humanitarian Engagement Project (March 2014) *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*, Research and Policy Paper

lists of groups designated as terrorists NGOs are forced to make operational decisions based on the political considerations of whichever government is involved in funding projects or where the projects are based. In addition, requirements to communicate the outcome of screenings – such as the Partner Vetting System, incidences of diversion or inadvertent breeches in counterterror clauses of donor contracts or even elements of counterterror law to donors puts NGOs in a position of monitoring in on behalf of governments in the areas where they work or who fund their projects.

The numerous challenges to accessing areas controlled by designated terrorist groups (no tolerance of diversion, inability to negotiate with terrorist groups, screening of partners etc.) can limit the ability of NGOs to program in an impartial way across the fault lines of conflicts. The perception that NGOs are communicating information to governments (foreign and national) seriously affects the relationship that NGOs have with staff, partners and the communities where they work. This lack of independence undermines acceptance and consequently staff security.

In areas where designated terrorist groups operate it is, for all intents and purposes, illegal to provide aid based on need alone. Full compliance with counterterror legislation requires that the selection of programming areas, project partners and ultimately beneficiaries⁷⁴ must continually consider the applicable definitions of who is a terrorist and those associated with them in the first instance.

Mounting pressure on financial institutions and private corporations to comply with counterterror legislation indirectly affects the ability of humanitarian organizations to implement principled humanitarian action. As programming becomes increasingly infused with technology the ability of NGOs to control access to the data they collect (about staff, partners and beneficiaries) will depend, in part, on the ability of the corporations from which services are purchased to rebuff government pressure to share data collected through their systems.

The brunt of the impact of counterterror provisions are felt by international NGOs who are more likely to be directly contracted with the major western donors. The complexity of the system can act as a barrier to entry for many national NGOs who may be unable to comply with significant areas of counterterror legislation, such as partner vetting or working with financial institutions, or unwilling given the costs of compliance to their independence and acceptance in the community. The provisions of counterterror legislation, their implementation by the private sector and the corresponding donor requirements that impact on humanitarian aid amass to a fundamental challenge to principled humanitarian action.

CONCLUSION

The established link between humanitarian action and terrorism has been concretized. The opportunity to influence the fundamental architecture of existing counterterror legislation created prior to and in the spike post 9/11 is likely closed. Rather than expanding humanitarian exceptions the behavior of the majority of donor governments is tending to reduce the space for allowances and negotiations. As a

⁷³ Norwegian Refugee Council (2015) *Risk management toolkit in relation to counterterrorism measures* Geneva, NRC pg. 11

⁷⁴ Counterterrorism and Humanitarian Engagement Project (May 2014) *An Analysis of Contemporary Anti-Diversion Policies and Practices of Humanitarian Organizations*, Research and Policy Paper

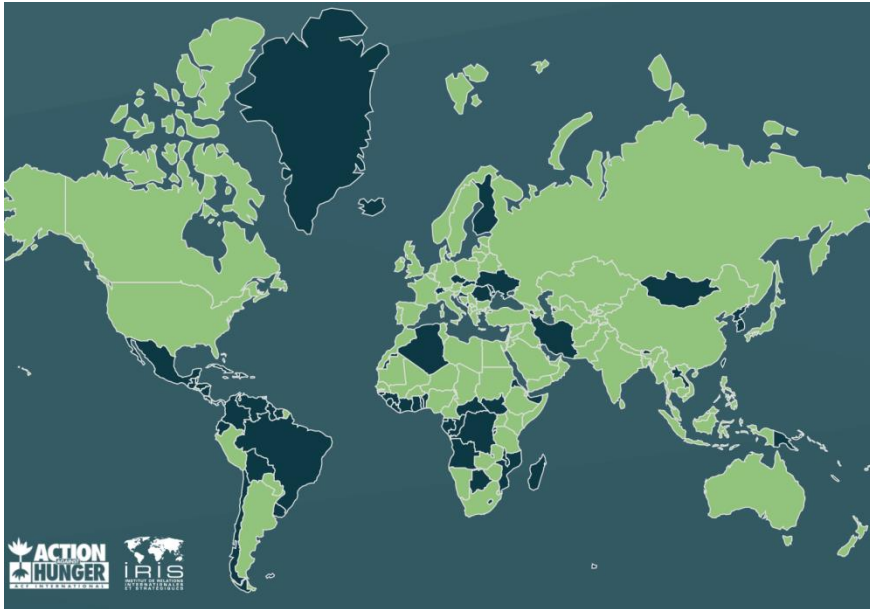
result the change to humanitarian practices as necessitated by the advent of increasingly restrictive legislation is likely to be permanent. Humanitarian staff will require training on the implementation of programming under the conditions outlined by counterterror legislation to ensure compliance. Humanitarian organizations dependent on donor funding will have little recourse but to improve their level of compliance, their approaches to risk management and their capacity for direct negotiations with governments and donors.

Though the opportunities to fundamentally change the structure of counterterrorism law and the approach of states over the course of the outlook will be few, the areas of likely expansion could compound the existing challenges faced by NGOs. The trend towards greater surveillance to combat the networked approach of terrorist groups concentrated in areas of fragility and migration could increase the demand for NGOs to share the information they are required to collect on partners, suppliers and communities with governments, an increase in oversight on financial transactions could make the movement of funds to high-risk areas increasingly difficult, restrictions on travel could make the deployment of staff more complicated and the politicization of counterterror law could significantly impede the ability of NGOs operating in areas in zones of terror to operate and advocate. In addition there will be increased tension between the commitment of donors to move funding to directly support national NGOs and the pressure for greater compliance with complex and burdensome counterterror legislation.

The effect of the dramatic increase in counterterror legislation since 2001 and its continuing role in foreign affairs and security policy will provide a sustained challenge to principled humanitarian action in high-risk areas which could result in diminished access to aid for some of the most vulnerable. ■

ANNEX 1: Countries with Counterterror Legislation

This map is an illustration of the number of countries with dedicated laws pertaining to counterterrorism legislation⁷⁵. This does not include amendments to the penal codes.



⁷⁵ This map endeavours to represent all the countries with counterterrorism legislation. 103 countries are represented here but given the continual change in the counterterrorism architecture there could be others that are not included.

How will the international counterterrorism architecture evolve in the next 5 years and in what way does it affect humanitarian action?

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HUMANITARIAN FORESIGHT THINK TANK

A think tank under the

HUMANITARIAN AND DEVELOPMENT PROGRAMME

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