

**PILOT EMPIRICAL SURVEY STUDY ON THE
IMPACT OF COUNTERTERRORISM MEASURES
ON HUMANITARIAN ACTION**

BY JESSICA S. BURNISKE AND NAZ K. MODIRZADEH

COMMENT

ON THE PILOT EMPIRICAL SURVEY STUDY ON THE IMPACT OF
COUNTERTERRORISM MEASURES ON HUMANITARIAN ACTION

BY NAZ K. MODIRZADEH

HARVARD LAW SCHOOL PROGRAM ON INTERNATIONAL LAW AND ARMED CONFLICT
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CREDITS

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PILOT EMPIRICAL SURVEY STUDY ON THE IMPACT OF COUNTERTERRORISM MEASURES ON HUMANITARIAN ACTION

JESSICA S. BURNISKE AND NAZ K. MODIRZADEH

HLS PILAC • CHE PROJECT • MARCH 2017

I. INTRODUCTION

Counterterrorism laws and policies have affected the humanitarian sector in consequential ways. Amid humanitarian crises in places such as Mali, Somalia, Syria, and Yemen, counterterrorism laws and policies have proliferated over the past two decades. The background concern is that counterterrorism measures are capable of functioning in a way that could prohibit or otherwise impede forms of humanitarian action. Considerable time, attention, and other resources have been dedicated to ascertaining and addressing the impact of counterterrorism legal and policy frameworks on humanitarian action.

In respect of certain situations, counterterrorism frameworks have engendered a sense of paralysis in parts of the humanitarian community. Some humanitarian actors report a “chilling effect” on life-saving and needs-based humanitarian assistance because of perceptions that counterterrorism laws and policies are overly restrictive, vague, and far-reaching.¹ Certain requirements, such as vetting of local partners and aid recipients, have led some humanitarian actors to fear an actual or perceived compromise of core humanitarian principles, such as impartiality, neutrality, and independence.²

Considerable work has been undertaken to shed light on the intersection of counterterrorism laws and humanitarian action. That work, which includes influential studies and reports, has made important contributions to the discussion. To date, this research has largely contained anecdotal information and used case studies to illustrate potential and existing concerns and challenges arising in relation to counterterrorism frameworks.

We sought to supplement these efforts by helping to determine the measurable impact of counterterrorism laws on humanitarian action. We therefore decided,

1. See generally, e.g., Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (July 2013).

2. 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.

as an initiative of the Harvard Law School Program on International Law and Armed Conflict (HLS PILAC) and with the assistance of experts in empirical research, to collect data from humanitarian actors demonstrating the impact (or lack thereof) of counterterrorism laws and regulations on humanitarian organizations and their work.

This document captures our resulting initial attempt at a pilot empirical study in this domain. We undertook this pilot empirical study with two main aims: first, to provide an initial analytical framework concerning survey-based empirical approaches to measuring the impact of counterterrorism frameworks on humanitarian action, and second, to identify practical and methodological challenges in undertaking such research. The study was developed as part of the Counterterrorism and Humanitarian Engagement Project (CHE Project) at HLS PILAC. Since 2011, the CHE Project has researched and analyzed contemporary challenges posed by situations of armed conflict where terrorist-listed armed groups control territory and access to civilian populations.³

In conducting this pilot study, we sought information and perspectives from humanitarian actors operating across the globe and in a variety of settings and positions within organizations. In short, we found that while further research on these issues is needed, survey respondents indicated over all that counterterrorism laws have a real and tangible impact on the work of humanitarian actors and that, in some cases, those laws have reportedly chilled humanitarian assistance. Many survey respondents also reported a lack of clarity regarding counterterrorism laws and policies. This uncertainty persists despite a reported general awareness of the laws and corresponding instructions provided by humanitarian organizations.

In the rest of the report, we provide an overview of previous work on the impact of counterterrorism laws on humanitarian action. We discuss the utility of empirical data in formulating evidence-based policy, including in relation to counterterrorism laws pertaining to the humanitarian sector. We discuss the methodology of the study alongside our findings, which are detailed in Section VI. And we conclude by highlighting a few considerations with respect to additional research in this domain.⁴

3. The CHE Project's work includes the creation and maintenance of its Senior Law and Policy Working Group; the provision of analysis of potential concerns raised by counterterrorism regulations on humanitarian action; and the publication of independent research and policy papers on legal, policy, and operational issues of concern to stakeholders. We have, for example, produced publications on issues such as humanitarian exemptions, medical care in armed conflict, counterterrorism-related clauses in humanitarian grant and partnership agreements, implications of the United States Agency for International Development (USAID) and U.S. State Department partner-vetting systems, as well as briefings on issues of importance to humanitarian actors, including U.S. congressional inquiries, U.S. Department of the Treasury's Office of Foreign Assets Control (OFAC) licensing, and humanitarian crises in Somalia and Mali.

4. An accompanying Comment by one of us (Naz K. Modirzadeh) suggests several additional areas for further consideration by states, donors, and humanitarian actors.

II. RELEVANCE AND IMPORTANCE OF EMPIRICAL STUDY

As previously noted, extensive work has been undertaken regarding the intersection of counterterrorism laws and humanitarian action. Notably, in 2013, the U.N. Office for the Coordination of Humanitarian Affairs (OCHA) and the Norwegian Refugee Council commissioned a study on the impact of counterterrorism laws on humanitarian action.⁵ That report contains extensive qualitative analysis of counterterrorism laws and regulations in place in key donor countries and assesses the qualitative impact of those laws on humanitarian crises in Somalia and the occupied Palestinian territories (oPt). The report also provides information gleaned from interviews with humanitarian actors about the impact of counterterrorism laws on their work, particularly in the contexts of Somalia and oPt. Work by other organizations has explored similar issues and illuminated possible challenges to principled humanitarian action posed by counterterrorism laws.⁶ These studies and reports have made important contributions to legal and policy debates regarding the impact of counterterrorism laws on humanitarian action. To supplement these efforts, we decided, as part of the CHE Project, to collect and analyze relevant data from humanitarian actors.

Empirical analysis can be useful in informing and shaping public policy across a range of domains. In recent years, the notion of evidence-based policymaking has gained bipartisan support in the United States⁷ and throughout the European Union.⁸ Several key initiatives and projects are aimed at supporting programs

5. Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (July 2013).

6. See, e.g., Sara Pantuliano et al., *Counter-terrorism and Humanitarian Action*, HPG Policy Brief 42 (Oct. 2011); Naz K. Modirzadeh et al., *Humanitarian Engagement Under Counter-Terrorism: A Conflict of Norms and the Emerging Policy Landscape*, *International Review of the Red Cross* (Vol. 93, No. 883) (Sept. 2011); Charity & Security Network, *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States* (June 2012).

7. See, e.g., the Commission on Evidence-Based Policymaking, created with bipartisan support through the passage of the Evidence-Based Policymaking Commission Act of 2016 (<https://www.cep.gov/about.html>). The Commission “recognizes that better use of existing data may improve how government programs operate,” and seeks to “develop a strategy for increasing the availability and use of data in order to build evidence about government programs, while protecting privacy and confidentiality.” *Id.* See also Memorandum to the Heads of Departments and Agencies, Executive Office of the President, Office of Management and Budget (July 26, 2013), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2013/m-13-17.pdf>, encouraging U.S. federal agencies to “draw upon existing credible evidence” and “propose new strategies to develop additional evidence relevant to addressing important policy challenging,” noting that programs supported by evidence are more likely to be funded by the U.S. government.

8. See, e.g., the European Commission, *Evidence-Based Policymaking*, available at http://ec.europa.eu/youth/policy/implementation/policy-making_en.

whose utility is buttressed by tested, verifiable data. In a nutshell, evidence-based policy-making approaches are rooted in the notion that, “wherever possible, public policy decisions should be informed by careful analysis using sound and transparent data.”⁹ In addition to government-led initiatives, U.S. foundations have also supported evidence-based policymaking. Examples include Actionable Intelligence for Social Policy, which is based at the University of Pennsylvania,¹⁰ and the Laura and John Arnold Foundation, which has dedicated resources toward evidence-based policy and innovation.¹¹

In the humanitarian sphere, “evidence-based decision-making often requires...an understanding of well-established technical best practices in conjunction with financial resources and political will.”¹² While valuable, research in this context, however, presents challenges:

Research on humanitarian crises and the use of humanitarian action has been problematic.... [T]he humanitarian domain often is normative and agencies derive their legitimacy and credibility by making reference to their principles rather than to their evidence-based approaches.... [H]umanitarian crises pose their own research questions and methodological and ethical challenges, for example, in terms of insecurity, potential instrumentalization or research results, and complex human subject research issues when studying in and with a community in crisis.¹³

Despite these challenges, empirical data can, where rigorously produced and critically analyzed, provide benefits for humanitarian actors, perhaps especially where such data concerns counterterrorism law. For example, information provided in an empirical study can inform consultations with donors, with both parties having a greater awareness of the real and perceived risks of humanitarian engagement in conflict situations where terrorist-listed groups control territory. Along those same lines, empirical data can help organizations navigate their work in high-risk environments, shaping risk assessments and other control measures put into place to assess and decrease risk. Empirical data may also illuminate areas where changes need to be made, both in the actions of humanitarian actors and donors, including areas where changes in laws and regulations may be needed, as well as what those changes might entail. Empirical data can help provide clarity in an area that has been legally and operationally difficult for humanitarian actors, fraught with uncertainty and a lack of information regarding the impact of counterterrorism laws on humanitarian assistance. Over all, empirical data

9. Christopher Scott, *Measuring up to the Measurement Problem: The Role of Statistics in Evidence-Based Policymaking*, Proceedings of the 2005 CBMS Network Meeting, at 36.

10. See Actionable Intelligence for Social Policy, <http://www.aisp.upenn.edu/>.

11. See Laura and John Arnold Foundation, <http://www.arnoldfoundation.org/initiative/evidence-based-policy-innovation/>.

12. David A. Bradt, *Evidence-Based Decision-Making in Humanitarian Assistance*, Humanitarian Practice Network Paper No. 67 (Dec. 2009), at 3.

13. Dennis Dijkzeul et al., *Introduction: Evidence-Based Action in Humanitarian Crises*, Disasters (2009) at S2-S3.

can help identify and justify a path forward for humanitarian actors operating in areas where counterterrorism laws affect their operations and affect their ability to provide assistance to those in need.

III. METHODOLOGY

We developed our survey informed by issues and questions raised by humanitarian actors, governments, and donors throughout our years of dialogue and research on these matters. In selecting the study's key areas of focus, we engaged in conversations with government donor representatives, other government actors, and humanitarian organizations. We worked to develop the approximately 30-question survey with the assistance of experts in empirical research at Harvard Law School, and an institutional review board approved those questions. The questions included multiple-choice answers, as well as open-ended questions where respondents could provide a narrative response. We distributed the survey online by providing a hyperlink to potential respondents, who could answer the survey in any one of four languages: Arabic, English, French, or Spanish. We identified potential respondents through research on humanitarian organizations operating in a wide range of environments; funded by different states and donors; and of varying sizes and structures. We sent the survey to the CHE Project's Senior Law and Policy Working Group, which contains approximately 110 members, as well as approximately 175 humanitarian organizations based in 28 countries and throughout the United Nations. We reached out directly to both individuals and organizations. We also sent the survey announcement through professional networks, such as the International Association of Professionals in Humanitarian Assistance and Protection (PHAP). We followed up with potential respondents periodically with reminders to complete the survey. The survey remained open to respondents for several weeks until closing on November 15, 2016.

IV. FINDINGS

The full survey results are included in Section VI. In this section, we provide a summary of select findings.

The survey received approximately 500 responses from individuals in nearly 50 countries and territories across the world.¹⁴ The respondents represented a broad range of organizational roles and positions, including senior management (29 percent), project management and implementation (20 percent), and legal departments (13 percent), as well as other specialized areas such as research, administration, and communications.

14. See Section VI for a comprehensive list of all countries and regions represented by survey respondents. Not every respondent answered every question included in the survey. In each graph and chart included in Section VI, we indicate the number of respondents in the "frequency" section of the graph or chart. Possible reasons why respondents may not have answered each question include the sensitivity and complexity of the issues involved and the level of knowledge of the specific issue.

Respondents indicated a wide range of familiarity with counterterrorism laws and regulations: only seven percent stated that they were “extremely familiar” with counterterrorism laws, while 26 percent stated that they were “very familiar” with those laws, 38 percent stated they were “moderately familiar” with the laws, and 24 percent stated that they were “slightly familiar” with counterterrorism laws. Respondents accessed a variety of resources to gain familiarity with counterterrorism laws, including supervisors, colleagues, legal counsel, donors, training, and external sources.

Survey respondents generally agreed that counterterrorism laws have affected their work and the work of their organizations. Fifty-three percent of respondents indicated that counterterrorism laws affected both their work and the work of their organizations, while 20 percent indicated it affected their organization’s work. An additional 14 percent indicated that counterterrorism laws specifically affected their work. Nine percent of respondents answered that counterterrorism laws neither affected their work nor the work of their organization.

The survey also asked respondents whether counterterrorism laws affected their respective organization’s commitment and adherence to the humanitarian principles of humanity, impartiality, independence, and neutrality. Many respondents (60 percent) answered affirmatively; 23 percent of respondents answered no, while 16 percent answered that they did not know. When asked how counterterrorism law affected the organization’s commitment and adherence to humanitarian principles, 91 percent of respondents answered that it weakened their commitment to humanitarian principles, suggesting a strong perceived impact of counterterrorism laws and policies on the work of humanitarians.

In addition to exploring the impact of counterterrorism laws on humanitarian principles, previous work examining the impact of counterterrorism laws on humanitarian action has considered the possibility and potential ramifications of a so-called “chilling effect” arising in relation to counterterrorism laws.¹⁵ The theory is that counterterrorism laws are capable of chilling, or curtailing, humanitarian work by, for instance, making it less likely that humanitarian actors will work in particular regions or with particular groups, such as those regions where terrorist-listed armed groups control territory and access to the civilian population. In asking about the impact of counterterrorism laws

15. See, e.g., Kate Mackintosh & Patrick Duplat, *Study of the Impact of Donor Counter-Terrorism Measures on Principled Humanitarian Action* (July 2013) at 68, 84 (“[U.S. officials] did note that the totality of [counterterrorism] measures may have a ‘chilling effect,’ causing humanitarian actors to think twice before implementing programs in areas where there may be a real or perceived risk...Some humanitarian actors reported that counterterrorism legislation in countries such as Canada, Denmark, the U.K., and the U.S., as well as restrictions in funding agreements, had a ‘chilling effect.’ Operational decisions were made not strictly according to need but, in part, to minimize organizations’ exposure to legal liability. This ‘chilling effect’ was also due to uncertainty...Many were unsure what was permitted, whether licenses were needed, and whether organizations and individuals could be held liable. The confusion...resulted in a range of behaviors, from dismissal of the risk to refusal to operate in certain areas or to take funding from certain donors.”).

on humanitarian action, 69 percent of survey respondents indicated that counterterrorism measures had chilled or curtailed their work; 19 percent answered that counterterrorism measures left their work unchanged, while 9 percent answered that such measures had improved their work. Additionally, 38 percent of respondents stated that counterterrorism laws had caused their organization to forego, alter, or cease activities and programming.

One possible reason why counterterrorism laws and policies may have engendered uncertainty within the humanitarian community, consequently “chilling” humanitarian action that would otherwise be undertaken, could involve the perceived lack of clarity regarding the laws themselves. For instance, when asked whether counterterrorism laws provided clear direction to humanitarian actors on their legal obligations, a majority of respondents (55 percent) answered no. When asked why counterterrorism laws did not provide clear direction to humanitarian actors on their legal obligations, a majority of respondents (54 percent) answered that the laws included unclear or vague language. Other factors noted by respondents included insufficient guidance from donors (13 percent), that counterterrorism laws conflicted with humanitarian principles (13 percent), that humanitarian actors had insufficient awareness and training on counterterrorism laws (11 percent), and that counterterrorism laws conflicted with information provided by governments and donors (11 percent).

This lack of clarity regarding counterterrorism laws persists even though a majority of respondents (53 percent) stated that their organization had implemented policies, procedures, and/or training regarding counterterrorism law. Perhaps because of the lack of clarity surrounding counterterrorism laws, respondents overwhelmingly indicated (88 percent) that further engagement and guidance on counterterrorism laws and policies would be useful.

Respondents stated that they used a variety of methods to comply with counterterrorism laws, including risk mitigation, vetting, training, legal compliance, and audits. When counterterrorism laws restricted the respondent’s engagement in humanitarian work, various strategies were reportedly used to comply with the laws, including increased oversight, screening, and/or vetting (31 percent) and restricting work (23 percent). Forty percent of respondents reported using various strategies to comply with counterterrorism laws when those laws restricted their work. These efforts may entail certain costs: 60 percent of respondents reported spending substantial amounts of time towards compliance measures. In addition, around a third of respondents indicated that counterterrorism laws presented other costs, whether in the form of reputational (37 percent), legal (35 percent), or security risks (33 percent), to their organization.

In certain situations, counterterrorism laws may require vetting local partners and recipients of aid. Sixty-five percent of survey respondents stated that their organization had to vet local partners and/or recipients of aid. Vetting has reportedly affected the activities of humanitarian organizations in several ways. Among the responses, humanitarian actors indicated that vetting slowed

operations (34 percent), inhibited work with local partners (12 percent), increased costs (8 percent), and reduced the credibility of their organization (8 percent).

We also sought to assess the level of candor between humanitarian actors and donors regarding the impact of counterterrorism measures. Many respondents (61 percent) reported that they could be forthright with their donors regarding concerns about compliance with counterterrorism laws, such as diversion of aid to designated terrorist groups, and other risks that may arise in environments where designated terrorist organizations control territory or access to a civilian population. In instances where individuals answered that they could not be forthright with donors, the reasons provided for the lack of candor included a perceived lack of understanding on the part of the donor (50 percent) or a potential loss of funding (21 percent).

V. CONCLUSION

This pilot study, when understood within the limits of the gathered data, sheds light on areas of tension and concern between counterterrorism frameworks and humanitarian action. The study also provides a strong basis on which to call for additional research, exploration, and analysis.

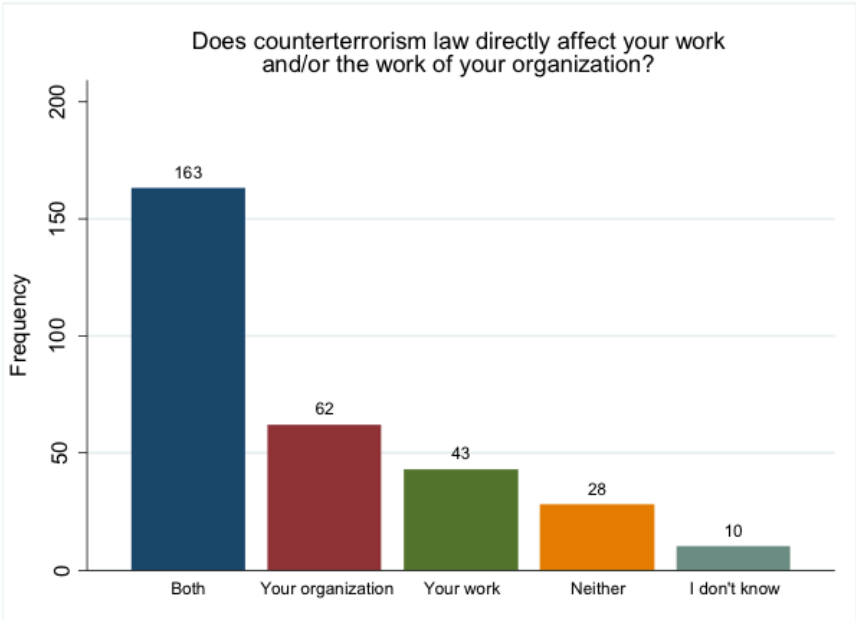
Additional research in relevant areas could benefit various actors. Humanitarian actors might obtain more concrete information that would help inform conversations with donors and that would then develop and implement strategies to address counterterrorism laws and regulations, such as risk-assessment programs within their organizations. Humanitarian donors might obtain a more accurate and comprehensive understanding of the legal, political, and operational landscape. And policy-makers might obtain a more accurate and comprehensive understanding of the tensions and interests arising at the intersection of counterterrorism frameworks and humanitarian action.

To calibrate future studies, researchers should bear in mind challenges that we encountered. Those challenges included gathering information on sensitive issues through a survey distributed to a diffuse audience, including the level of knowledge and/or comfort in discussing multifaceted legal issues, as well as difficulties in distributing the survey to many humanitarian actors and reaching those actors working in certain areas, such as conflict zones. While we distributed the survey through several different mechanisms and organizations, even broader distribution and promotion may result in a higher response rate, which could reveal more statistically significant (i.e., reliable) data. A survey with a greater number of responses could provide more information that would enable the humanitarian sector to clearly assess how and where counterterrorism laws and policies are having the greatest impact. Obtaining a larger number of responses might be achieved by opening a survey for a longer period of time, conducting more in-depth outreach to humanitarian organizations and their staff, and using broader networks of humanitarian actors to distribute and promote the survey.

VI. SURVEY RESULTS

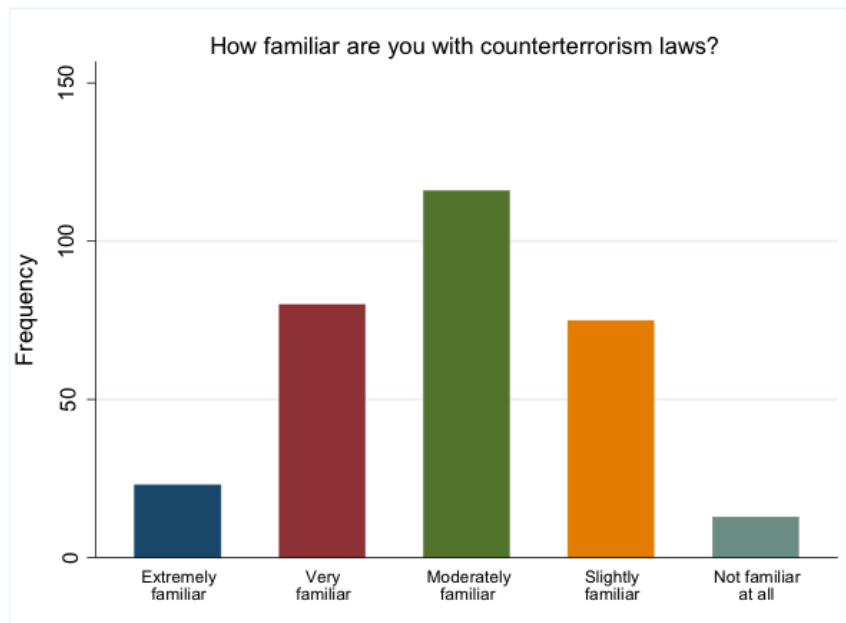
Question 1: Does counterterrorism law directly affect your work and/or the work of your organization? Select all that apply.

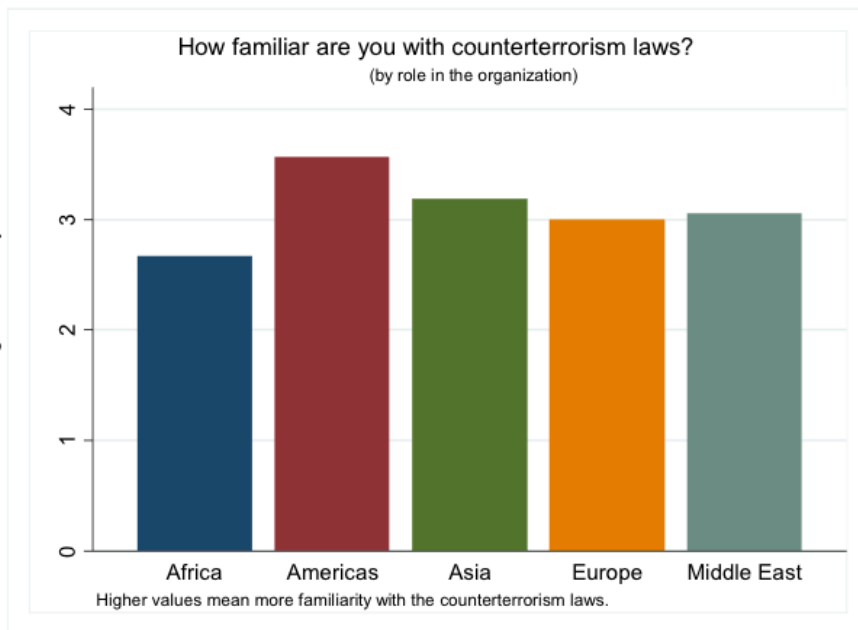
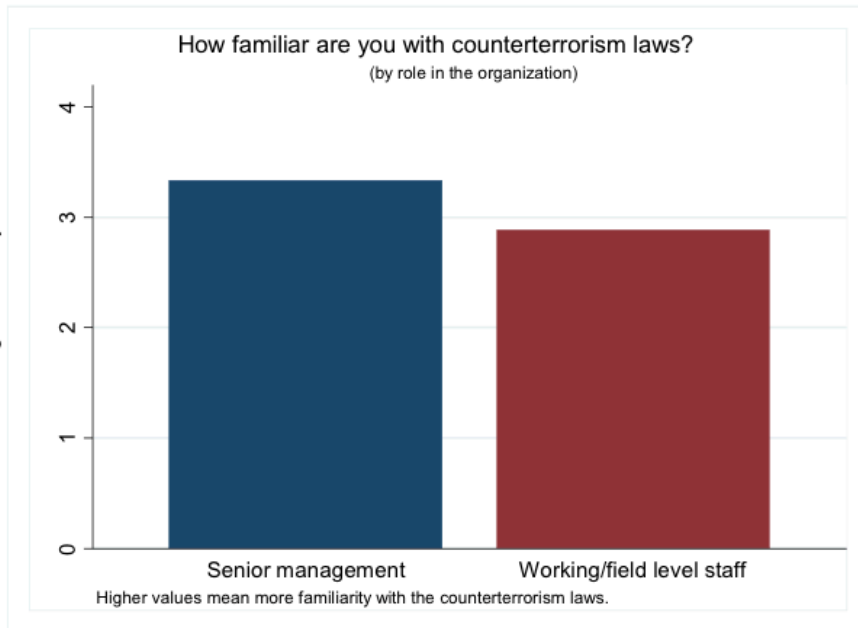
Does counterterrorism law directly affect your work and/or the work of your organization?		
Responses	Frequency	Percent
Both	163	53
Your organization	62	20
Your work	43	14
Neither	28	9
I don't know	10	3
Total	306	100



Question 2: How familiar are you with counterterrorism laws?

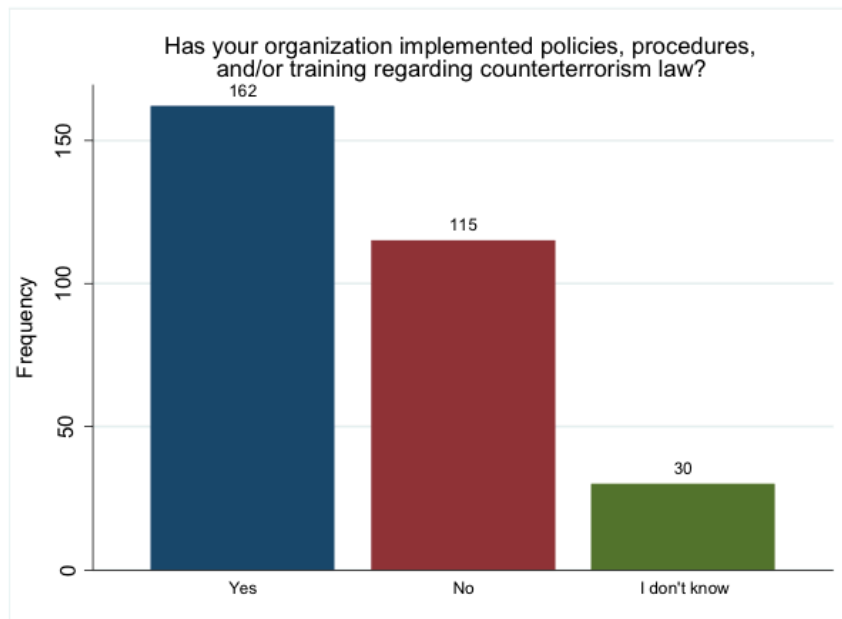
How familiar are you with counterterrorism laws?		
Responses	Frequency	Percent
Extremely familiar	23	7
Very familiar	80	26
Moderately familiar	116	38
Slightly familiar	75	24
Not familiar at all	13	4
Total	307	100

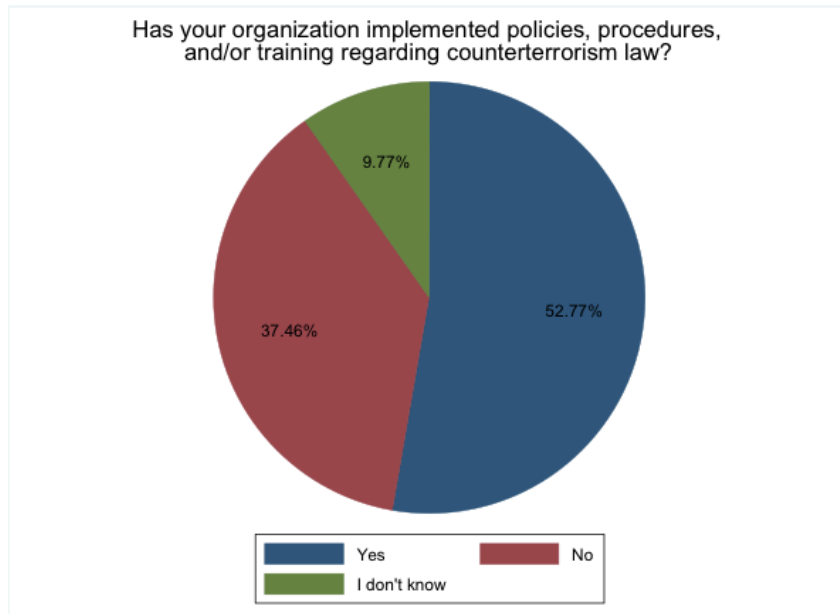




Question 3: Has your organization implemented policies, procedures, and/or training regarding counterterrorism law?

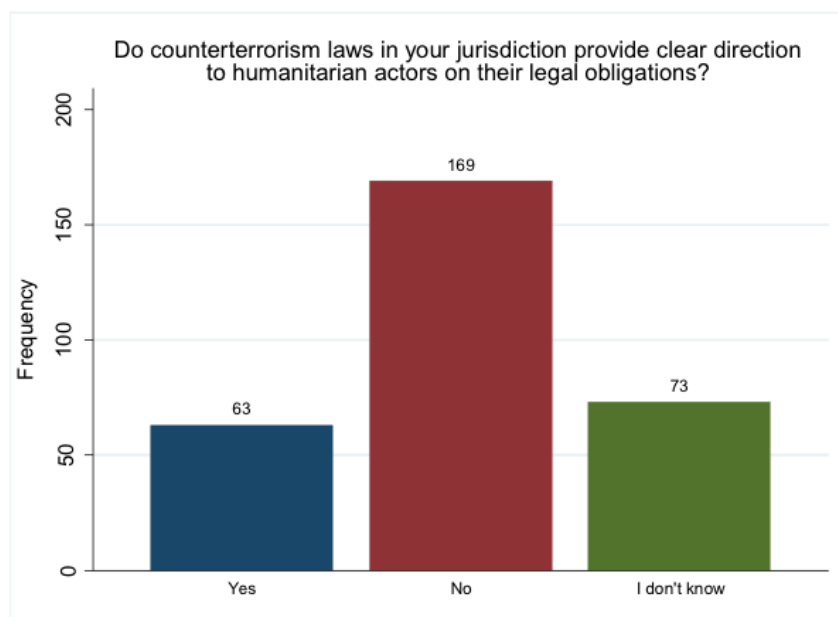
Has your organization implemented policies, procedures, and/or training regarding counterterrorism law?		
Responses	Frequency	Percent
Yes	162	53
No	115	37
I don't know	30	10
Total	307	100

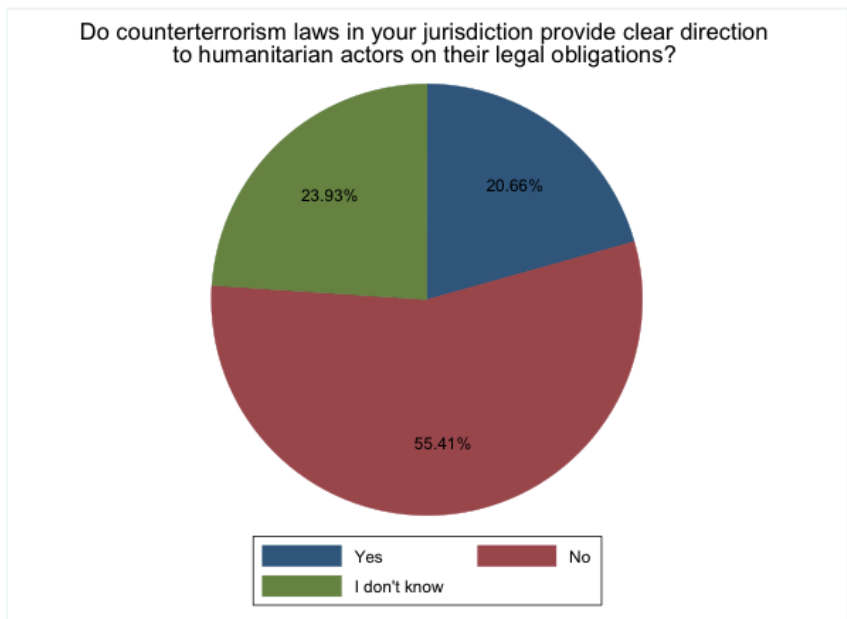




Question 4: In your opinion, do counterterrorism laws in your jurisdiction provide clear direction to humanitarian actors on their legal obligations?

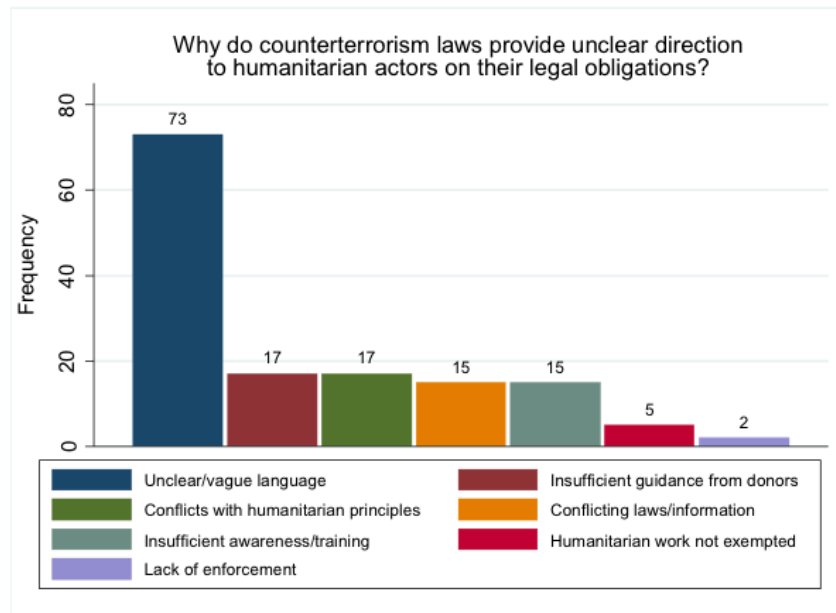
Do counterterrorism laws in your jurisdiction provide clear direction to humanitarian actors on their legal obligations?		
Responses	Frequency	Percent
Yes	63	21
No	169	55
I don't know	73	24
Total	305	100





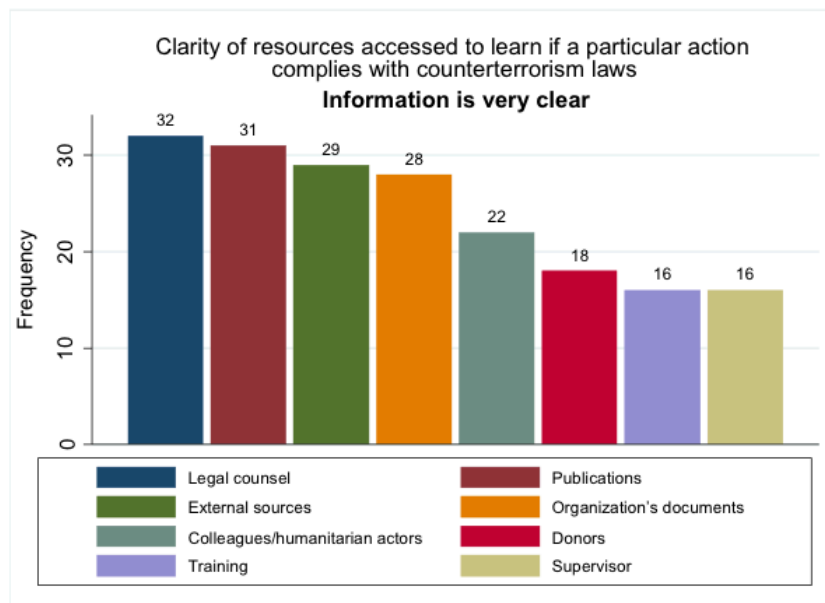
Question 5: Please explain why you think that counterterrorism laws in your jurisdiction do not provide clear direction to humanitarian actors on their legal obligations.

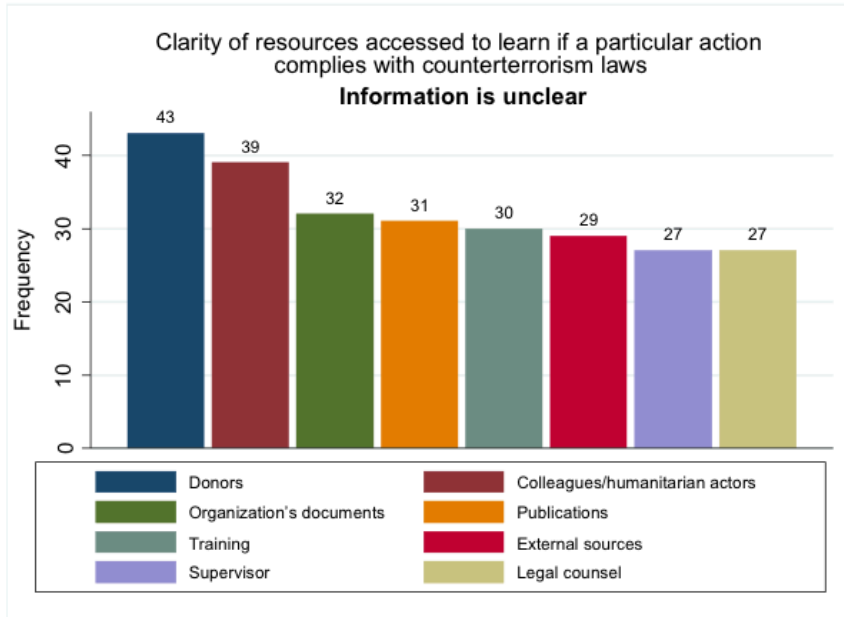
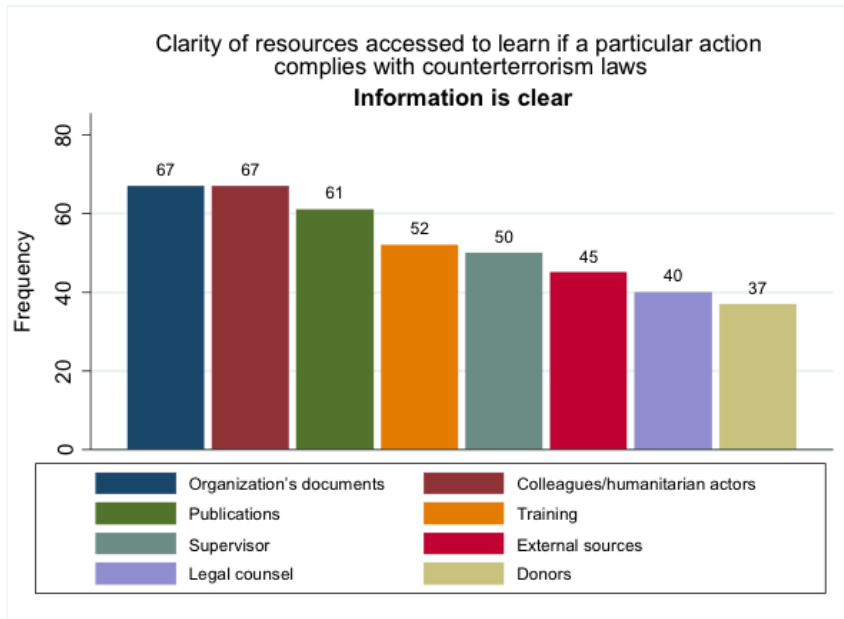
Why do counterterrorism laws provide unclear direction to humanitarian actors on their legal obligations?		
Responses	Frequency	Percent
Unclear/vague language	73	54
Insufficient guidance from donors	17	13
Conflicts with humanitarian principles	17	13
Insufficient awareness/training	15	11
Conflicting laws/information	15	11
Humanitarian work not exempted	5	4
Lack of enforcement	2	1
Total	134	

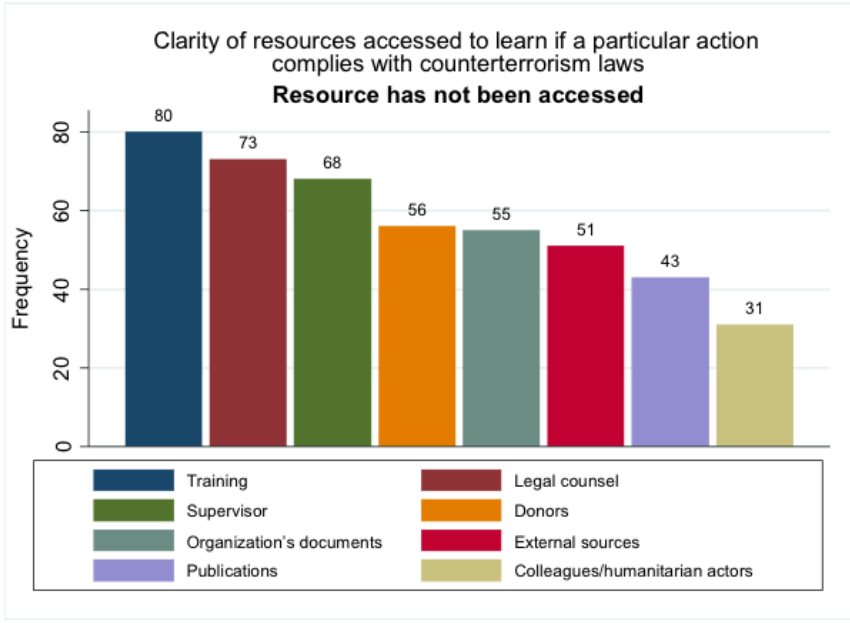
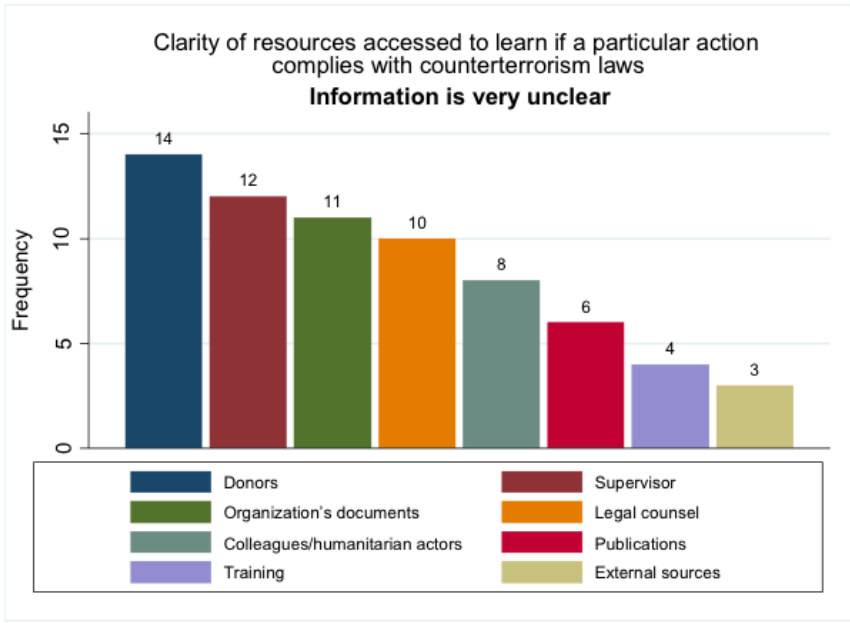


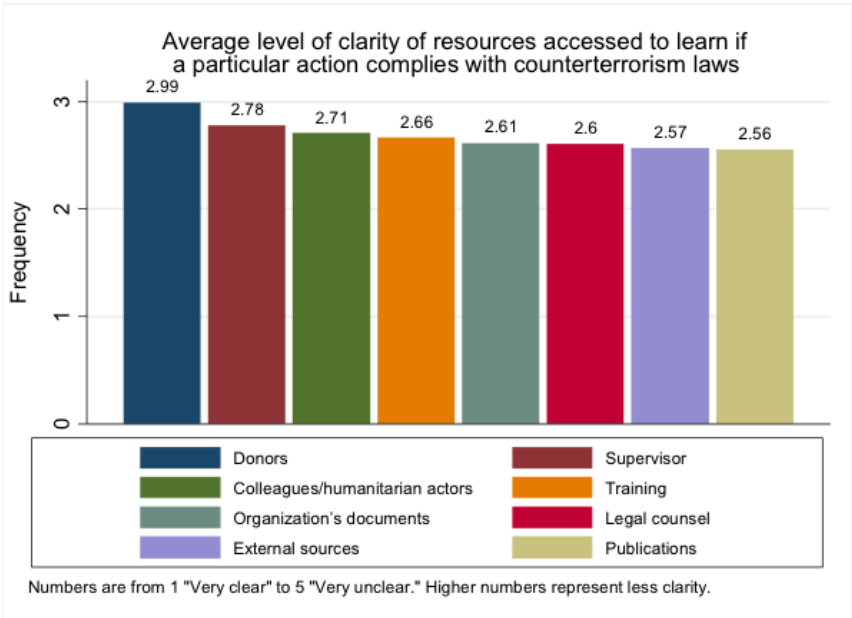
Question 6: What resources have you accessed to learn if a particular action complies with counterterrorism laws, and how clear was the information received from each source?

What resources have you accessed to learn if a particular action complies with counterterrorism laws, and how clear was the information received from each source?							
		Very clear	Clear	Neither unclear nor clear	Unclear	Very unclear	Have not accessed
Documents provided by your organization	N	28	67	40	32	11	55
	%	12%	29%	17%	14%	5%	24%
Training	N	16	52	34	30	4	80
	%	7%	24%	16%	14%	2%	37%
Supervisor	N	16	50	34	27	12	68
	%	8%	24%	16%	13%	6%	33%
Legal counsel	N	32	40	35	27	10	73
	%	15%	18%	16%	12%	5%	34%
Colleagues and/or other humanitarian actors	N	22	67	54	39	8	31
	%	10%	30%	24%	18%	4%	14%
Donors	N	18	37	49	43	14	56
	%	8%	17%	23%	20%	6%	26%
Publications	N	31	61	51	31	6	43
	%	14%	27%	23%	14%	3%	19%
External sources	N	29	45	52	29	3	51
	%	14%	22%	25%	14%	1%	24%



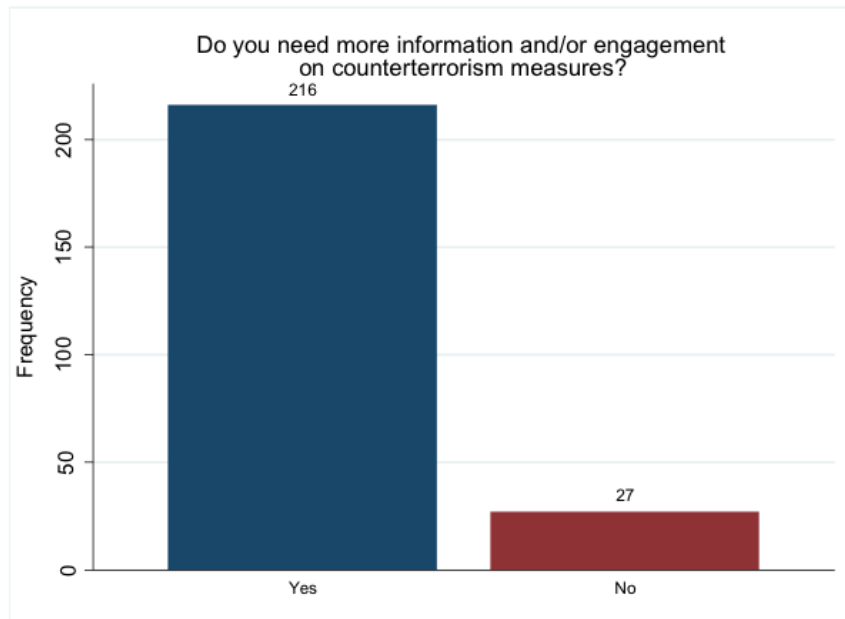


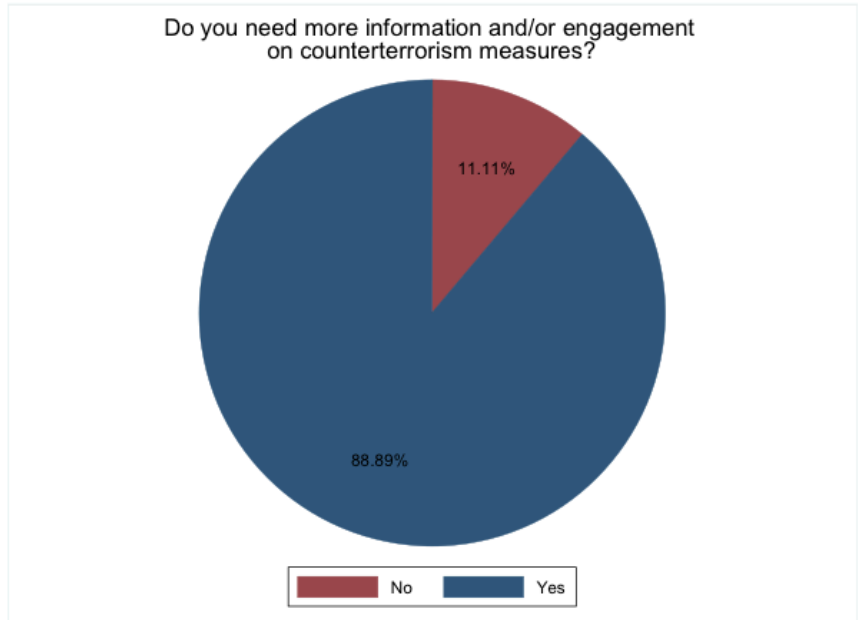




Question 7: Do you feel that you need more information and/or engagement on counterterrorism measures or that you already have adequate guidance regarding counterterrorism measures?

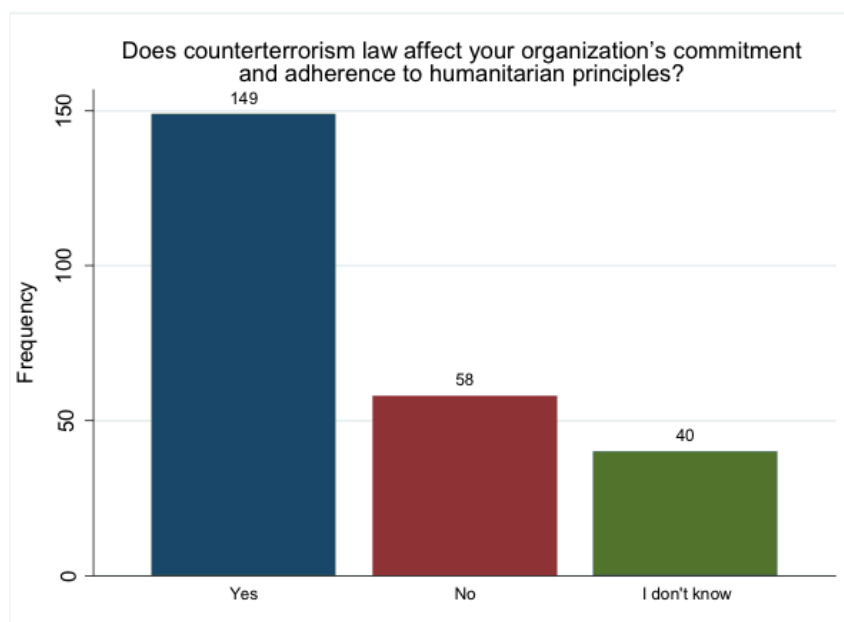
Do you need more information and/or engagement on counterterrorism measures?		
Responses	Frequency	Percent
Yes	216	89
No	27	11
Total	243	100

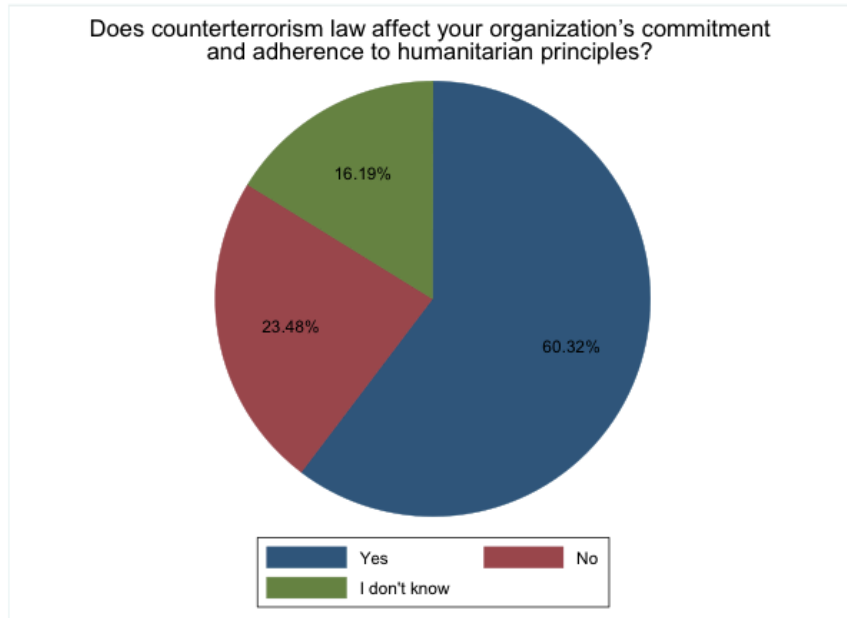




Question 8: Does counterterrorism law affect your organization’s commitment and adherence to the humanitarian principles of humanity, impartiality, independence, and neutrality?

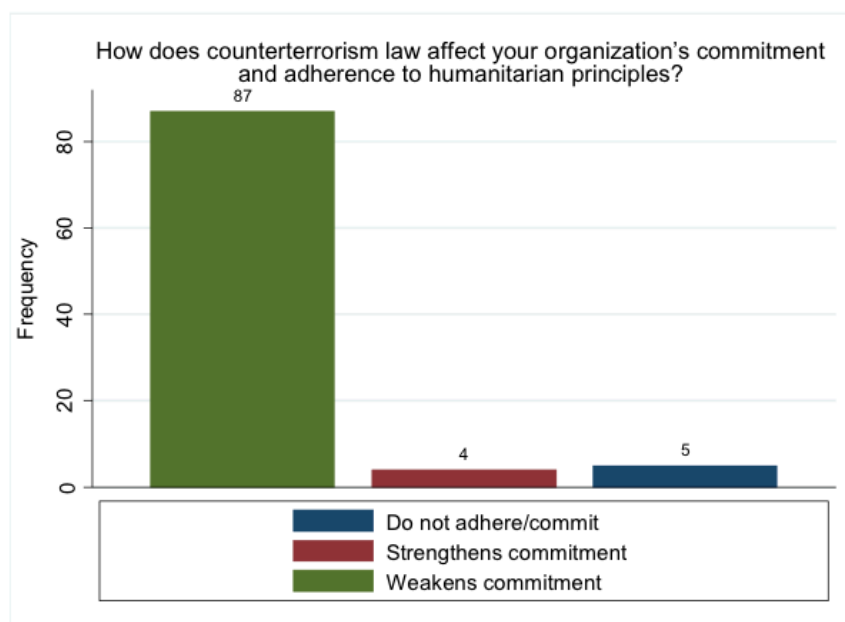
Does counterterrorism law affect your organization’s commitment and adherence to humanitarian principles?		
Responses	Frequency	Percent
Yes	149	60
No	58	23
I don't know	40	16
Total	247	100

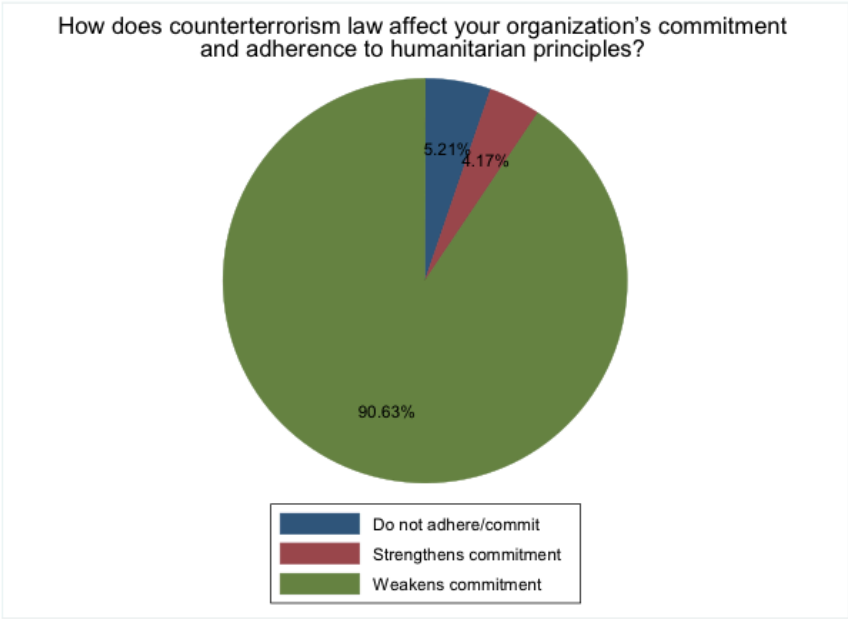




Question 9: Please explain how counterterrorism law affects your organization’s commitment and adherence to the humanitarian principles.

How does counterterrorism law affect your organization’s commitment and adherence to the humanitarian principles?		
Responses	Frequency	Percent
Weakens commitment	87	91
Strengthens commitment	4	4
Do not adhere/commit	5	5
Total	96	100





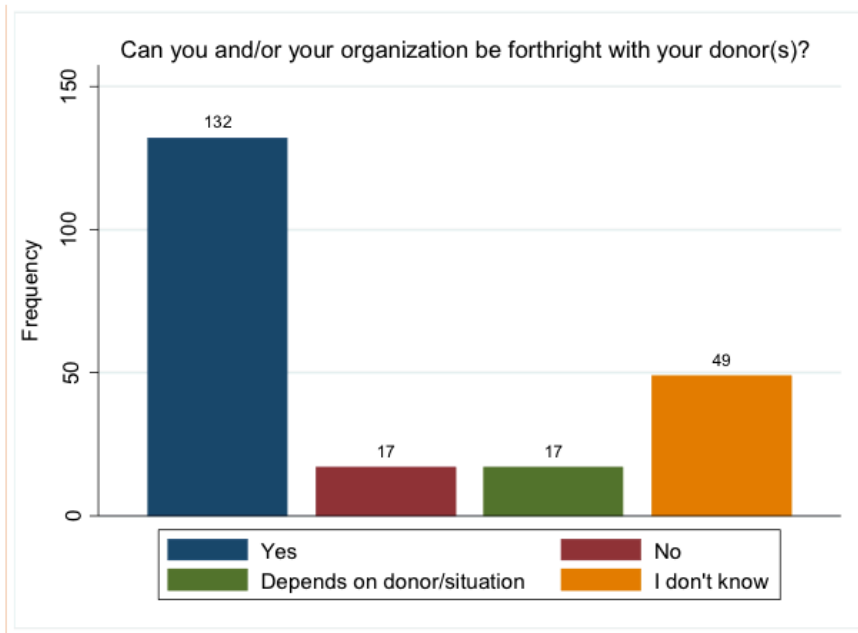
Question 10: If known, what strategies do you and/or your organization use to comply with counterterrorism laws if and/or when these laws or measures restrict your engagement in humanitarian activities?

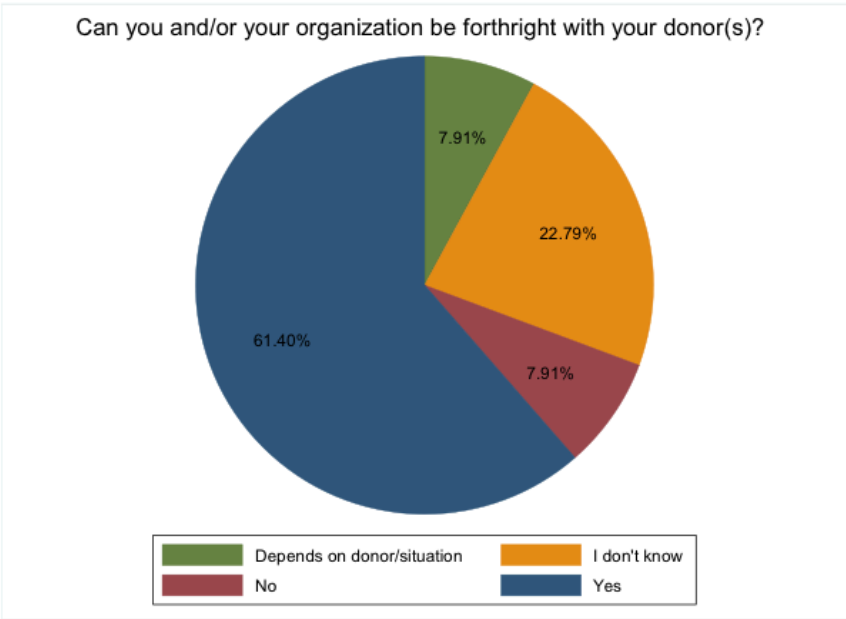
Responses	Frequency	Percent
Various strategies	58	40
Oversight/screening/vetting	44	31
Restrict engagements	33	23
Training	13	9
Obtain a license/exemption	11	8
I don't know	9	6
Don't use any strategies	9	6
Seek guidance from government officials	2	1
Total	144	



Question 11: If known, can you and/or your organization be forthright with your donor(s) regarding concerns about designated terrorist groups, diversion of aid to terrorist groups, and/or risks that you face in environments where designated terrorist organizations control territory or access to the population?

Can you and/or your organization be forthright with your donor(s)?		
Responses	Frequency	Percent
Yes	132	61
No	17	8
Depends on donor/situation	17	8
I don't know	49	23
Total	215	100



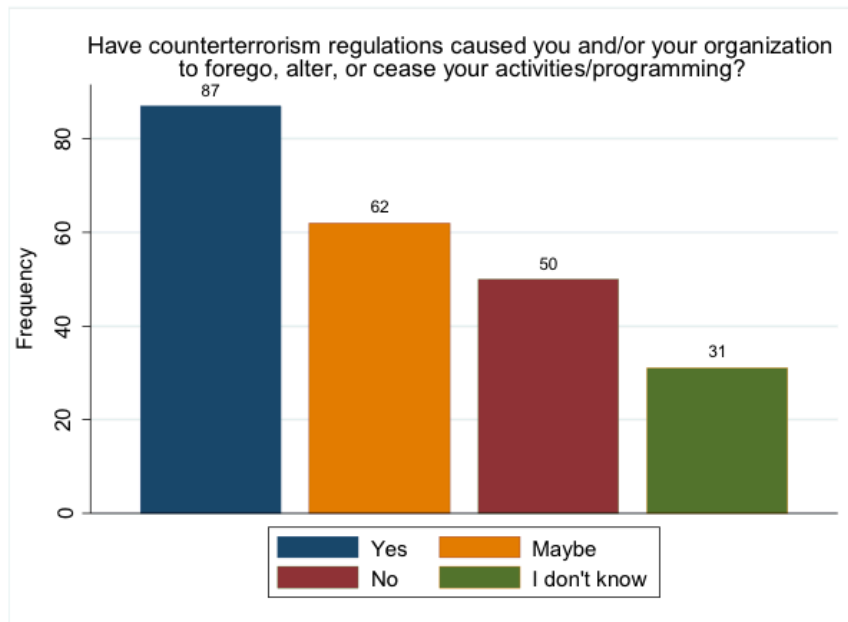


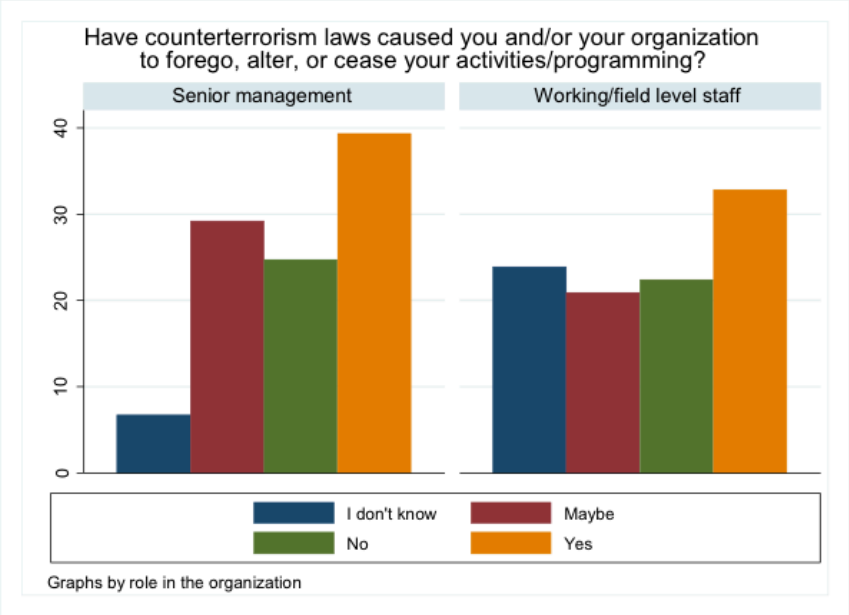
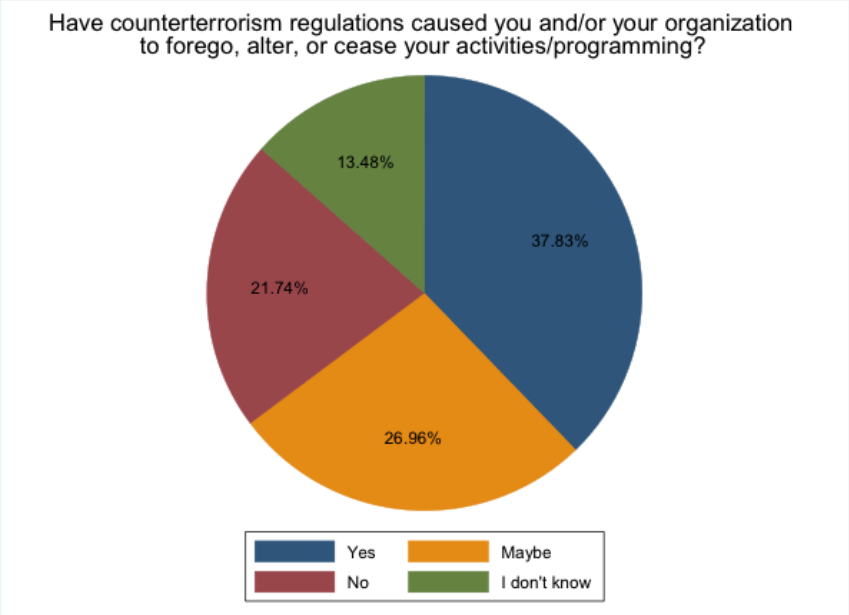
Question 12: Please explain why you think that you and/or your organization cannot be forthright with your donor(s).

Why do you think that you and/or your organization cannot be forthright with your donor(s)?		
Responses	Frequency	Percent
Lack of understanding	7	50
Limits operations	1	7
Lose funding	3	21
Total	14	

Question 13: Have counterterrorism regulations caused you and/or your organization to forego, alter, or cease your activities/programming?

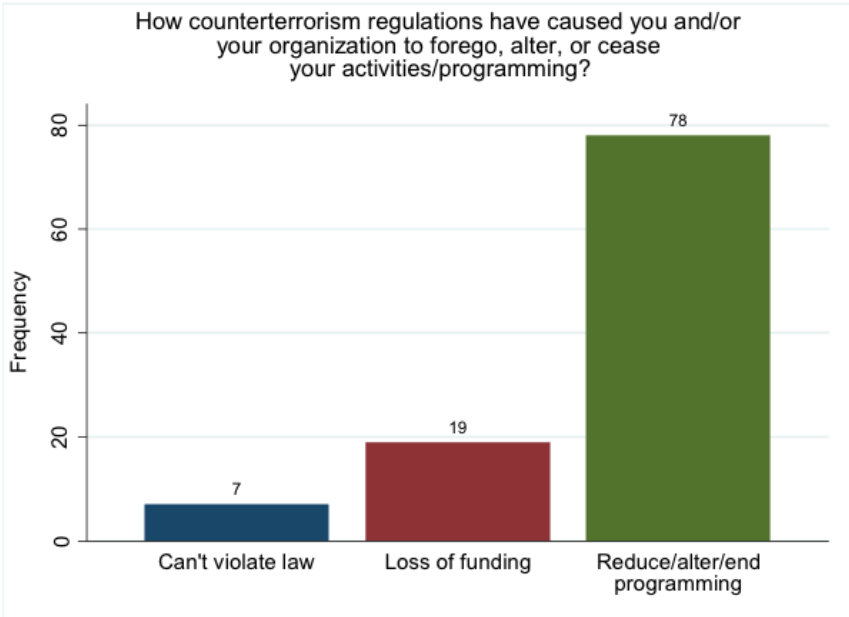
Have counterterrorism regulations caused you and/or your organization to forego, alter or cease your activities/programming?		
Responses	Frequency	Percent
Yes	87	38
Maybe	62	27
No	50	22
I don't know	31	13
Total	230	100





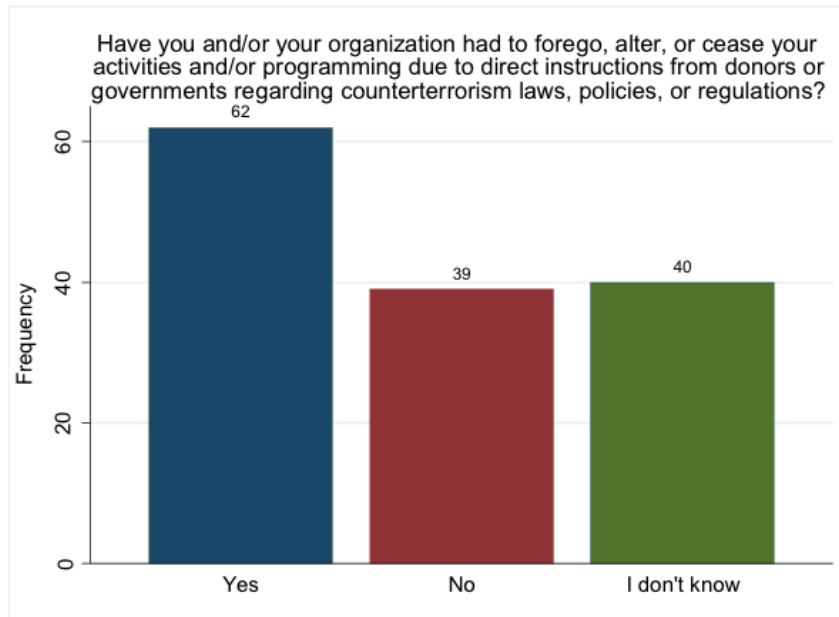
Question 14: Please explain how counterterrorism regulations have caused you and/or your organization to forego, alter, or cease your activities/programming.

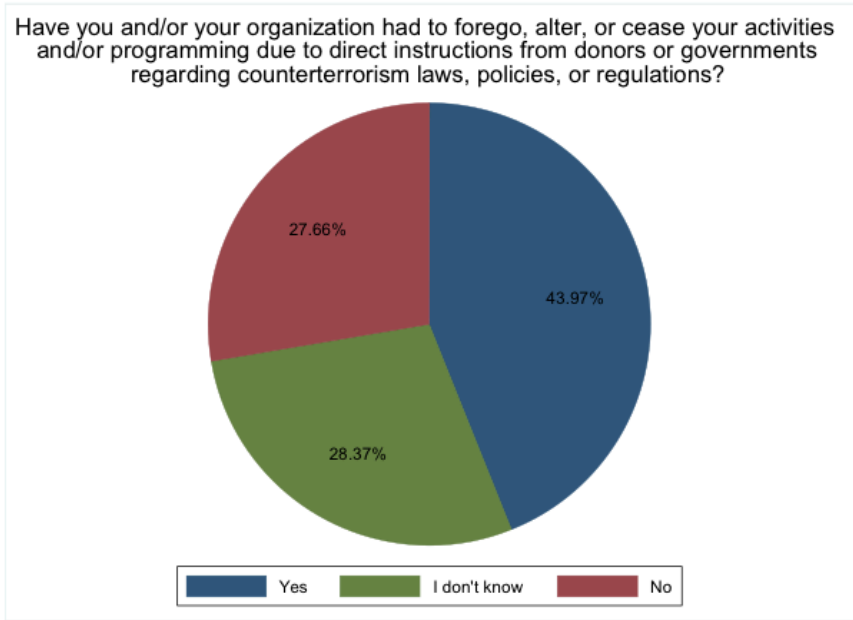
How counterterrorism regulations have caused you and/or your organization to forego, alter, or cease your activities/programming?		
Responses	Frequency	Percent
Reduce/alter/end programming	78	68
Loss of funding	19	17
Can't violate law	7	6
Total	115	



Question 15: Have you and/or your organization had to forego, alter, or cease your activities/programming due to direct instructions from donors or governments regarding counterterrorism laws, policies or regulations?

Have you and/or your organization had to forego, alter, or cease your activities/programming due to direct instructions from donors or governments regarding counterterrorism laws, policies, or regulations?		
Responses	Frequency	Percent
Yes	62	44
No	39	28
I don't know	40	28
Total	141	100





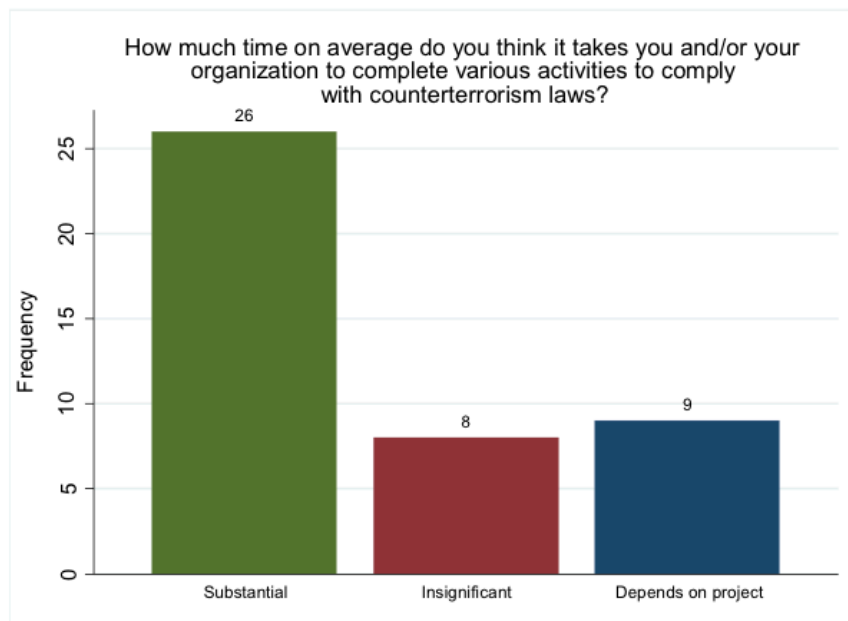
Questions 16a: If known, what type of activities do you and/or your organization do to comply with counterterrorism laws (e.g. vetting, training, legal compliance, risk mitigation strategies, additional audits, etc.)? Please explain.

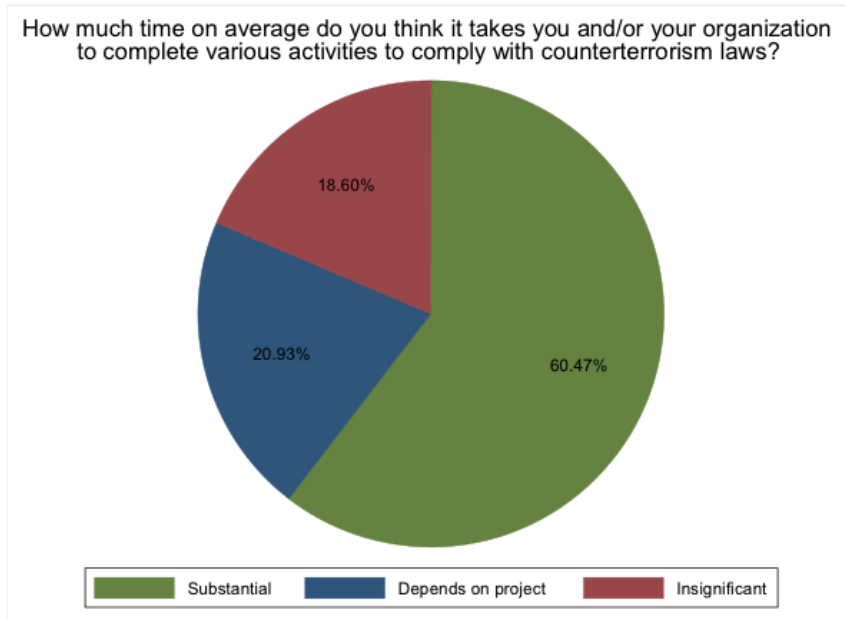
What type of activities do you and/or your organization do to comply with counterterrorism laws?		
Responses	Frequency	Percent
Risk mitigation strategies	52	39
Vetting	47	35
Training	38	28
Legal compliance	34	25
Internal/external audits	22	16
None	14	10
Total	135	



Question 16b: If known, how much time on average do you think it takes you and/or your organization to complete various activities to comply with counterterrorism laws?

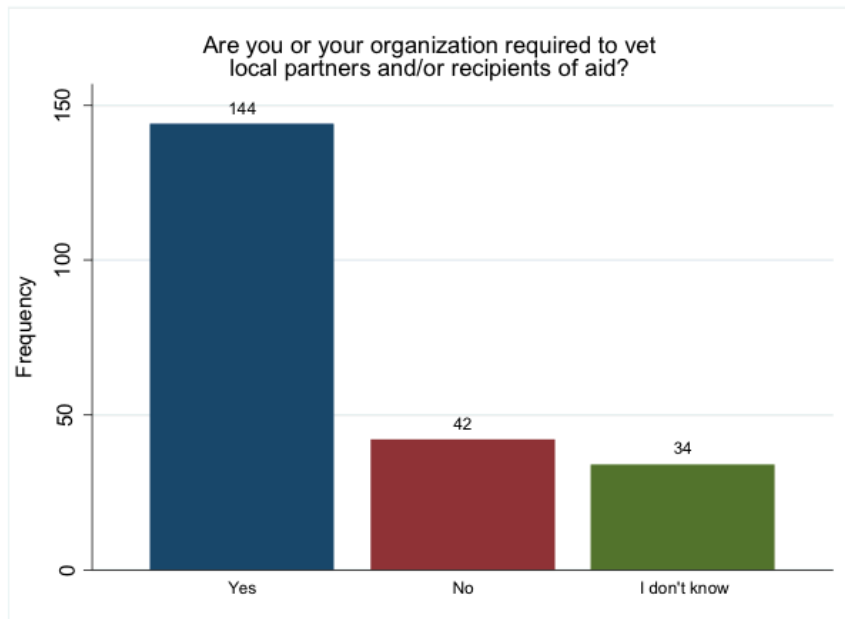
How much time on average do you think it takes you and/or your organization to complete various activities to comply with counterterrorism laws?		
Responses	Frequency	Percent
Substantial	26	60
Depends on project	9	21
Insignificant	8	19
Total	43	100

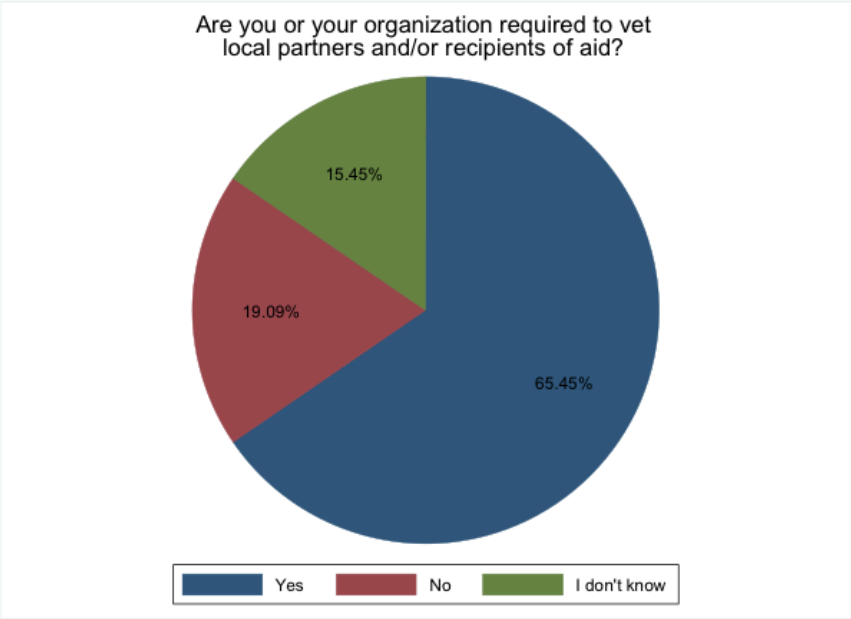




Question 17: Are you or your organization required to vet local partners and/or recipients of aid?

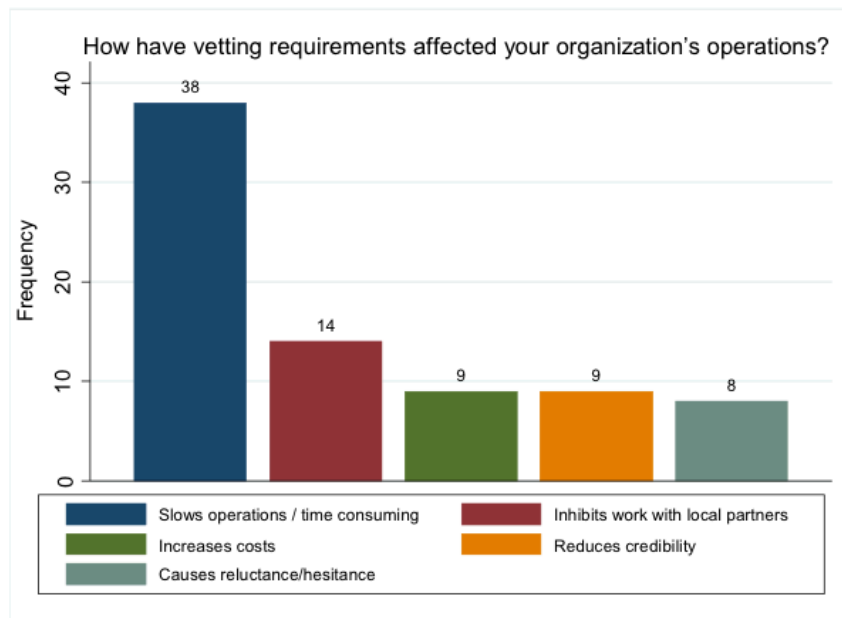
Are you or your organization required to vet local partners and/or recipients of aid?		
Responses	Frequency	Percent
Yes	144	65
No	42	19
I don't know	34	15
Total	220	100





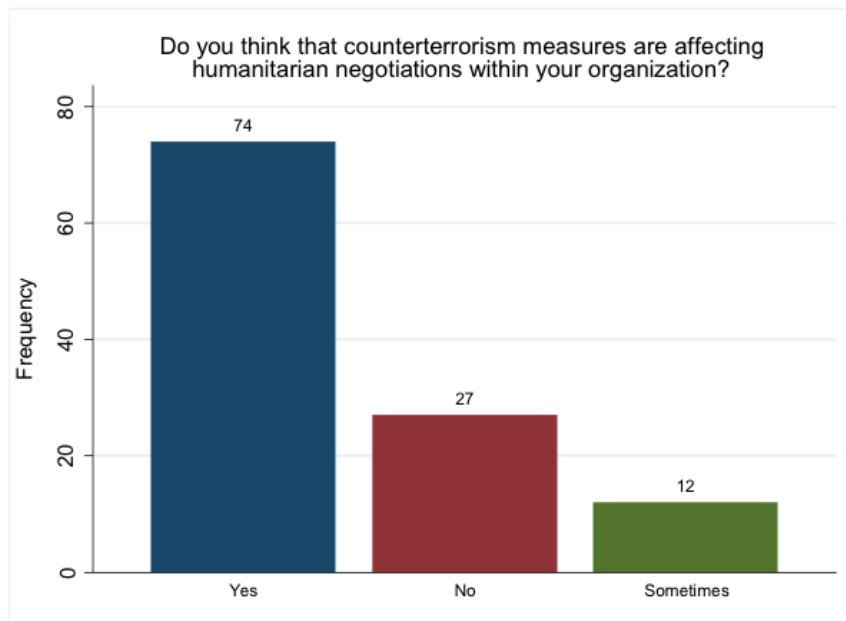
Question 18: How have these vetting requirements affected your organization's operations?

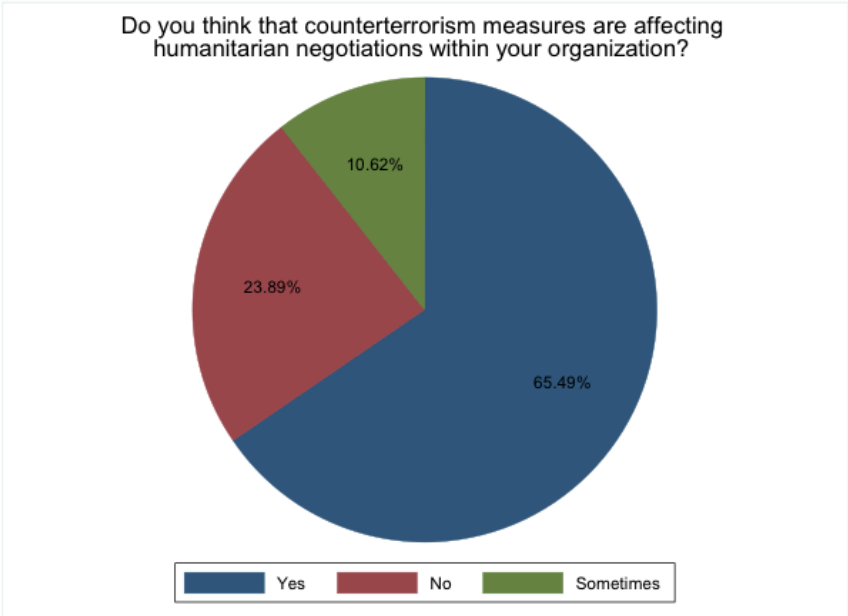
How have vetting requirements affected your organization's operations?		
Responses	Frequency	Percent
Slows operations / Time consuming	38	34
Inhibits work with local partners	14	12
Increases costs	9	8
Reduces credibility	9	8
Causes reluctance/hesitance	8	7
Total	113	



Question 19: Do you think that counterterrorism measures are affecting humanitarian negotiations within your organization? Please explain.

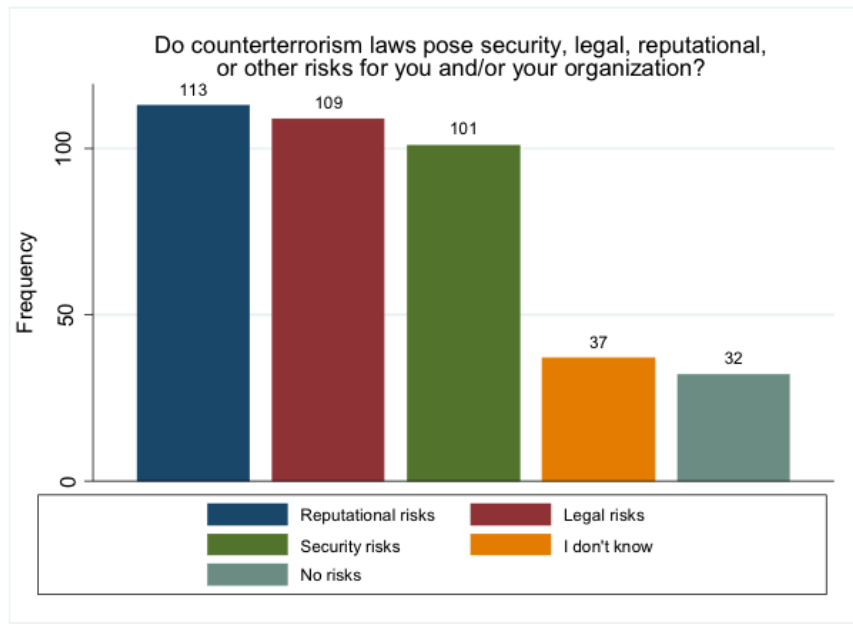
Do you think that counterterrorism measures are affecting humanitarian negotiations within your organization?		
Responses	Frequency	Percent
Yes	74	65
No	27	24
Sometimes	12	11
Total	113	100





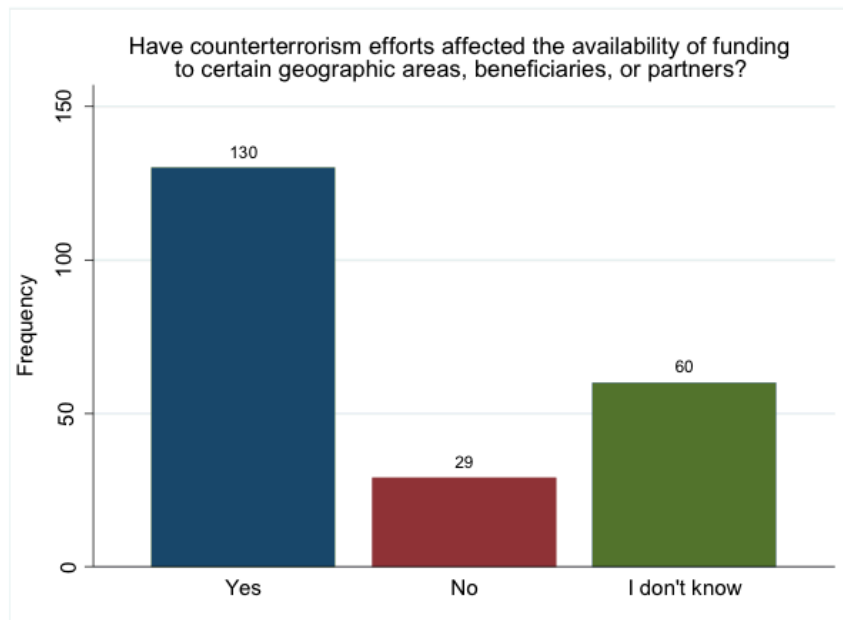
Question 20: Do counterterrorism laws pose security, legal, reputational or other risks for you and/or your organization?

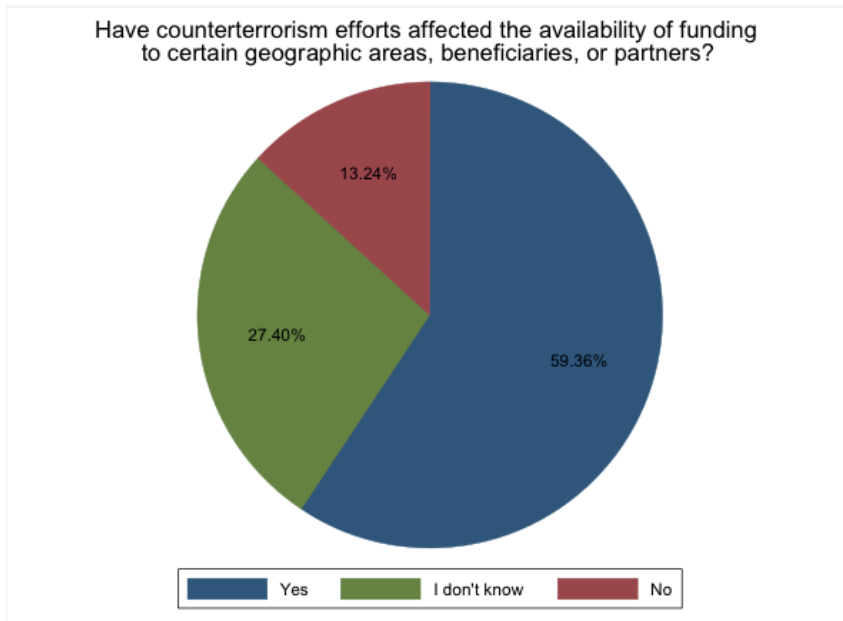
Do counterterrorism laws pose security, legal, reputational or other risks for you and/or your organization?		
Responses	Frequency	Percent
Reputational risks	113	37
Legal risks	109	35
Security risks	101	33
I don't know	37	12
No risks	32	10
Total	308	



Question 21: If known, have counterterrorism efforts affected the availability of funding to certain geographic areas, beneficiaries, or partners?

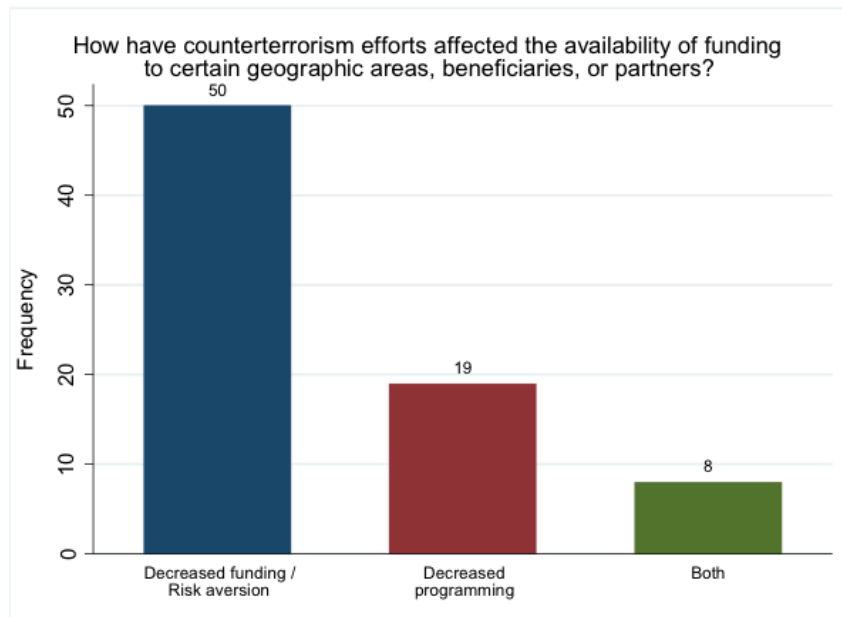
Have counterterrorism efforts affected the availability of funding to certain geographic areas, beneficiaries, or partners?		
Responses	Frequency	Percent
Yes	130	59
No	29	13
I don't know	60	27
Total	219	100

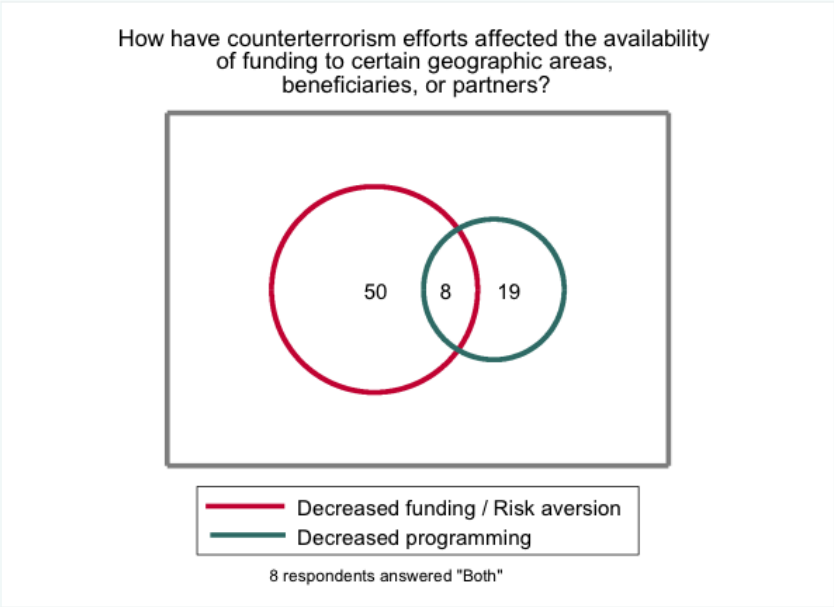
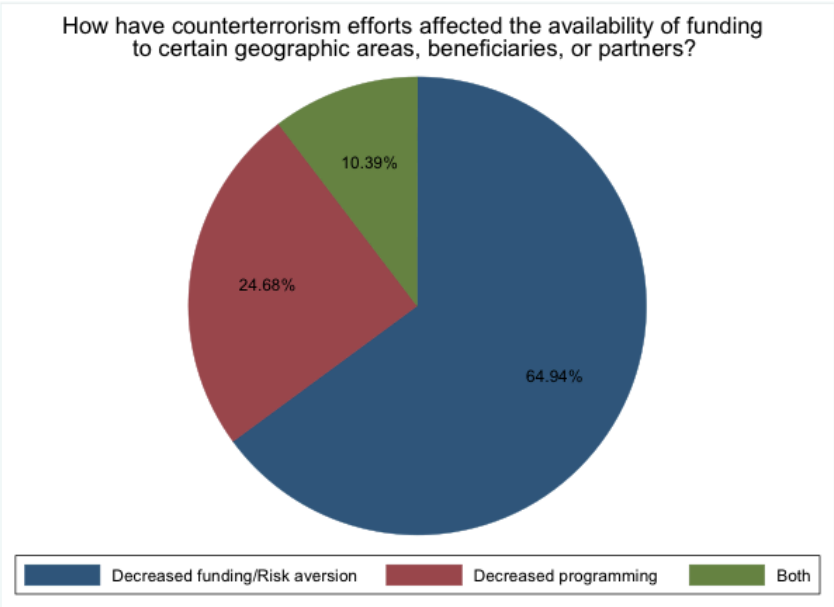




Question 22: Please explain how have counterterrorism efforts affected the availability of funding to certain geographic areas, beneficiaries, or partners.

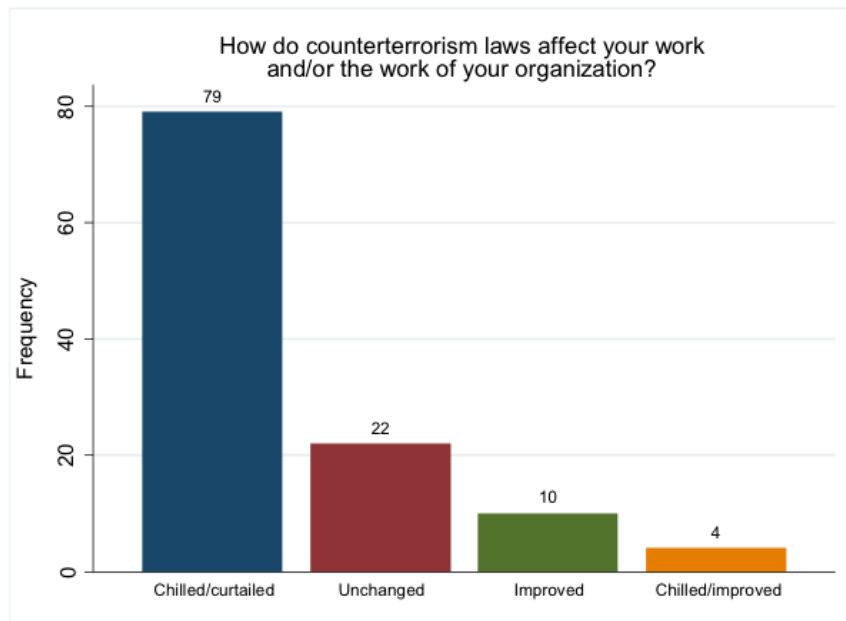
How have counterterrorism efforts affected the availability of funding to certain geographic areas, beneficiaries, or partners?		
Responses	Frequency	Percent
Decreased funding / Risk aversion	50	65
Decreased programming	19	25
Both	8	10
Total	77	100

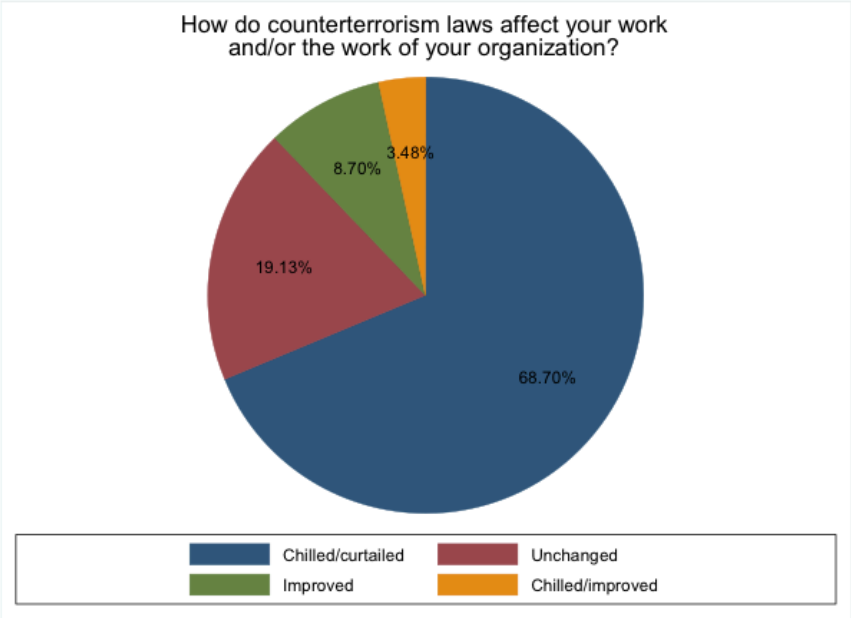




Question 23: How do counterterrorism laws affect your work and/or the work of your organization? Have they “chilled” (curtailed) your work, improved or left your operations unchanged? Please explain.

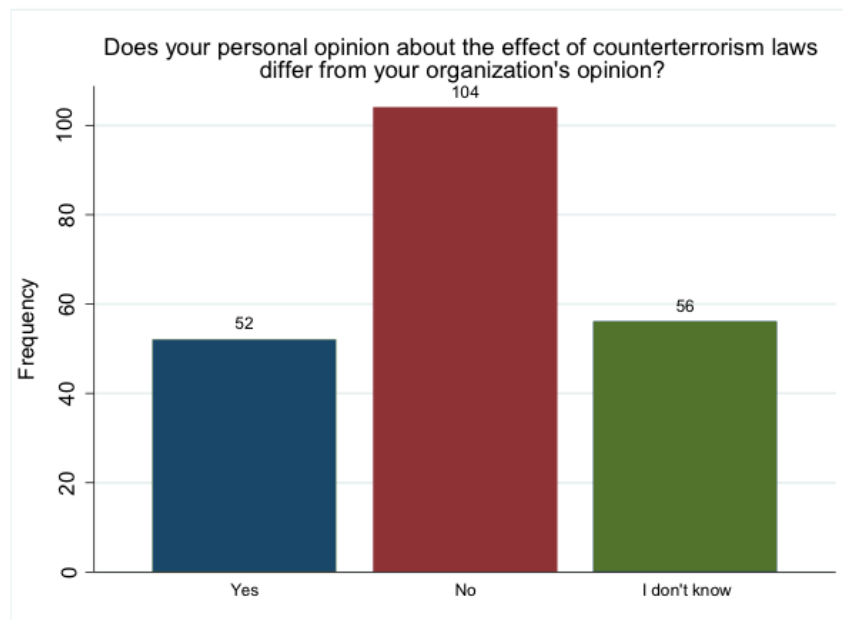
How do counterterrorism laws affect your work and/or the work of your organization?		
Responses	Frequency	Percent
Chilled/curtailed work	79	69
Unchanged	22	19
Improved work	10	9
Chilled and improved	4	3
Total	115	100

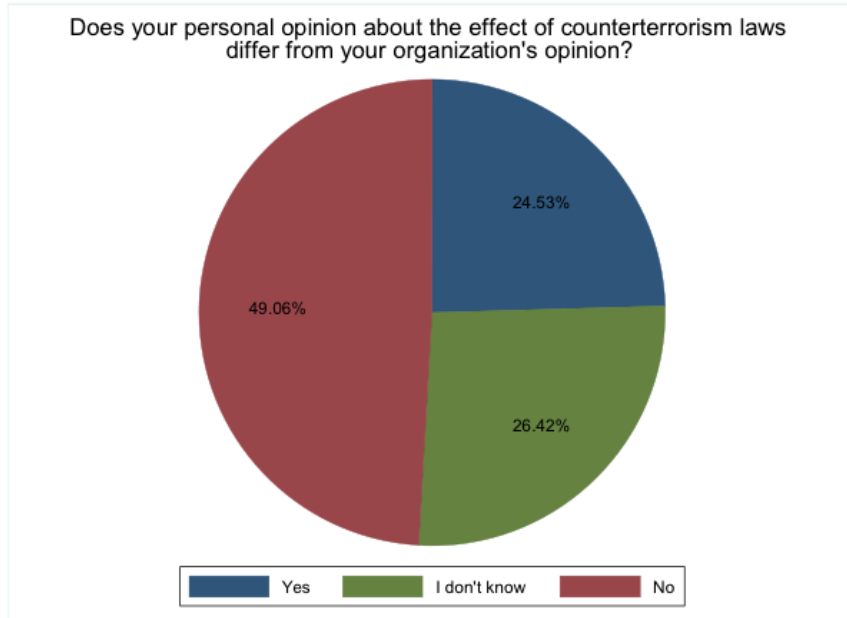




Question 24: Does your personal opinion about the effect of counterterrorism laws on your work and/or the work of your organization differ from your organization's understanding of the effect of counterterrorism laws?

Does your personal opinion about the effect of counterterrorism laws differ from your organization's opinion?		
Responses	Frequency	Percent
Yes	52	25
No	104	49
I don't know	56	26
Total	212	100



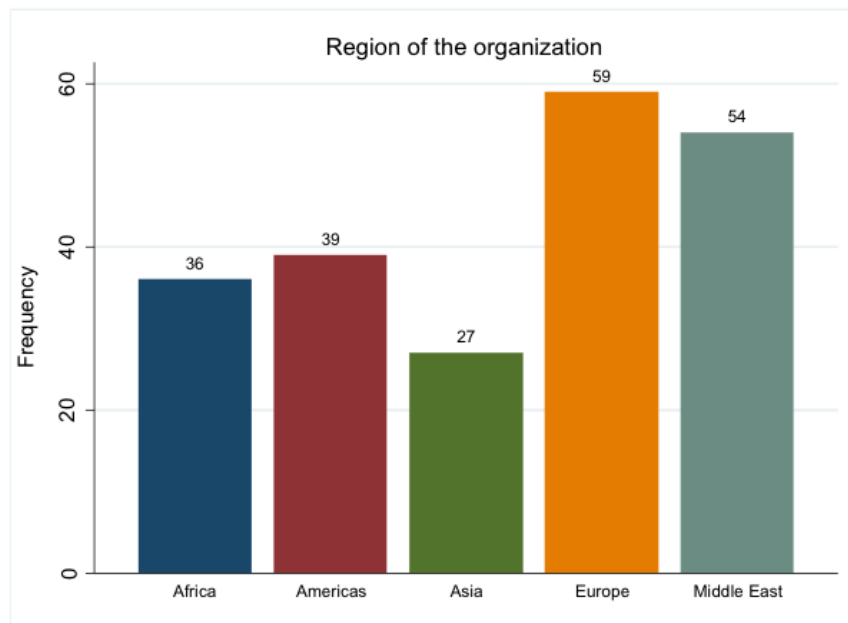


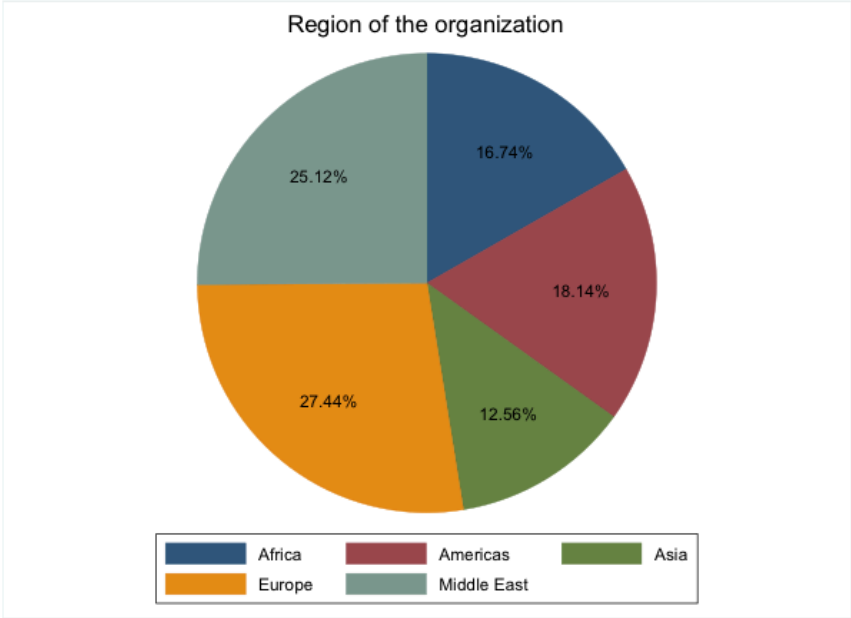
Question 25: Please explain how does your personal opinion about the effect of counterterrorism laws on your work and/or the work of your organization differ from your organization's understanding of the effect of counterterrorism laws.

How does your personal opinion about the effect of counterterrorism laws differ from your organization's?		
Responses	Frequency	Percent
Affects/contradicts humanitarian principles	9	45
Affects work	5	25
Affects safety and security	3	15
Advocacy ineffective	2	10
No effect	1	5
Total	20	100

Question 26: Please provide the name of your current organization and the location where you are based for the majority of your work.

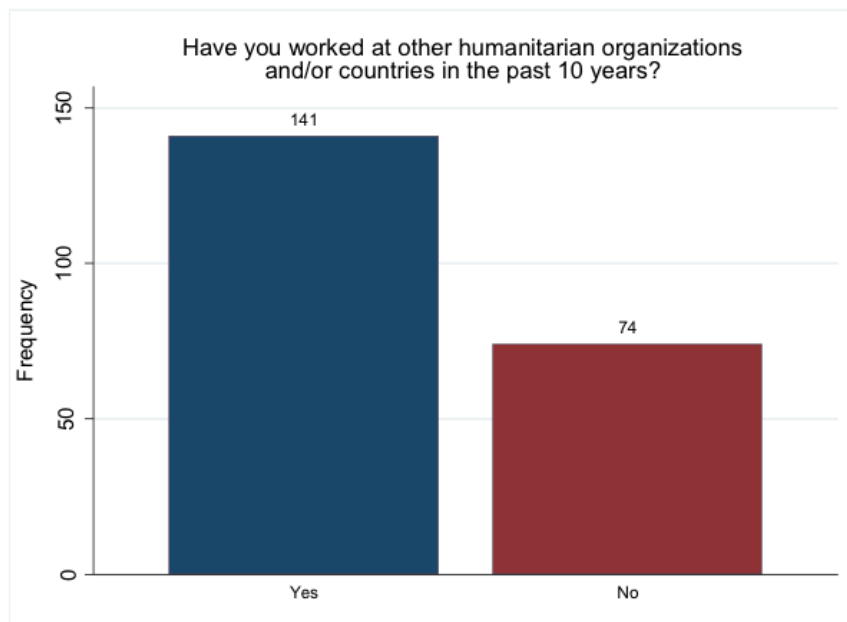
Q2.26 Region where the respondent works.		
Responses	Frequency	Percent
Europe	59	27
Middle East	54	25
Americas	39	18
Africa	36	17
Asia	27	13
Total	215	100

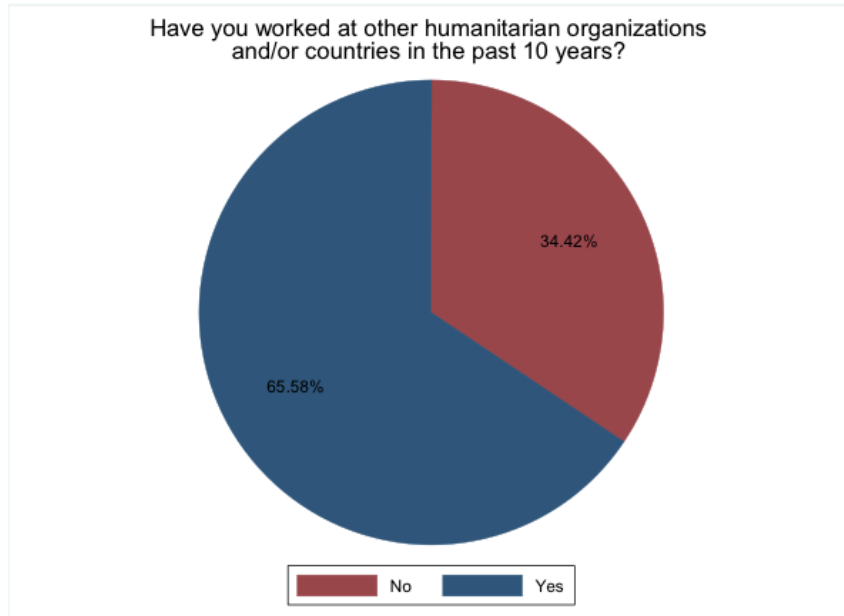




Question 27 Have you worked at other humanitarian organizations and/or countries in the past 10 years?

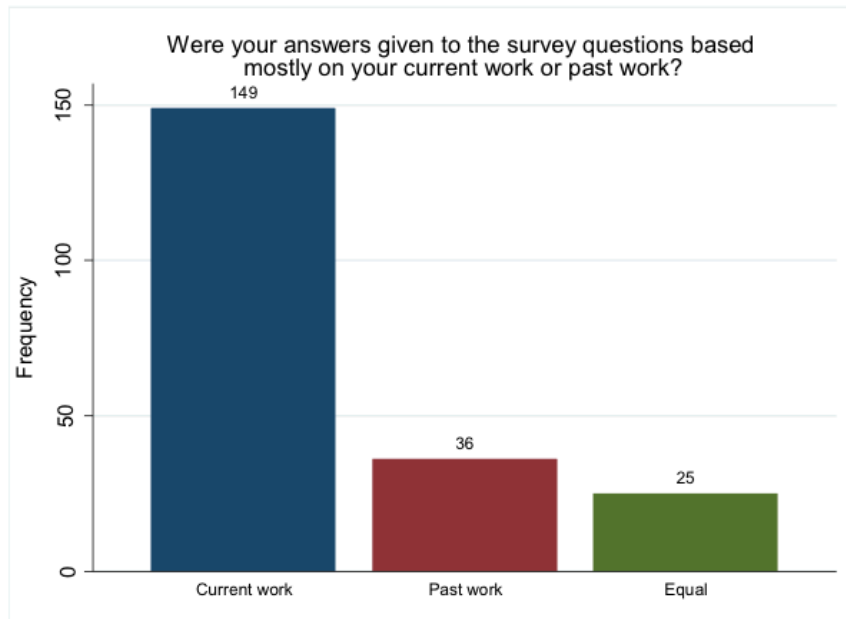
Have you worked at other humanitarian organizations and/or countries in the past 10 years?		
Responses	Frequency	Percent
Yes	141	66
No	74	34
Total	215	100

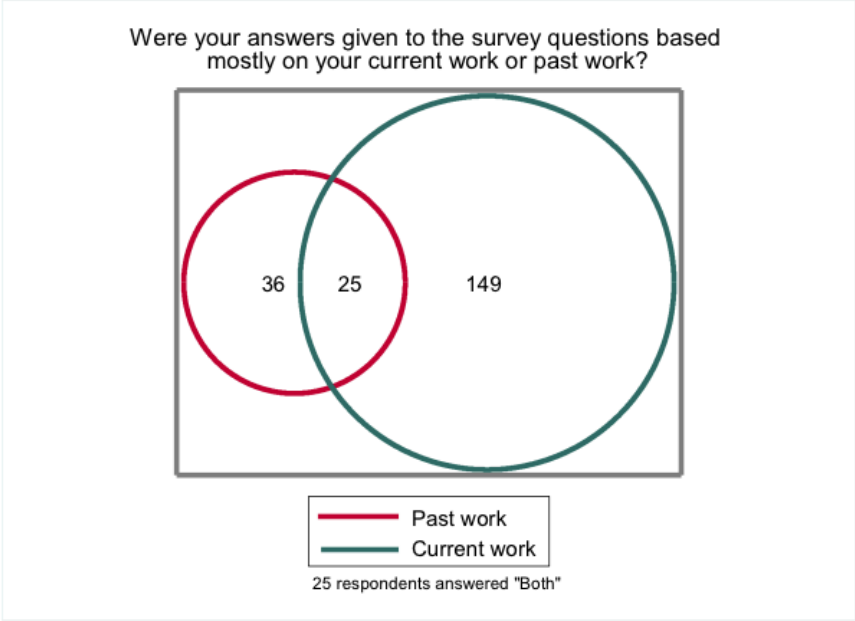
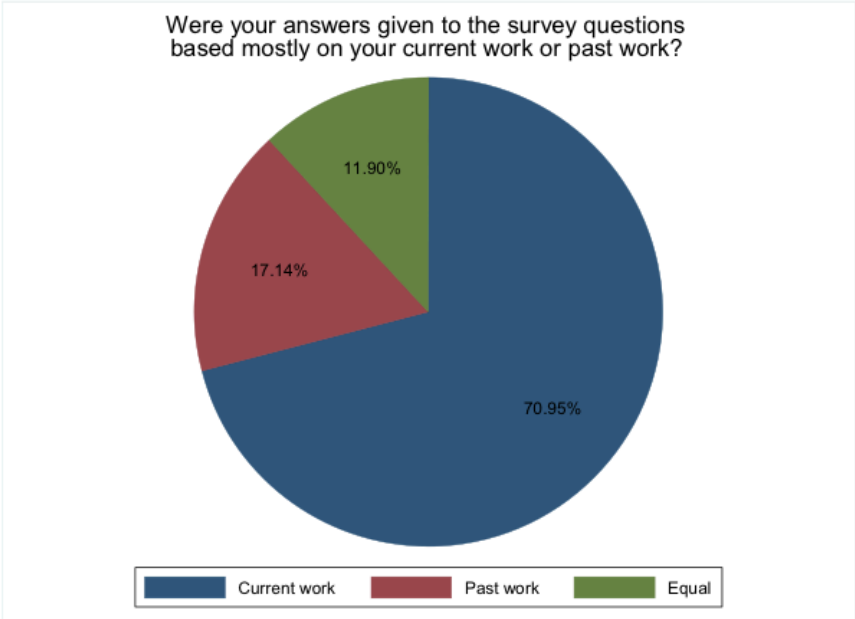




Question 29: Were your answers given to the survey questions based mostly on your current work or past work?

Were your answers given to the survey questions based mostly on your current work or past work?		
Responses	Frequency	Percent
Current work	149	71
Past work	36	17
Equal	25	12
Total	210	100





Question 30: What is your primary role in your organization?

What is your primary role in your organization?		
Responses	Frequency	Percent
Senior management and representation	65	31
Project/program management and implementation	43	20
Legal	28	13
Other	5	2
Research, policy, professional development	18	8
Administration (HR, finance, procurement, etc.)	15	7
Other specialized areas (logistics, security, WASH, nutrition, etc.)	23	11
Communication, fundraising, advocacy	13	6
Health / medicine	2	1
Total	212	100

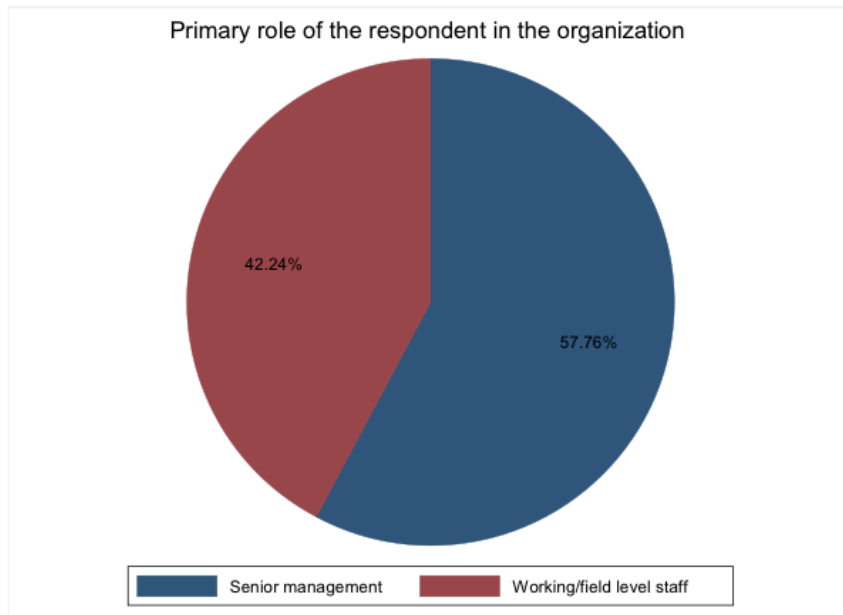
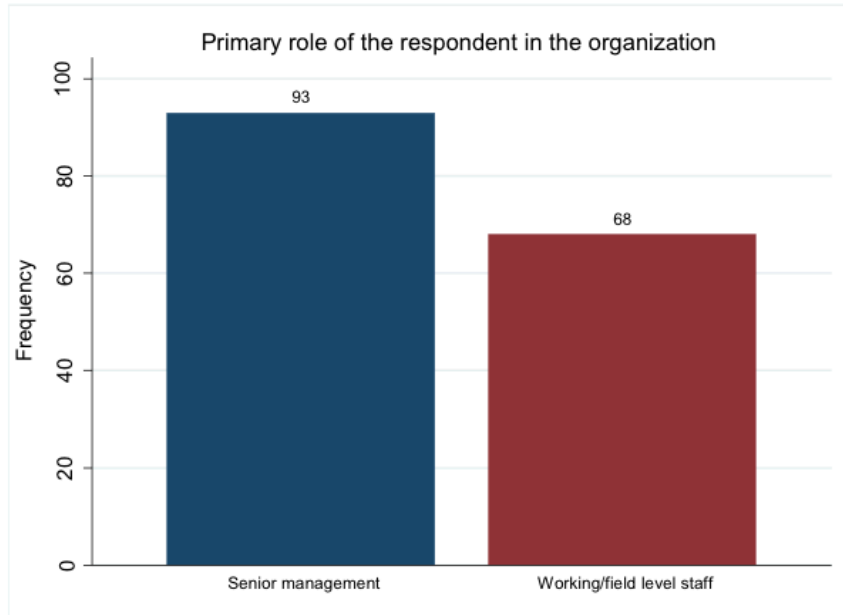


Table A1: List of countries/locations where survey respondents' organizations are based.

Country/Location
Afghanistan
Australia
Belgium
Benin
Cameroun
Canada
Central African Republic
Chad
Colombia
Cyprus
Democratic Republic of the Congo
Ethiopia
Finland
France
Gaza
Germany
Greece
Guinea
Honduras
India
Indonesia
Iraq
Iraqi Kurdistan
Jordan
Kenya
Lebanon
Libya
Mali
Mauritania
Myanmar
Netherlands
Nigeria
Norway
Pakistan
Palestine
Philippines
Senegal
Somalia
South Sudan
Sri Lanka

Country/Location
Sudan
Sweden
Switzerland
Syria
Tajikistan
Tanzania
Turkey
Uganda
Ukraine
United Kingdom
United States
Western Sahara
Yemen

*Note, that the list of countries/locations is not exhaustive, as only 53% of the respondents chose to specify the location of their work.

VII. SELECTED RESPONSES FROM OPEN-ENDED QUESTIONS

Question 5: Please explain why you think that counterterrorism laws in your jurisdiction do not provide clear direction to humanitarian actors on their legal obligations.

1. Laws are overly broad so that they end up covering almost every aspect of operations, particularly in ‘hot spot’ regions/countries. Severe penalties lead to well-founded fears of any potential violation, which have a chilling effect on humanitarian action.

2. We are an international organization dedicated to humanitarian and development projects in Turkey and in several places in the world, and we are currently especially focused on humanitarian projects that deal with the Syrian crisis and the Syrian refugees. As we implement our projects in Syria and in Turkey we are often faced with serious challenges in delivering humanitarian assistance or services within Syria due to anti-terrorism laws. Further, when we implement [our projects] in Syria in those places under the control of the Syrian state, all of our projects are rejected or not approved due to the laws against domestic terrorism. (Translated from Arabic.)

3. [I]t establishes that the legal reporting obligations are more important than the humanitarian obligations of saving a life...if for example I were to encounter a member of a guerrilla group that was hurt and needed urgent medical assistance, I couldn’t provide humanitarian assistance. My obligation is to report this person so that the police can arrest him/her and eventually provide medical assistance. As such, this places me in risk because by clearly reporting, I am taking part in one of the two sides in conflict. (Translated from Spanish.)

4. Ultimately, there is a contradiction between counter-terror legislation and international humanitarian law, undermining the humanitarian imperative and thus making it impossible for humanitarian organizations to operate with impartiality, neutrality, and independently. Essentially, humanitarian organizations work in areas controlled by authorities designated terrorist at the discretion of the governing authorities who have developed counter-terror legislation.

Question 9: Please explain how counterterrorism law affects your organization's commitment and adherence to the humanitarian principles.

1. The provision of humanitarian assistance is almost always deterred whenever there is any possibility of potential violations of any counterterrorism law, regardless of the humanitarian imperative to help. If an action has even the slightest potential of exposing the organization to legal liability arising out of CT laws, which could potentially shut the organization down, the organization will always choose their own survival first in order to protect their future work.
2. We are not global policemen. Our work and lives depend on our ability to adhere to humanitarian principles, which counterterrorism laws contradict.
3. The fight against terrorism demands that we take positions against the terrorists. These terrorists can come to control a territory and eventually its inhabitants. These populations may require humanitarian aid. Theoretically, humanitarian organizations should have access. However, if [the humanitarian organizations] are perceived to have committed themselves to fight against 'those who control' these territories, they presumably will not be able to negotiate access on the basis of neutrality and independence. There is a dilemma here! (Translated from the French.)
4. We are unable to be independent if we are required to screen partners or suppliers on behalf of foreign governments. It impacts on our ability to work effectively with local partners and access to populations based on need alone.

Question 10: If known, what strategies do you and/or your organization use to comply with counterterrorism laws if and/or when these laws or measures restrict your engagement in humanitarian activities?

1. At the end of the day, when operating in areas controlled by authorities identified as terrorist, we apply due diligence with regards to procurement, administrative, and financial procedures, but otherwise are vulnerable to be in breach of counterterror legislation as it is impossible to function in these areas without engaging the authorities and thus directly or indirectly benefiting them. As such, we operate in these areas at the discretion of governments who have counterterror legislation in place.
2. [My] organization has hired an Anti Diversion and Corruption Manager to support staff on complying with counterterrorism laws and measures. The organization also does vetting of key staff, partners, and suppliers. These measures, however, raise privacy concerns to many stakeholders and also cause significant delays of humanitarian operations on the ground.

Question 12: Please explain why you think that you and/or your organization cannot be forthright with your donor(s).

1. There is a perception of this issue being black or white on this question, and this shuts down opportunity for discussion about it. This is only possible where there are personal relationships built between individuals to enable dialogue. Accepting the reality of this kind of work feels far off for those at the operational level.
2. You may place vulnerable individuals at protection risks, i.e., donors may withdraw funding. There is also the issue that the donors try to shape our response away from neutrality and impartiality and towards their own goals.

Question 14: Please explain how counterterrorism regulations have caused you and/or your organization to forego, alter, or cease your activities/programming.

1. The behavior of terrorists confronted to the application of the law may cause them to take out their anger on humanitarian workers (hostage taking, executions, rapes, etc.) We are no longer ready to sacrifice a life for this mission; we now act with a lot more prudence and we mentally prepare ourselves not to reach our objective. (Translated from the French.)
2. There are contexts where we do not even make the effort to explore operational opportunities. For example, to work in ISIS-controlled northern Syria. Theoretically, this would be possible but would require engagement with local authorities and representatives to lay the groundwork, gain adequate safety and security agreements, etc. Can you imagine if I tried to contact and meet an ISIS representative in Turkey? These constraints undermine our ability to engage with prevailing authorities, to develop relationships, and manage perceptions adequate to support operational engagement.

Questions 16: If known, what type of activities do you and/or your organization do to comply with counterterrorism laws (e.g. vetting, training, legal compliance, risk mitigation strategies, additional audits, etc.)? Please explain. If known, how much time on average do you think it takes you and/or your organization to complete various activities to comply with counterterrorism laws?

1. Vetting/screening against anti-terrorism lists, legal compliance/risk mitigation, external/internal audits, etc. The time and organizational resources required to do all of this is significant, probably taking up to 5-10% of resources.

2. Charity and donor vetting, risk mitigation strategies, audits of our protocols and practices, extensive staff training. These activities take up about 30-40% of staff time.

Question 18: How have these vetting requirements affected your organization's operations?

1. Vetting has become more detailed and inherently more time-consuming.
2. Sometimes it is not easy to maintain a relationship of trust for future activities. (Translated from the French.)

Question 19: Do you think that counterterrorism measures are affecting humanitarian negotiations within your organization? Please explain.

1. Somewhat, but mostly in a beneficial way. Due to my organization's country office location, counterterrorism laws play a vital role in maintaining the security of organizations and workers working here.
2. Yes, to a large extent. (Translated from Arabic.)

Question 22: Please explain how have counterterrorism efforts affected the availability of funding to certain geographic areas, beneficiaries, or partners.

1. Banks will not wire to 'hot spots' and/or wires that may indicate countries they deem risk averse.
2. Funding is not provided to certain types of activities, such as unconditional cash assistance and large-scale development projects. Areas controlled by listed groups receive less funding despite humanitarian needs, certain civil servants, perceived as recruited by the ruling listed group(s) are not necessarily eligible for assistance due to their employment status rather than based on their actual humanitarian needs. Local partners are largely excluded from receiving direct donor funding and need to partner with 'approved/vetted' international organizations, who in many cases have less capacity and sustainability than the national partners. Funding to support the functioning of basic services or to build government capacity is not available.
3. Most of the Sub-Saharan funding now goes to [countering violent extremism] and not to programs which would naturally target the same areas. All funding now comes with a security lens to look legitimate.

Question 23: How do counterterrorism laws affect your work and/or the work of your organization? Have they “chilled” (curtailed) your work, improved or left your operations unchanged? Please explain.

1. It is clear that [counterterrorism] laws affect and [have] cooled our everyday work. Security measures, terrorist acts, all these have had a negative impact on our work. (Translated from the French.)
2. They have led to extremely conservative decision making and a significant reluctance to engage in areas controlled by authorities designated as terrorist.

Question 25: Please explain how does your personal opinion about the effect of counterterrorism laws on your work and/or the work of your organization differ from your organization’s understanding of the effect of counterterrorism laws.

1. The main difference is on the impact of accepting contributions under funding agreements containing clauses that are not aligned with the humanitarian principles of humanity, impartiality, neutrality and operational independence. Whereas my organization believes that all recipients of assistance should just be vetted against the UN 1267 list, I believe that in cases where agreements contain such type of clauses, it would require a different implementation.
2. I think to hand over the work of law enforcement officials to humanitarians is not fair, we are not equipped to do this fight for donors. If they believe that some people are dangerous, they should take the legal path and take actions rather than hiding behind NGOs.

COMMENT

ON THE PILOT EMPIRICAL SURVEY STUDY ON THE IMPACT OF COUNTERTERRORISM MEASURES ON HUMANITARIAN ACTION

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I. INTRODUCTION

Counterterrorism laws and policies have been and will almost certainly continue to be part of the political landscape facing humanitarian actors. As terrorist-designated non-state actors increasingly control access to territory, humanitarian actors will continue to face dilemmas presented by adhering to counterterrorism legal requirements while delivering principled humanitarian assistance.

Along with past literature, the Pilot Empirical Survey Study on the Impact of Counterterrorism Measures on Humanitarian Action (the Study) indicates that some humanitarian actors both perceive and experience an adverse impact arising from counterterrorism laws and policies on the provision of life-saving assistance. The results of the Study can help inform states, donors, policy-makers, humanitarian actors, and other parties of possible areas of tension or issues that might warrant legal or policy change (or both). Those results can also help shape research agendas. In this Comment, I provide my views on these issues, based not only on the Study but also on the other work of the Counterterrorism and Humanitarian Engagement (CHE) Project, which is now part of the Harvard Law School Program on International Law and Armed Conflict (HLS PILAC). The CHE Project at HLS PILAC has been conducting legal research, policy analysis, and engagement efforts with counterterrorism officials, government donors, and humanitarian actors for over five years. While the Study serves as the first effort to quantitatively assess the impact of counterterrorism regulations at a general level on humanitarian action, the broader efforts of the CHE Project suggest a number of areas for possible reflection, decision-making moments, and critical questions for consideration by donor governments and the humanitarian sector.

II. STATES AND DONORS

This Comment is primarily addressed to large humanitarian organizations and agencies. However, states and donor governments may wish to reflect on the implications of the Study and the underlying themes discussed in this Comment for their own approach to dilemmas that may arise where counterterrorism

concerns and humanitarian action intersect. To date, this has been largely viewed and treated as a “problem” for the humanitarian sector. That is, the increasing confusion, administrative costs, and programmatic effects of counterterrorism laws and regulations have been framed as a burden that must be borne by the humanitarian community and as a risk that that community must absorb and determine how to address. Because the majority of counterterrorism regulations are, in practical terms, communicated to the humanitarian community in the form of donor contracts representing the exchange of funds from governments to the humanitarian sector, there may be a sense that such regulations have a “take it or leave it” quality. Indeed, many humanitarian actors have reported to the CHE Project that donor representatives have told them that clauses cannot be negotiated, or that they should not raise objections rooted purely in administrative costs (as opposed to reporting that counterterrorism regulations are actually resulting in, for example, the denial of life-saving foodstuffs to a specific population). Some donors have made extensive efforts to engage in dialogue with humanitarian (and other non-profit) actors, have drafted some guidance for the sector, or have sought to make themselves available for discussion of specific dilemmas arising from counterterrorism policies in relation to particular contexts. Yet that guidance is often tempered with statements that it is not necessarily legally enforceable or that it would not apply in relation to situations that involve criminal liability. Many donors also seem to have set an exacting standard for what they would consider as sufficient “impact” of counterterrorism measures on humanitarian action, often limiting that category to a direct causation of harm to beneficiaries from a specific counterterrorism restriction.

In this arena, donor governments often experience significant internal division, resulting in a lack of coherence. Donor representatives themselves often have a different understanding of the scope and intended application of counterterrorism laws than, for example, government counterterrorism officials or anti-terrorist financing experts. Indeed, achieving a “whole of government” approach to humanitarian assistance concerning territories where designated groups control territory or access to a civilian population has proven exceptionally challenging, and often involves some government agencies intentionally avoiding the kind of internal political discussion that might result in privileging security concerns (sometimes far) above humanitarian commitments.

Perhaps as a result of this internal confusion, and perhaps due to the perceived political sensitivities around these issues, governments have been able to largely set the terms of the dialogue on counterterrorism measures and humanitarian action. Some governments may have even given the impression that if humanitarian actors are not willing to accept the terms of counterterrorism regulations, it would be easy to replace those humanitarian actors with commercial contractors. Against that backdrop, it is important to recall that principled humanitarian assistance remains a vital aspect of the foreign policy of many states and that donor representatives are often just as eager to ensure that humanitarian action

is not compromised or diminished as a result of overbroad regulation. Donor governments may therefore need both to increasingly consider the extent to which they must share the risks associated with counterterrorism concerns with their humanitarian partners and to understand that the restrictions imposed by some donors might affect the aid supported by other donors.

For their part, donor government representatives may feel increasingly frustrated by the lack of concrete evidence of impact and precise guidance from the humanitarian sector in this arena. While humanitarian actors have increasingly sought dialogue and engagement on the broad contours of the impact of counterterrorism measures on humanitarian action, they have, in key respects, provided minimal “proof” of this impact and have relatively rarely articulated concrete and specific activities that are or might be compromised by counterterrorism restrictions. (This can be a circular problem, as humanitarian actors may fear specificity out of a concern that this could be seen as an admission that they are engaging in criminally prohibited behavior.) Also, in dialogue with governments, particularly at the multilateral level, humanitarian actors have largely not articulated a coherent set of requests for reform or specific examples of the kinds of exemptions (if any) that they might find constructive.¹

To the extent that donor governments recognize that they, alongside humanitarian actors, can address the dilemmas that arise from the impact of counterterrorism policies on humanitarian action, those governments may wish to consider a number of approaches. First, donor governments may wish to explore creating coalitions of donors that can candidly discuss tensions between, on one side, state obligations and commitments to fight terrorism and, on the other, state approaches to supporting principled humanitarian assistance. Second, donor governments may be far better suited than the humanitarian sector to think through practical and principled approaches to due diligence; to bear the burden of explaining expectations for contract-clause compliance; to develop model safe harbors or exemptions to existing criminal and other laws; and to reconcile disparate approaches to the provision of humanitarian assistance, particularly in those areas where designated groups control territory or access to a civilian population. The Study demonstrates that many humanitarian actors are willing and able to discuss dilemmas associated with the impact of counterterrorism policies on their work with donor governments. It may be time for donors to reflect both on their own strategic and pragmatic response to this issue and on the fragmentation and incoherence that has often characterized donor engagement with their humanitarian partners in this arena.

1. On humanitarian exemptions, *see generally* Katie King with Naz K. Modirzadeh and Dustin A. Lewis, *Understanding Humanitarian Exemptions: U.N. Security Council Sanctions and Principled Humanitarian Action*, Harvard Law School Program on International Law and Armed Conflict, Counterterrorism and Humanitarian Engagement Project (April 2016).

III. HUMANITARIAN ORGANIZATIONS

The data from the Study raise an array of possible considerations for humanitarian actors. Humanitarian organizations may wish to consider whether they have established appropriate risk-assessment tools for work in regions where terrorist-designated individuals or groups may control territory. Humanitarian actors may wish to (continue to) engage in open and frank dialogue with governments and donors regarding challenges encountered in high-risk environments, and to seek guidance regarding the best way to respond to those challenges. Additionally, humanitarian organizations may wish to continue developing information about counterterrorism laws and policies and communicate that information to their employees through training materials, written guidance, and other forms.

Research has demonstrated that many major humanitarian actors grapple, often in isolation, with the impact of counterterrorism laws and regulations, and those actors seek (usually unsuccessfully) to negotiate counterterrorism-related contract or partnership-agreement provisions individually, unaware of how other organizations approach similar dilemmas.² The Study may encourage the humanitarian sector to consider what additional data and evidence would be useful in framing their approach to donor governments, and in understanding how the seeming shift toward a more restrictive regulatory environment should be addressed.

IV. BROAD TRENDS

Counterterrorism laws and regulations are increasing in scope and breadth in relation to a variety of major humanitarian donor governments.³ Many in the humanitarian community view the global political environment, as well as the counterterrorism regulations they see reflected in grant agreements, as increasingly restrictive and focused on prevention of *any* direct or indirect benefit to designated groups and individuals. The humanitarian sector—after several years of intensive research and discussion on the relationship between counterterrorism measures and humanitarian action—may soon face a decision on whether and how to engage donor governments *as a sector* on this issue.

V. STUDY-DESIGN CONSIDERATIONS

As states, donors, or organizations undertake further research on these issues, they may wish to consider ways in which to widely distribute a survey to an audience that may operate in many different environments and have access to varying levels of technology. Having an online survey, available in multiple

2. See generally 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.

3. See, e.g., Jessica Burniske and Dustin A. Lewis, with Naz K. Modirzadeh, “Suppressing Foreign Terrorist Fighters and Supporting Principled Humanitarian Action: A Provisional Framework for Analyzing State Practice,” Research Briefing, Harvard Law School Program on International Law and Armed Conflict, October 2015.

languages, with a URL that can be easily distributed may assist in disseminating the information across organizations with global operations. Professional organizations and other groups of humanitarian actors may prove helpful in disseminating the survey to a broad audience. In this domain, a survey seems more likely to succeed where there is a willingness of major humanitarian organizations to circulate the survey to thousands of staff in the field and where those organizations request that staff respond (or at least where those organizations are willing to share contact information for dozens, hundreds, or even thousands of staff with those conducting the survey). Finally, those undertaking surveys of humanitarian actors may wish to consider planning to open the survey at least for several weeks, allowing respondents ample time to complete the questions (particularly if there are open-ended questions). These steps may assist future research into the challenges facing humanitarian actors from counterterrorism laws and policies.

VI. POTENTIAL AREAS FOR FUTURE RESEARCH

The Study attempted to pilot the kind of questions that might concretely document and measure the much-discussed “chilling effect” that counterterrorism laws, policies, and donor regulations may have on humanitarian action in situations of armed conflict involving designated groups and individuals. The following are suggestions for more substantively-focused and widely-circulated empirical research.

Costs of Compliance

Many studies on counterterrorism measures and humanitarian action suggest that humanitarian organizations are expending more money and other resources attempting to comply with counterterrorism-related requirements, risk-avoidance, and reporting than donors realize. An empirical study might seek to identify the precise monetary burdens on humanitarian actors, especially those grappling with multiple (and often-unclear) donor government requirements. Such a study might seek to establish the total per annum costs of compliance (or perceived compliance) with counterterrorism regulations (as well as the costs of seeking to prevent liability under unclear and rarely-enforced criminal counterterrorism provisions in a wide variety of national jurisdictions) and a break down of costs associated with different types of compliance activity. Such expenditures could include vetting, purchasing of software, dedication of staff time to compliance efforts, training programs, legal advice in multiple jurisdictions, additional security required in areas where counterterrorism approaches have created risks from local armed groups, and additional staff dedicated to vetting and compliance (on-the-ground and/or at headquarters).

Humanitarian Activities Not Undertaken

The Study and other research on counterterrorism measures and humanitarian action suggest that major humanitarian actors (either at the field level or

at headquarters) may prematurely end or cease to undertake needs-based assistance activities due to actual or perceived counterterrorism regulations. Future empirical research might seek to document the activities, programs, and even proposals that are ceased prematurely or that are significantly altered or diminished due to concern arising in relation to counterterrorism regulations or perceived regulatory risks.

Humanitarian Activities Legally Prohibited or Significantly Limited by Counterterrorism Regulations

In discussions between donor governments and humanitarian actors, some governments have stated that humanitarian actors misperceive the restrictions placed on their activities through counterterrorism laws and policies. Some government actors indicate that humanitarian actors may exaggerate the prohibitory effects of counterterrorism regulations, or urge humanitarian actors to consider the government's record in order to highlight that humanitarian actors are rarely (if ever) prosecuted under terrorism-related criminal laws, even where those laws criminalize certain humanitarian activities. In all, these discussions between donors and humanitarian actors seem to be rarely productive. That is in part because humanitarian actors may continue to be uncomfortable engaging in activities that appear to violate criminal laws, while government representatives insist that concrete evidence of adverse legal impact (or lack thereof) should be a primary consideration in weighing the effects of criminal laws. Further, humanitarian actors may prefer that their understanding of criminal law remains vague, hoping that minimal clarification or discussion of what "legitimate" humanitarian activities do violate criminal laws will functionally limit the possibility of prosecution. Yet, in order for the humanitarian sector and governments to have an effective, meaningful, and evidence-based dialogue regarding how counterterrorism-related criminal laws are (perhaps increasingly) affecting the humanitarian sphere, it may be especially important to have a clear understanding of which mutually-desired and mutually-supported activities are prohibited by one or more criminal sanctions.

Measuring Increasing Restrictions over Time

Initial research and engagements with major humanitarian actors indicate that counterterrorism-based regulations and requirements are increasing and are spreading not only geographically but also in terms of the range of government and agency donors adopting more restrictive counterterrorism approaches. What may have once been seen as a tension arising primarily from one or two major donors may now constitute a range of counterterrorism-based policies and regulations that must be negotiated with virtually all government donors, donor funds, and intergovernmental donors. Since the rise of ISIS, and in light of growing concern over new forms of diversion or unintentional support to designated individuals and groups that control territory, humanitarian actors have found that an expanding range of donor governments impose new or

broadened vetting regulations and new or broadened definitions of prohibited activities. To the extent that the dilemmas highlighted in the Study and in other reports may be seen as becoming more pressing and creating concerning obstacles to emergency assistance, both humanitarians and governments need access to credible, objective data regarding the range of restrictions that are being imposed on the humanitarian sector. It may be particularly helpful for government donors to understand the breadth of differing (and possibly competing or conflicting) counterterrorism provisions that grantee humanitarian organizations face from their range of donors.

Deep Analysis of Vetting

A number of publications have described and analyzed U.S. government-promulgated partner-vetting systems. Additionally, several studies have looked at how vetting obligations and efforts may undermine humanitarian principles, particularly insofar as those obligations and efforts require the vetting of certain beneficiaries. However, as vetting requirements, counterterrorism contract and partnership-agreement clauses, and government policies have proliferated and become more complex, there is currently no comprehensive analysis of major humanitarian actors' approaches to vetting. Such a study might look closely at:

- The private companies that develop and market terrorist vetting databases;
- The extent to which these databases might include individuals who are not actually designated by relevant governments (so-called “grey lists”);
- The rates of positive and negative “hits” humanitarian organizations encounter as part of their vetting processes;
- The amount of time and money humanitarian actors spend on vetting efforts;
- The regions or contexts where humanitarian actors are required to vet beneficiaries;
- Contexts where donor governments require “pre-approval” for projects to move forward only after vetting has been conducted;
- The various forms of “enhanced” vetting; and
- The extent to which vetting is seen as effectively preventing diversion.

The Security Benefits of Counterterrorism Regulations

Justifications for increasingly stringent counterterrorism regulations imposed on humanitarian actors (particularly those regulations imposed by government donor agencies) vary from broad security concerns to the efforts of donor agencies to protect themselves from reputational and legal liability in the event grantee resources might be diverted to designated groups or individuals. This often involves an attempt to shift risk (partially or totally) from donors to humanitarian actors. Yet, there has been little empirical analysis of the actual security gains derived from counterterrorism clauses, regulations, and policies. Numerous methodological and research approaches could be utilized to assess the extent to which efforts by humanitarians to comply with counterterrorism

regulations might in fact lower diversion risks, decrease the likelihood of terrorist acts, or otherwise affect the ability of a designated group to conduct acts of terrorism.

The Impact of Criminal Law on Donor Contracts or Agreements

Counterterrorism-related donor regulations, policies, and criminal laws are often considered distinct and separable in discussions regarding counterterrorism measures and humanitarian action. To support an evidence-based policy discussion, it may be useful to conduct research (including empirical analysis, review of criminal enforcement, and interviews with government officials) to better understand and document the link between criminal law and donor regulations and policies. In that connection, issues to consider addressing might include the extent, if any, to which government donor agencies are internally pressured to align their approach to funding to national criminal provisions, and whether donors and the humanitarian sector see criminal laws and donor policies as connected.

VI. AREAS FOR REFLECTION

The Clarity/Ambiguity Debate

Many workshops, meetings, and discussions within the humanitarian sector have focused on the question of whether the lack of clarity regarding the impact of counterterrorism regulations (as further demonstrated in the Study) and ambiguity surrounding the extent to which these regulations apply to humanitarian activities might be beneficial—or deleterious—to the sector. That is, many have asserted that it is preferable for the humanitarian community *not* to seek clarity regarding counterterrorism regulations, *not* to directly engage donor governments on the impact of counterterrorism measures, and *not* to request information from donors regarding how they envision compliance—all because doing so might result, under this rationale, in greater enforcement or regulatory attention. Indeed, humanitarian actors have noted that donor representatives themselves sometimes urge their humanitarian interlocutors not to request clarity or a better understanding of complex counterterrorism policies. Others argue that this “don’t ask, don’t tell” approach is short-sighted, fails to appreciate the real impact of counterterrorism measures on humanitarian action overall, and enhances the ability of government regulators to individually negotiate contract terms to the detriment of the sector as a whole. Some fields, such as contract law, have produced extensive empirical research and scholarship on the question of ambiguity. It may be useful to seek to measure the extent to which ambiguity and lack of clarity are actually benefitting humanitarian action (if at all). Targeted research on this question may inform this debate and push it beyond abstract claims, anecdotes, and personal preferences.

Once such research has been conducted, the humanitarian sector may wish to weigh the costs and benefits of ambiguity and confusion versus greater clarity. Ultimately, if this debate remains unsettled, it may be challenging for the humanitarian sector as a whole to make strategic decisions regarding how best to address this issue and to engage donor governments and counterterrorism officials. To the extent that a major divide exists between those who view clarity as a risk and those who view ongoing ambiguity as costly, it will be difficult to develop a coherent approach to counterterrorism measures.

Increasing Knowledge of Counterterrorism Regulations within the Humanitarian Sector?

In line with several other major research efforts over the past several years, the Study demonstrated that humanitarian professionals wish to have more knowledge, information, and understanding of counterterrorism laws and policies. It may seem obvious that one of the conclusions that ought to be drawn from the Study is for humanitarians to invest in training, knowledge development, and awareness raising of counterterrorism regulations. Yet, this issue may be less simple than suggested by the findings contained in the Study. While individual humanitarian staff may be deeply frustrated by their lack of understanding of counterterrorism laws and regulations, given the extensive divisions within the humanitarian community regarding the impact of counterterrorism policies and whether clarity itself is a risk, it may not, on the whole, be useful to provide trainings or awareness-raising efforts at field- or headquarters-levels. Further, to the extent that major humanitarian actors remain undecided as to how they should approach counterterrorism regulations, the extent to which they should comply with them, and the extent to which they can strategically ignore certain policies, it is difficult to imagine how knowledge-development and awareness-raising efforts for staff will be constructive.

Any accurate and constructive training or knowledge-building exercise on counterterrorism laws and policies will need to provide a description of various criminal provisions (in the host state, donor states, and relevant states that apply their criminal laws extraterritorially), as well as vague and poorly-understood counterterrorism clauses in donor grant agreements. Such descriptions are likely to raise alarm and concern among staff, particularly to the extent that humanitarian organizations are not able to answer many staff questions (for example, whether staff are individually criminally and civilly liable for actions undertaken in the course of their humanitarian employment, the extent to which lack of past enforcement ought to inform expectations of future enforcement, or whether it is likely that counterterrorism clauses in grant agreements will be enforced in the future). Until the humanitarian sector as a whole has developed sufficiently clear policies, strategies, and widely-shared understandings of key questions (such as clarity versus ambiguity, understanding of impact, principled approaches to due diligence and vetting, and whether there are principled “red lines” that humanitarian actors should not cross in their negotiations with

government donors), general trainings and awareness-raising for humanitarian professionals may exacerbate anxiety, concern, or confusion that organizations and donors may not be able to address.

In this sense, the Study's findings on the question of the need for additional knowledge and understanding may be seen as urging major humanitarian actors and leaders within the sector to prioritize developing shared approaches to counterterrorism overall, *prior* to investing in more training or more awareness-raising. Increasing awareness of this issue without simultaneously providing clear, coherent, and practical guidance to staff seems unlikely to enhance humanitarian action in relation to high-risk areas.

Methodological Approaches

In conducting this and other research, the CHE Project at HLS PILAC has frequently encountered confusion and concern regarding the extent to which research in this sector is even possible or is legally and ethically sound. That is, to the extent that any empirical research on this issue involves asking individuals to discuss activities that may be subject to criminal sanction, or to the extent that researching counterterrorism clauses and due diligence efforts risks highlighting where donors and humanitarians may have come to a tacit agreement to overlook certain requirements, it may be difficult to set the parameters for effective research. Indeed, many humanitarian organizations may have been reticent to encourage staff to participate in the survey underlying the Study (despite its anonymity), as well as other research initiatives, for fear that staff would divulge concerns or approaches that could be seen as legally concerning. In other contexts, humanitarian staff may be (justifiably) concerned about articulating activities that might be legally concerning or describing “work-arounds” to regulations out of a concern that any documentation of such tactics would create or increase legal liabilities. It may be useful for the humanitarian sector to dedicate resources to explore how they can become and remain informed on developments in this sector while minimizing legal risks. This may involve drawing from other disciplines and areas of quantitative and qualitative analysis where similar issues arise. Once the sector is able to identify and agree upon methodologies that appear effective and ethical, they could be more widely and rapidly deployed to address specific questions and concerns. This would also avoid newcomers to research and policy in this area having to “reinvent the wheel” regarding their approach to analysis.

Strategic Agenda-Setting and Decision-Making

There have been at least five years of dedicated financial, personnel, and political investment by donors, major humanitarian actors, and intergovernmental agencies on questions concerning the intersections of counterterrorism measures and humanitarian action. It may therefore be time for the sector to consider strategic steps forward. Some powerful humanitarian actors (or at least some senior staff within those organizations) view the dilemmas as exaggerated, do

not see the impact of counterterrorism regulations as significant, and believe that organizations should *not* run the risk of undermining their relationships with government donors by emphasizing the challenges posed by counterterrorism policies or advocating for reform. Those with this perspective may further view continued engagement or public outreach on this issue as not only unnecessary but highly risky. These individuals may also point to the ongoing funding of humanitarian operations even in high-risk areas, as well as the demonstrated willingness of certain donor governments to overlook (or at least not to enforce) their own criminal laws and contract clauses, as evidence that counterterrorism frameworks are not a sufficient threat to humanitarian efforts. Those holding this perspective may see a risk to funding and donor confidence were their organizations to participate in strategy development or public statements regarding the impact of counterterrorism measures on humanitarian action. They may also view their own (or their specific organization's) ability to negotiate with government donors as superior to those of others, and they may therefore see their ability to create preferential terms as protected by a more "silo-ed" approach.

On the other side of the spectrum, many within the humanitarian sector view the rise of counterterrorism-related rhetoric, criminal law, and regulations as a major challenge for principled humanitarian action. These individuals may wish to increase investments of time and political capital in building coalitions that will seek to urge donor governments and intergovernmental bodies to significantly change existing laws, contract terms, and regulatory policies. This perspective may view further research, empirical analysis, and public advocacy as critical to the survival of principled humanitarian efforts in this arena, particularly as they see regulations and restrictions (and the related compromises on the part of humanitarian actors) as increasing across the board. Those holding this perspective may view ongoing silence and lack of a coordinated strategic approach as detrimental to the humanitarian sector as a whole. They may also view bilateral and non-transparent negotiations with individual donors as empowering government regulators to impose more restrictive and more divisive policies on interlocutors who are often not communicating with one another. These individuals within the humanitarian sector may see as crucial the development of a shared strategy on these issues, one where humanitarian actors are able to present a more unified perspective and set of requests to governments.

It is difficult to imagine a productive engagement with governments and intergovernmental bodies, whether on the issue of humanitarian exemptions, reform of criminal law, model donor clauses, due diligence requirements, or safe harbors until the humanitarian sector is able to build a bridge or at least shorten some of the distance between these two perspectives. So long as senior staff and leaders in the sector do not share a perspective on the fundamental questions underlying the impact of counterterrorism measures on humanitarian

action, the effectiveness of further study or development of possible solutions will likely be stymied.

As the Study indicates, it is possible—with the investment of time, research, and cooperation on the part of the sector—to produce more concrete and fine-grained understanding of the impact of counterterrorism measures on humanitarian action. It is also possible to better understand the concrete risks humanitarian actors face, or the activities they are *not* undertaking, because of counterterrorism laws and policies. It is further possible to understand whether the current overall approach to counterterrorism regulations (one that privileges the value of ambiguity; one that emphasizes individual, non-transparent, and competitive negotiation with donors; one that largely eschews public advocacy) is benefiting or hindering humanitarian efforts. The outcomes of such additional research will serve this purpose only if the humanitarian sector agrees that an evidence-based approach to policy is appropriate in this domain. Further understanding in this arena will provide a return on investment only if humanitarian actors decide to take up the fundamental issue with donors, with intergovernmental organizations, and within their own senior management.

Stepping back, it may be that a clear decision-making moment is emerging, where the humanitarian sector must determine whether it wishes to address the impact of counterterrorism measures on humanitarian action—and, if so, how to do so—*as a sector*.

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