

INTERACTION FORUM 2009

Threats to Civil Society: Government Restrictions on the Non-Profit Voice, Operations & Activities



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Focus: The United States

"Three Executive branch initiatives undermine the ability of nongovernmental organizations (NGOs) to effectively implement U.S. foreign assistance programs. Two intended to help fight terrorism put the lives of NGO staff at risk by requiring the organizations to perform tasks associated with intelligence services. The third needlessly puts countless others at risk by denying them access to programs that can help them avoid contracting HIV/AIDS."

- InterAction, Foreign Assistance Briefing Book, Section 13 (November 2008)

Introduction

What are the “three” initiatives referenced?

- US Agency for International Development’s (USAID) proposed “Partner Vetting System”;
- Department of Treasury’s (Treasury) “Anti-Terrorism Financing Guidelines: Voluntary Best Practices for U.S. Based Charities”
- “Anti-Prostitution Pledges” required by the Global AIDS Act (22 U.S.C. §§ 7601-7682) and the Trafficking Victims Protection Reauthorization Act(22 U.S.C. §§ 7101-7110)

Are there other similar initiatives? **Yes.**

For several decades, US law and federal agency regulations have imposed restrictions and requirements on US-based NGOs limiting their ability to provide effective relief and assistance and undermining the support of civil society in developing countries in an apolitical, fair, secure and transparent manner.

How does this impact the space in which we work?

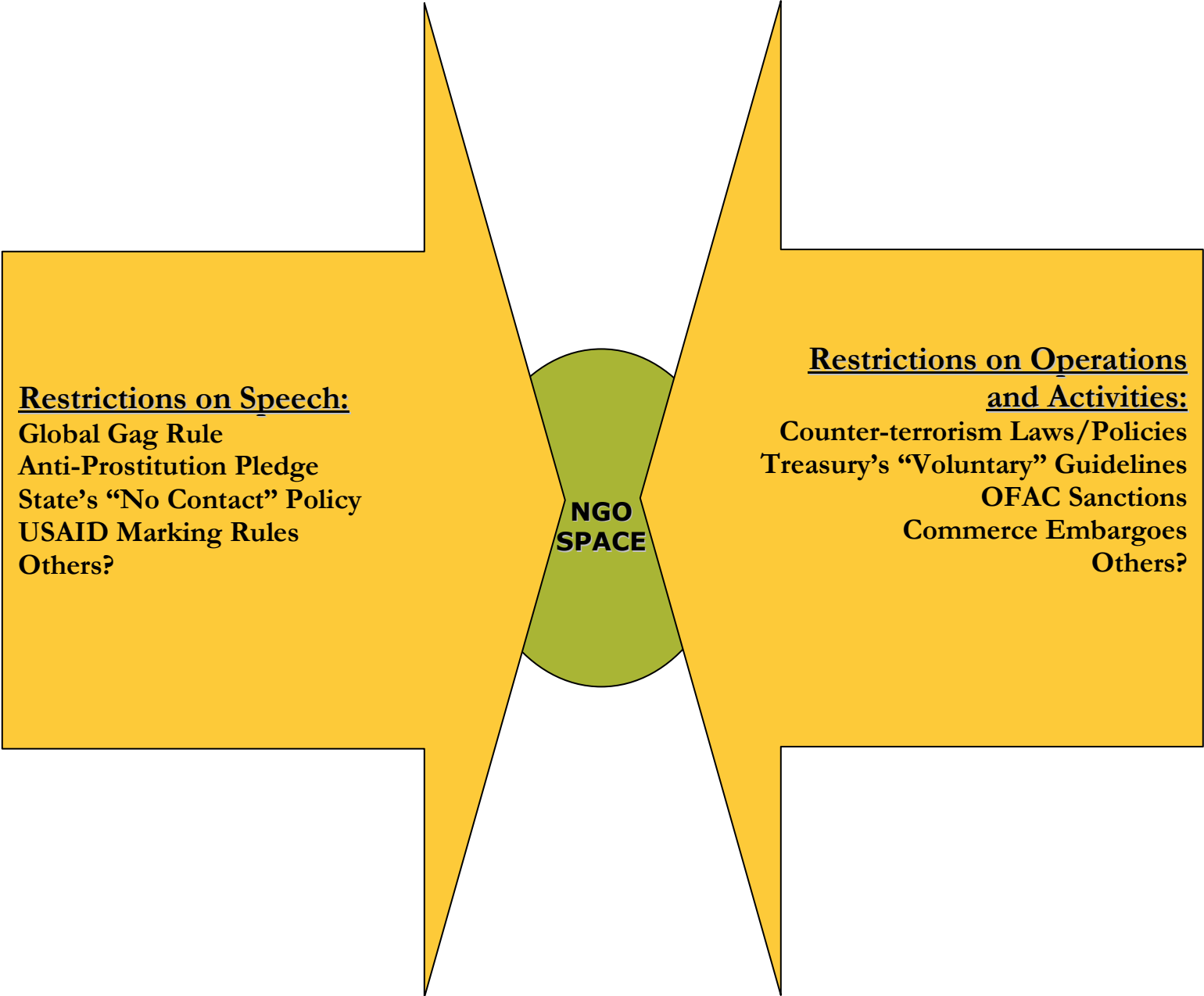
The politicization of foreign aid and increasing restrictions on the freedoms of speech and association tied to US government funding result, at least in part, in:

- Increased violence toward local and international staff of US based NGOs
- Excluding local partners and beneficiaries from participating in US foreign assistance programming (usually excluding the most marginalized in local society)
- Undermining the health, education and democracy goals of US foreign assistance programs
- Suspension of Constitutional protections for US-based NGO’s and staff in connection with US counterterrorism policies and protection measures
- Negative perceptions and loss of credibility for US-based NGOs working to create or sustain the movement of un-coerced collective action around shared civic interests, purposes and values in developing nations (civil society)



Notes:

The Big Picture



Restrictions on Speech

Global Gag Rule (The Mexico City Policy)

Background:

Prohibits the provision of US foreign assistance funds to NGOs that use funding from any other source to:

- Perform abortions in cases other than a threat to the life of the woman, rape, or incest
- Provide counseling and referral for abortion (even where legal); or
- Lobby to make abortion legal or more available in their country

Denies federal funds and contraceptives to foreign NGOs that choose to counsel their patients on a full range of reproductive health options (or have affiliated operations performing abortions)

- Instituted 1984-1993 (Reagan/Bush I)
- Rescinded 1993 (Clinton)
- Reinstated 2001 (Bush II)
- **Rescinded January 23, 2009 (Obama)**

Impacts*:

- Undercuts goals of providing a full range of information and family planning services to individuals in developing countries by forcing care providers to choose between complying with the policy or being denied access to U.S. contraceptive supplies (condoms and other medically effective methods of contraception)
- Compromises women's health and life expectancy because trained reproductive health care providers receiving U.S. funds may not perform abortions for

their clients or advise them where to safely seek the procedure, forcing women to turn to untrained providers of such services and forgoing safe medical care

- Undermines rights of freedom of speech and assembly by prohibiting international NGOs from working with their governments to foster safer medical practices and weakens civil society's participation in government

The Anti-Prostitution Pledges (Global AIDS Act and Trafficking Victims Protection Reauthorization Act)

Background:

NGOs applying for or signing a contract or agreement for federal global HIV/AIDS funding must have a policy explicitly opposing prostitution and sex trafficking

NGOs applying for or receiving federal anti-trafficking funds (Department of State (State), USAID, Health and Human Services (HHS)) must sign a statement in the grant application or grant agreement stating it does not promote or support the legalization of prostitution

- **AOSI v. USAID (S. District Court, New York)**
 - A lawsuit by AOSI and Pathfinder International against USAID challenging the constitutionality of the pledge requirement
 - May 2006, a preliminary injunction was issued preventing the government from requiring plaintiffs to sign the anti-prostitution pledge
 - February 2008, plaintiffs amended the complaint to add Global Health Council and InterAction (as representatives of their members) as plaintiffs
 - August 2008, the District Court granted Global Health Council and InterAction requests for a preliminary injunction on behalf of their members

* Reference: Center for Health and Gender Equity, Global Gag Rule: U.S. Restrictions on Global Democracy and Sexual and Reproductive Health and Rights (2009) available at <http://www.genderhealth.org/GlobalGagRule.php>

Impacts*:

- Undermines the ability of recipients of US funds to establish trust with already marginalized segments of the population (sex workers and those stigmatized by AIDS) because of labeling
- Self-censorship by recipient and reduction in programming made available to impacted populations because of the overly broad and vague prohibitions (*Would advocating a change in local law to allow sex workers to wear shoes be considered the “promotion of prostitution”?*)
- Decrease in the number of NGOs willing to accept US funding, thereby reducing services and resources to meet critical program needs

“No Contact Policy”

(Department of State in West Bank and Gaza/Mission Notice 2006-WBG-17)

Background:

Implemented by USAID in both West Bank and Gaza and initially prohibited contact (when furthering US Government-funded activities) with the Palestinian Authority

- “Contact” defined to mean: meeting, telephone conversation, or other communication (oral or written)
- Applied to the expatriate and local staff of both for-profit and non-profit contractors and grantees
- Initially covered contact with: PA Ministries (including working-level employees), Palestinian Legislative Council members elected on the Hamas-affiliated ticket and staff
- Palestinian President’s Office was exempt
- Revised in June 2007: currently applied only to Hamas controlled Gaza public/government authorities (and should be limited to US government funded activities)

*References: Center for Health and Gender Equity, Policy Brief, Implications of U.S. Policy Restrictions for Programs Aimed at Commercial Sex Workers (2005), available at <http://www.genderhealth.org/pubs/ProstitutionOathImplications.pdf>; and, Global Health Council, Anti-Prostitution Requirements (2006), available at, http://www.globalhealth.org/images/pdf/publications/app_requirement_brief.pdf

Impacts:

- *Provided the communication does not confer a benefit on a prohibited person*, the policy is a peremptory suspension of freedom of speech without a statutory basis
- Undermines the ability of US based NGOs to effectively operate in Gaza, regardless of funding source (provided there is no violation of the “material support” provisions) because communication with the governing authority is prohibited

USAID Branding and Marking Requirements

(ADS Chapter 320)

Initiated in 2005, the branding and marking rules are a form of “forced speech”, requiring USAID recipients to engage in the development and execution of branding and marking plans for foreign assistance programs including public communications, program names and positioning, and other references to USAID funded activities

- Waiver by country is available for security reasons (where association with the US government jeopardizes safety); otherwise, waiver of the requirement must be requested by project

Impact:

- Requires NGOs to include US government identified logos, phrases and other statements in communications, on packaging, program materials, and other program related activities if funded by USAID

Restrictions on Operations and Activities

The Counter-Terrorism Laws*

The Laws

- **Executive Order 12947 “Prohibiting Transactions with Terrorists Who Threaten to Disrupt the Middle East Peace Process”** (1995, and amended by EO 13099) Prohibits transactions with specially designated persons and entities, including the contribution of funds, goods, or services to or for the benefit of a specially designated terrorist
- **Prohibition on “Material Support”** (18 U.S.C. §§ 2339A) Prohibits the provision of material support or resources knowing or intending they be used in preparation for, or in carrying out, terrorist acts
- **Antiterrorism and Effective Death Penalty Act of 1996** (8 U.S.C. 1189, 18 U.S.C. 2332d, and 18 U.S.C. 2339B) (AEDPA) Section 321 of AEDPA makes it a criminal offense for US persons to engage in financial transactions with the governments of countries designated under the Export Administration Act; US persons who engage in such transactions are subject to criminal penalties under title 18, United States Code
- **Executive Order 13224 “Blocking Property And Prohibiting Transactions With Persons Who Commit, Threaten To Commit, Or Support Terrorism”** (2001) prohibits transactions with individuals and organizations identified as “associated with terrorism” and potentially extends to individuals and organizations who “could” be listed in the future
- **USA Patriot Act (Uniting and Strengthening America by Providing Appropriate Tools to Intercept and Obstruct Terrorism Act** (Pub. L. No. 107-56, 115 Stat. 272) Creates or enhances criminal sanctions for providing material support for terrorism and provides for possible civil liability for the organizations and individuals involved in prohibited activities; expands the Secretary of

* Laws generally apply to US-based NGOs regardless of funding source (although some are appropriation specific). International Emergency Economic Powers Act, 50 U.S.C. 1701-06 (“IEEPA”) is the statutory authority giving Executive Orders the force of law in emergency situations

the Treasury’s authority to regulate financial transactions, particularly those involving foreign individuals and entities; and expands the definition of terrorism

- **Palestinian Anti-Terrorism Act of 2006** (Pub. L. No. 109–446) Sets forth US policy opposing organizations, individuals, and countries that support terrorism and amends the Foreign Assistance Act of 1961 to provide assistance under such Act to the Hamas-controlled PA only during a period for which a presidential certification of support of the peace process in the Middle East

Impacts:

- Humanitarian exceptions to the laws are not consistent and requirements may eliminate or diminish the ability of US-based NGOs to provide life-saving services and support in immediate onset emergency response without engaging in a “list checking” or “vetting”
- Undermines credibility of US-based democracy and civil society organizations working with local partners and others by requiring them to collect personal information about the staff and principles of the local

Counter-Terrorism Regulations (Embargoes and Sanctions)*

The Regulations Administered by Treasury’s Office of Foreign Asset Control (OFAC)

- **Global Terrorism Sanctions Regulations** (31 C.F.R. Part 594) implementing Executive Order 13224
- **Terrorism Sanctions Regulations** (31 C.F.R. Part 595) implementing Executive Order 12947
- **Terrorism List Governments Sanctions Regulations** (31C.F.R. Part 596) implementing Section 321 of AEDPA
- **Foreign Terrorist Organizations Sanctions Regulations** (31 C.F.R. Part 597) implementing Sections 301 and 302 of the AEDPA

OFAC regulations include a licensing program to authorize otherwise prohibited activities

* Regulations are permanent rules with the force of law and applicable to activities of US-based NGOs generally regardless of funding source; violation of which results in criminal/civil prosecution established by underlying laws

Impacts:

- Humanitarian exceptions are not consistently built into the regulations, sometimes resulting in delaying US-NGO support in critical situations while license applications are processed
- US foreign assistance is politicized as licensing approvals are limited by political agenda, regardless of humanitarian suffering

Counter-Terrorism Policies and Practices*

USAID AAPD 04-14 (Anti-terrorism Certification-2004): to receive funds from a grant/cooperative agreement a recipient must certify that it has (i) *not knowingly* provided material support or resources to any individual or entity that is a terrorist or associated with terrorism in the prior 10 years, **and** (ii) that it takes reasonable steps to ensure it does not do so

- compliance with the terms effectively requires grant recipients to check US, UN and EU lists of prohibited parties to ensure funds are not diverted to “terrorists” or “those associated with terrorism”
- excludes basic humanitarian and relief services from the definition of “material support and resources” to ultimate beneficiaries **unless** there is a reason the PVO should have known that the beneficiary is a prohibited person

USAID WB/G Revised Mission Order 21(Notice 2007-WBG-26, October 5, 2007): sets forth the Mission’s procedures to ensure USAID funded assistance does not inadvertently benefit individuals or entities that support terrorism (including vetting requirements, restriction on naming facilities, anti-terrorism certifications and mandatory language for agreements)

- Requires recipients to provide USAID Mission with the names of board and staff of local partners receiving subawards

USAID AAPD 09-01 (Synchronized Pre-deployment Operational Tracker (SPOT) - April 2009): imposes registration requirements for personnel of grants and contract recipients implementing USAID awards in Iraq

- Part of a Department of Defense (Defense) system of records
- “Blanket Uses” for Defense records include counter-intelligence purpose and sharing information with foreign governments
- AAPD 09-01 expands SPOT registration requirements to personnel of grant recipients performing in Iraq or Afghanistan which is beyond the scope of underlying laws

USAID Partner Vetting System: (globalizing vetting requirements of the Palestinian Anti-terrorism Act of 2006) if it becomes effective, PVS introduces additional eligibility requirements

- imposes obligation on recipients to provide personal information regarding US and international staff and board members (and possibly staff and board members of onward recipients) to USAID for checking against confidential US Government lists
- the system will be exempt from the protections of the Privacy Act, including
- no appeal of denied ineligibility based on inaccurate information
- USAID reserves the right to use the information in the system for its general and routine uses (including support of law enforcement and foreign intelligence activities) without informing the individual and giving the individual the change to correct/alter information
- may become effective August 4, 2009

Impacts:

Eligibility requirements that compel USAID grant and contract recipients to turn over or enter personal information of staff and others into classified US government and military databases:

- Creates the perception that NGOs are acting as extensions of US intelligence and law enforcement agencies or the US military
- Exposes US-based NGO staff to heightened personal safety risks

* Policy requirements are contractual and apply only to the funding from the specific donor

- Creates a “chilling effect” on implementation of programs in post-conflict region undermining the ability to partner with local NGOs and strengthen civil society

Export Administration Act of 1979, 50 U.S.C. App. 2405 (“EAA”)

A series of laws administered by the Department of Commerce/Bureau of Industry & Security (BIS) intended to control certain types of goods and technologies from export to certain countries, companies, organizations, and/or individuals

- used as a tool to support the US government’s designation of governments and states as supporting international terrorism
- restricts the ability of US-based NGOs to ship technology and other goods to specified countries
- there is no list of exempt “humanitarian goods” (equipment and materials appropriate for operations overseas)

Internal Revenue Service

Treasury’s “Voluntary” Guidelines:

- do not have the force of law and do not provide a “safe harbor” if they are complied with
- unintentional support for terrorism may be subject to enforcement action
- compliance with the anti-terrorism provisions requires the expenditure of a US-based NGO’s limited unrestricted funds to meet additional administrative costs to engage in due diligence in connection with all individuals and organizations with which a US-based NGO transacts business (staff, partners, vendors, etc.)
- guidelines have been adopted by several grant-making organizations as standards of eligibility for recipients (inconsistently applied standards of behavior required depending on funding sources)

Rules Regarding Non-Diversion of Charitable Assets*

- generally prohibits the diversion of charitable assets to any non-charitable purpose – which clearly includes material or financial support of terrorism
 - applicable to any kind of organization described in Section 501(c)(3) of the U.S. Tax Code
 - violation risks the revocation of its tax-exempt status
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* e.g. Section 501(c)(3) of the Internal Revenue Code; Sections 1.501(c)(3) - 1(c)(1) of the Treasury Regulations; IRS Revenue Ruling 68-489 (1968)

Where do we go from Here? Possible Solutions?

(something akin to the International Red Cross/Red Crescent's "International Disaster Response Law" Initiative)

The services provided by NGOs are increasingly needed around the world, often in the most dangerous places

US-based NGOs' ability to effectively communicate, operate and program is often restricted by overly broad prohibitions and requirements enacted in the name of national security and policy (usually a legitimate intent with poor execution)

Addressing the tension between prohibitions and requirements and the humanitarian imperative is an ongoing campaign

- How do we prioritize our advocacy and action?
- What steps should be taken to broaden the dialog?
- Where do we go from here?

Possible Solutions:

The Global Gag Rule: legislative repeal to ensure future administrations cannot politicize health by reinstating the rule - Global Democracy Promotion Act (S. 311)

Partner Vetting System: USAID implements a system that does not require the NGO community to be complicit in US foreign intelligence and law enforcement activities

Commerce's Embargos: create standard exceptions for basic NGO equipment and materials (including basic communication and computing technology) to ensure ability of NGOs to operate where needed most

USAID: the agency agrees to engage in negotiated rule-making for grant recipients (similar to rule-making for contractors) to ensure NGOs' issues are addressed in advance of publication of rules and policies

Global Framework of Law: establish/use a credible forum to discuss and establish a framework of laws for states to adopt that protect the NGO space to operate in accordance with the *Code of Conduct for International Red Cross and Red Crescent Movement and NGOs in Disaster Relief* and State's *Guiding Principles on Non-governmental Organizations*

