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# NGO Responses to Counterterrorism Regulations After September 11th

By Elizabeth A. Bloodgood<sup>1</sup> and Joannie Tremblay-Boire<sup>2</sup>

*We examine variations in nongovernmental organizations' (NGOs') responses to post-2001 changes in counterterrorism regulations in the United States, Canada, the United Kingdom, Germany, and Japan. We connect the presence of different ideal type responses—hiding, shirking, vocal opposition, participating, and litigating—to the extent of change in regulations, the degree of uncertainty (and risk) created by new regulations, and the availability of political institutions for NGO participation in policy-making.*

Why have nongovernmental organizations (NGOs) in different national contexts taken such different approaches in responding to recent changes in counterterrorism regulations? Given that changes in regulation were inspired by a transnational threat causing a strong shock to all countries, we might expect that NGOs, particularly international NGOs (INGOs) operating in multiple countries affected by the new transnational terrorist threat, would respond similarly to protect their interests. A common response would enable coordination among international NGOs and a stronger global campaign to fight counterterrorism laws with negative consequences for civil society. The popular media and academic literature warn of potentially dire consequences if regulations continue to tighten (Howell and Lind 2009; Sidel 2004). We find that INGO responses to changes in counterterrorism regulation have ranged dramatically from hiding and shirking, to vocal opposition, to participation in policy-making and court challenges to reverse or reinterpret law.

We examine NGOs' responses to new counterterrorism regulations (post-2001) in five major OECD countries—the United Kingdom, the United States, Canada, Germany, and Japan. These are the countries with the most to fear from recent anti-Western transnational terrorism and the countries where most international NGOs operate. In each country, we examine the nature of NGO responses to counterterrorism regulation and possible explanations for the nature of those responses. We conclude that the extent of change in regulations, the amount of uncertainty created, and the availability of access to participate in policy-making have an important effect on the nature of NGO responses to government regulations.

These findings have interesting implications for the regulation of INGOs and our understanding of their likely responses in the future to changes due to transnational terrorism or other global shocks. National institutions are very important for NGOs, even international NGOs that cross national borders, as NGOs adapt their organization and operations in response to the institutions of the countries in which they operate. International NGOs do not operate at the international level above the nation-state, but on the ground within complex and overlapping national legal jurisdictions that complicate their operations.

## **NGO Responses to Changing Regulations**

National regulations, including counterterrorism legislation as applied to NGOs, constrain NGO behavior by limiting their legal identities, permitted activities, and access to resources. Such regulations serve as formal institutions directing NGOs to behave in ways desirable to states by incentivizing positive behaviors (from the point of view of the state) and making illegal and punishing negative behaviors. As argued in new institutionalism and the new economics of organization, formal institutions such as regulations exert both coercive and normative pressures on NGO behavior by laying out what they can and cannot do and what is thus appropriate or inappropriate (North 1990; Ostrom 1991, 2005; Powell and DiMaggio 1991; DiMaggio and Powell 1984). Governments provide incentives to NGOs to encourage them to submit to national laws, such as tax breaks and access to grant competitions, in return for filing financial statements and adopting specific accounting and governance procedures. Governments also enforce penalties on NGOs that do not conform, including dissolution in extreme cases as well as loss of tax status, revocation of the ability to lobby, and

criminal penalties for hiding assets, misallocating assets, or violating national terrorism or hate crime laws.

NGOs, however, are not passive agents forced simply to comply with the regulations or to conform to the institutions they confront. International NGOs can choose to relocate to alternative locations with different legal strictures (Keck and Sikkink 1998; Smith and Wiest 2005). Or NGOs can work to remake institutions via available political processes such as elections, participation in policy debates, and legal challenges through the courts (Prakash and Gugerty 2010; Dalton 1998; Heins 2008). We categorize NGO responses to national regulation into five ideal type actions: hiding, shirking, vocal opposition, participating, and litigating. We then look for patterns between national counterterrorism law post-2001 (and the extent and nature of changes in counterterrorism law post-2001) and NGO responses.

We define hiding as minimal compliance with regulations (Scott 1987). Hiding allows NGOs to avoid government attention by complying with just enough of the regulation to escape notice while also minimizing any new costs associated with complying with new regulations. For example, hiding would describe an organization that did its best to cross-check employees against available government terrorist watch lists, but did not take additional measures to certify the employees' legal identities. Minimal compliance constitutes a type of free-riding, however. NGOs that hide might want new regulations abandoned or reformed, or alternatives put into place, but they are unwilling to bear the costs of advocating for such changes (Prakash and Gugerty 2010). Advocacy requires expending money on the real costs of funding a campaign, such as hiring lobbyists, printing educational materials, or organizing rallies (Dalton 1998; Betsill and Corell 2007). But advocacy also raises the risk of punitive measures being imposed by the government on the NGO, including review of tax-exempt status and fines or penalties for inappropriate/illegal actions, as well as the costs of hiring a lawyer and the loss of public support if an NGO is seen to be out of favor with the government. The NGOs most likely to hide are those that lack political pull (or protection) in the form of a strong, active, and well-connected leadership or membership, and those for which the costs of minimal compliance are quite small, particularly when compared to the potential costs of either not complying or speaking out aggressively against new regulations.

Alternatively, NGOs can shirk regulations by deliberately ignoring or avoiding the provisions of a law until they are caught and forced to comply by the government (Miller 2005; Johnson and Prakash 2007; Horn 1995). Shirking allows the NGO to avoid the costs of implementing changes to its behavior or organizational structure required by regulation. Shirking also constitutes a passive form of resistance to authority. The actor is less vulnerable to reprisals than if it engaged in active resistance, but nonetheless undermines government authority by not complying (Scott 1987). In principal-agent theory, shirking is argued to be a favored agent behavior in order to maximize agent interests at the expense of the principal (Miller 2005). If NGOs do not report their activities and income to the government, the government has a more difficult time monitoring their behavior. Most regulations include a penalty for shirking (or a reward for not shirking) in order to deter this undesirable behavior (Moe 1984; Haubrich 1994; Williamson 1985). Thus NGOs which are caught shirking will be required to pay a premium, often in the form of the loss of access to resources (political or economic), a fee, or possibly even dissolution (and associated costs to become reestablished). For example, new tax code provisions in the United States in 2006 provide for the automatic loss of tax-exempt status for any non-profit organization that has not filed the necessary tax forms by October 2010, thus forcing many organizations to pay back taxes and report their financial information (<http://www.irs.gov/newsroom/article/0,,id=226030,00.html>). The NGOs most likely to shirk are, first, those that have the least fear of being caught, possibly because they have few government ties, believe they are in compliance with laws, or believe their activities are unlikely to lead to violations of the law; and, second, those that face exceptionally high costs for compliance or opposition. For example, an aid organization with no government funding working in geographic areas where terrorist organizations are known to have many ties to the local populations and where foreign employees are unable or unwilling to work would likely need to defy new terrorist regulations to continue operating if it believed it could not abandon its projects in the country.

Some NGOs choose to engage in vocal opposition to government regulations via public protests and demonstrations, press releases, educational materials, newspaper editorials, and op-ed pieces. Vocal

opposition is the strategy most commonly associated with NGOs, and is consistent with scholars' view of NGOs as watchdogs and human rights/civil society organizations working to prevent the encroachment of government authority (Keck and Sikkink 1998; Heins 2008; Risse, Ropp, and Sikkink 1999). The proliferation of NGO websites that clearly present their position on issues, including government regulation, demonstrates the importance of vocal opposition as a response to regulation on the part of NGOs. For example, [strong statements by Human Rights Watch, the International Center for Not-for-Profit Law, and Open Democracy opposing changes to Russian NGO law in 2006](#) can be found on their websites. Vocal opposition, however, has risks as NGOs can be deemed to be disruptive, even anarchists or terrorists, depending upon the form of opposition. They may face penalties in the form of changes in tax status and even imprisonment, fines, or dissolution as punishment for illegal or inappropriate behavior. NGOs are more likely to turn to vocal opposition if their mandate or mission includes monitoring and critiquing government behavior, as is common of human rights organizations. NGOs are also more likely to engage in vocal opposition if they rarely work collaboratively with government, if they are not dependent upon government funding, or if they feel they have exhausted other options.

Other NGOs choose to work inside political institutions to change regulations rather than challenge them from the outside. We term this participating, in that NGOs work with regulators in the form of legislators or regulatory agencies to review and revise regulations in ways that are mutually satisfactory to both the NGOs and the government. Either as interests lobbying for changes in regulations or as expert advisers testifying before government committees (Charnovitz 1997; Dalton 1998; Betsill and Corell 2007), these NGOs seek to engage and collaborate with government on improving regulations to benefit both parties. In this case, NGOs do not see regulations as only constraints, but also as legal protections that provide opportunities for NGO activities by limiting government authority, by reducing competition from other NGOs, and/or by eliminating "bad" NGOs and thereby enhancing the legitimacy and credibility of those that remain (Heins 2008; Brock and Banting 2003; Brock 2001). NGOs are more likely to turn to participating as a response if they have a history of close relations with the government and if institutional mechanisms exist that make participation possible and effective.

Lastly, NGOs may choose to challenge regulations in court, using litigation to clarify provisions in the law and the extent of government authority to enforce new regulations. Not all national political systems allow NGOs easy access to the court system. For example, in Japan, NGOs are regulated via executive departments that have bureaucratic oversight over them. Litigation is an actively confrontational response, like vocal opposition, although from within political institutions rather than outside of them. Litigation has the benefit of imposing a binding decision upon both parties, but generally results in only marginal changes to laws as court decisions are decided on a one-by-one basis as compared to the more comprehensive reform possible through participation in the policy-making process (Dotan and Hofnung 2005; Hirschl 2008). NGOs founded and/or staffed by lawyers, such as the Natural Resources Defense Council, Lawyers for Human Rights, and the American Civil Liberties Union, are the most likely to use litigation as a strategy, as these organizations are the best able to bring cases to court given their in-house expertise. NGOs are also likely to use litigation as a means of clarifying the law in situations of extreme uncertainty regarding the requirements and applicability of regulations for either NGOs or the government. Without clarification of the content or bounds of the regulation, the NGO is unable to gauge if it can and should comply, and if the government is applying and enforcing the regulation correctly. Litigation also resolves the collective action problem, as the NGO expects to receive clear, direct, and concentrated benefits for its efforts in bringing the case to trial, while free riders may or may not benefit.

We argue that the political context and the nature of changes to regulation (the extent of the increase in the severity of regulation and beliefs about government capacity and intention to enforce new rules) are the key determinants of the costs of, and potential for, passive versus active resistance. Minor changes in regulations, particularly if combined with improved monitoring and enforcement provisions, will make hiding more likely as it is cheaper to hide than resist. Major changes in regulation, especially those that create high costs or new risks for NGOs, are likely to promote more active resistance in the form of vocal opposition or participation. Changes in regulation without changes to monitoring and enforcement capabilities are likely to cause shirking, particularly if there is uncertainty about the new requirements imposed on NGOs or about government willingness or ability to enforce new regulations.

Uncertainty itself is a form of risk and a source of costs for NGOs, and thus new regulations that create a great deal of uncertainty, especially if some interpretations of the new law are potentially very restrictive, are likely to create strong incentives for active resistance by NGOs via participation or litigation. Here the nature of the political system matters. In places in which NGOs have easy access to political institutions and a sense of political efficacy (i.e., participating within the political system is possible and cost-effective), participating in policy-making is likely (Risse-Kappen 1995). In places in which NGOs have more limited access to policy-making, they may turn to litigation, particularly if there is a history of successful legal challenges and an adversarial political culture. These ideal types of NGO responses to new or changed regulations are not necessarily mutually exclusive. Participating in the political process to improve regulations might be tried prior to vocal opposition or litigation, which could be seen as a fallback option if a participatory approach fails. Similarly, NGOs might switch from shirking to hiding if they are caught shirking, or from hiding to more active opposition if new reforms impose increased constraints or costs on the NGO.

### **Counterterrorism Regulation Post-2001**

In the five countries under study, new regulations were adopted as a result of the tragic events of 9/11. Yet, for the most part, the new regulations did not constitute a departure, but rather the logical continuation of previous legislation in light of the new international context. Almost ten years later, many new or amended provisions have rarely or never been used, but the uncertainty and potential ambiguity of their interpretation and implementation could lead to tremendous changes in the NGO landscape.

#### *United States*

Prior to the events of September 11, 2001, the Internal Revenue Service (IRS) was primarily responsible for regulating NGOs in the United States. Although the IRS retained a major role after 9/11, new laws led to more involvement by other government actors in NGO affairs. This new involvement, however, did not mark a shift in US regulation of NGOs as much as a continuation of existing laws. Executive Order 13224 of September 23, 2001, provided the first terrorist list. The assets of groups on that list and of suspected terrorists would be blocked. Helping terrorists in any way, including humanitarian assistance and the unintentional provision of expertise, was prohibited. Although it clearly went further, this provision was consistent with previous IRS regulations that prohibited charities from diverting funds to non-charitable purposes, including funding terrorism (26 U.S.C. § 501(c)(3)). The executive order also presented a definition of terrorism that NGOs and academics criticized because it allowed for acts of domestic protest and government dissension to be deemed "terrorist" acts (Odendhal 2005, 1; Guinane et al. 2008). The USA Patriot Act was less controversial among NGOs than the executive order in that it mostly amended existing legislation by increasing sentences for terrorism-related offenses, expanding the definition of material support, and officially prohibiting terrorist financing.

One of the most controversial actions taken by the US government with regard to NGOs post-9/11 was, interestingly, not a law. After Muslim charities expressed concern about how to protect themselves against terrorism, the U.S. Department of Treasury published its "Anti-Terrorist Financing Guidelines: Voluntary Best Practices for U.S.-Based Charities" in 2002. A revised version appeared in 2006. NGOs and academics were (and still are) concerned that the due diligence requirements detailed in the guidelines are unrealistic (see Baron (2004) for specific issues). As a result, many NGOs are afraid that the guidelines may become de facto law (Sidel 2006, 206; Billica 2006, 17-18).

#### *Canada*

There were major changes in NGO legislation in Canada post-9/11. However, most of the debate and fear in Canada center on uncertainty – not how the new legislation has affected NGOs so far, but how it could potentially affect them if interpreted in a certain way. For instance, the 2001 Anti-Terrorism Act created the Charities Registration (Security Information) Act (Part 6). The latter makes it possible for the government to issue a security certificate against a charity based on intelligence that the charity in question has or will provide resources to a terrorist organization or is engaged in terrorist

activities (section 4(1)). One of the major problems with this act is that the intelligence used to produce the security certificate does not have to be shared with the accused NGO (Bloodgood and Tremblay-Boire 2010). Yet, as of April 1, 2008, no certificate had been issued by the Canadian government (Dept. of Justice 2008). The 2001 Anti-Terrorism Act also added new provisions on terrorism to the Criminal Code, providing for the listing of organizations or individuals who take part in terrorism (83.05), and for the freezing of assets and imprisonment of individuals knowingly assisting terrorists (83.02; 83.03; 83.04; 83.08; 83.12). Some in the legal community have criticized the definition of "facilitation" employed in the Criminal Code (83.19(2)) because it implies that an NGO could be accused of helping terrorists even if it had no knowledge of terrorist activities and even if the terrorist act(s) never occurred (Carter 2004; Carter, Carter, and Claridge 2008).

Uncertainty as to how new regulations may affect charities is also prevalent in the interpretation of the amended Proceeds of Crime (Money Laundering) Act. Although the law does not explicitly require charities to report their financial transactions to the Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), they may be considered as belonging to the residual category of "(g) persons and entities authorized under provincial legislation to engage in the business of dealing in securities or any other financial instruments, or to provide portfolio management or investment advising services" (Proceeds of Crime Act, sec. 5). Other organizations or persons, such as financial institutions or accountants, may also be obligated to reveal financial information about NGOs (Carter 2004; Carter, Carter, and Claridge 2008).

### *United Kingdom*

In the United Kingdom as in the United States, post-9/11 regulations did not mark a departure but rather a continuation of existing terrorism legislation. The focus was on adapting domestically oriented legislation (created to deal with incidents in Northern Ireland) to a context of international terrorism. Provisions prohibiting the funding of terrorism already existed in the UK prior to 9/11 (Terrorism Act 2000) and penalties remained the same after 9/11. One of the amendments of the Terrorism Act 2006 provided that an organization could be added to the list of terrorist entities for "glorification" of terrorism. As Dunn (2008, 15) explains, however, the term "glorification" is problematic because a person only has to consider the behavior as something that should be emulated for it to be unlawful. No emulation has to take place.

After 9/11, new legislation expanded the powers of the Charity Commission, the independent government agency responsible for regulating charities in England and Wales. The Charities Act 1993 had given the right to the Commission to remove NGOs' trustees or employees from their position (Part IV, section 18). The Charities Act 2006 allowed the Commission to cancel trustees and employees' membership in an organization (Part II, chapter 5, section 19). The Charities Act 1993 had given the right to the Commission to conduct inquiries and to request charities' documentation (Part II, secs. 8-9). Under the Charities Act 2006, the Commission can now, with a warrant, enter a charity's premises and seize documents (Part II, chap. 5, sec. 26).

### *Japan*

The Japanese government, like the United Kingdom government, dealt with domestic terrorism for a number of years prior to 9/11 (e.g., Aum Shinrikyo and Japan's Red Army). The approach of the Japanese government has always been reactive more than proactive (Katzenstein 2003). Incidents such as the 1995 sarin gas attacks in the Tokyo subway did not trigger the enactment of legislation to prevent terrorism, but rather led to efforts to manage crises effectively. Terrorism was handled through police presence, not legislation (Katzenstein 2003). The events of 9/11 have resulted in the same type of "crisis management" response in Japan. The Anti-terrorist Special Measure Act immediately committed the Japanese Self-Defense Force (SDF) to provide assistance (e.g., fuel, transportation, humanitarian assistance) in the international fight against terrorism (Embassy of Japan, 2001; Katzenstein, 2003, 752). In 2003 and 2004, the Law Concerning Measures to Ensure National Independence and Security in a Situation of Armed Attack and the Law Concerning Measures for Protection of the Civilian Population in Armed Attack Situations established procedures in case of an armed attack against Japan. None of these regulations relate to NGOs.

The 2004 Action Plan for the Prevention of Terrorism was created by the Japanese government to implement the recommendations of the Financial Action Task Force (FATF). Since FATF's Special Recommendation VIII is explicitly directed toward non-profit organizations as a source of terrorist financing (FATF 2009), the Action Plan should have affected NGOs. Yet the Japanese government does not even mention NGOs in its plan. Nonetheless, NGOs could be affected indirectly, as laws implemented as part of the plan prohibit funding of terrorism and demand that financial institutions report suspicious transactions to the Japanese Financial Intelligence Office (Headquarters, 2004, 21; Kishima, 2004).

### *Germany*

Germany, which had been the target of domestic terrorism prior to 9/11 (e.g., Red Army Faction (RAF)), focused on adapting domestically oriented legislation to the post-9/11 international terrorism context. The government shortened the discussion period for two acts, Security Packages I and II, in the immediate aftermath of 9/11. Security Package I was in preparation prior to 9/11, but Security Package II (Terrorismusbekämpfungsgesetz) was drafted as a direct result of the attacks. Security Package I expanded German jurisdiction to the European Union as a whole, prohibiting the formation of terrorist groups anywhere in the EU and allowing prosecution of terrorists for acts perpetrated outside the EU if the offender is German (or a German resident), is found in Germany, or if a victim is German (German Criminal Code, art. 129a, 129b). Security Package II abolished the religious privilege, which meant that religious organizations were now subject to the Act Governing Private Associations (Vereinsgesetz) like any other NGO. Rau (2004, 316) states that the abolition of religious privilege was under discussion for some time, but the events of 9/11 served as a catalyst in reaching approval. Security Package II also amended the provision on associations of aliens (non-EU citizens) in the Act Governing Private Associations (Vereinsgesetz) by including additional reasons to prohibit them (Rau 2004). The Federal Office for the Protection of the Constitution and the Federal Intelligence Service were granted more powers, such as access to financial information and computer surveillance. In 2002, new legislation on money laundering, the Fourth Financial Market Promotion Act (Viertes Finanzmarktförderungsgesetz) and the Money Laundering Prevention Act (Geldwäschebekämpfungsgesetz), implemented a computer system capable of freezing assets and added a provision obligating bank officials, accountants, and other individuals to divulge suspicious financial transactions to the Financial Intelligence Unit (Codexter 2004, 6-7).

### **INGO Responses to Counterterrorism Regulations in Case Countries**

Based on insights from the new economics of organization and sociological institutionalism that we used to define the ideal types presented above, we have the following expectations about NGO responses to regulatory changes in the five countries examined. First, we hypothesize that the more extensive and invasive the changes in counterterrorism regulation, and thus the greater the costs imposed by the new rules, the more likely NGOs are to take an active approach (vocal opposition, participation, or litigation) rather than a passive approach (hiding or shirking) to regulation. Second, we expect that if changes to the regulation include elements that improve the government's ability to monitor and enforce the law, NGOs will be less likely to shirk. Third, if changes to counterterrorism regulation are costly for NGOs, and if national political institutions permit participation, then we expect to see more participation. But if changes to regulation are costly for NGOs, and political participation is not possible or effective, then we expect to see litigation. Fourth, if there are major changes to counterterrorism regulation that generate uncertainty about the correct interpretation or application of the law, we expect to see litigation as a means to clarify appropriate behavior by NGOs and states, or hiding to avoid possible political targeting in an uncertain and thus risky environment.

### *United States*

NGO responses to changes in counterterrorism regulations in the United States have run the gamut from hiding and shirking to litigation. The extent of the changes in the regulations requiring due diligence, given the lack of previous counterterrorism regulation, imposed high costs (at least if regulations are fully enforced) on many NGOs. Free-riding among NGOs, given the size and diversity of the NGO community, and the lack of means to influence counterterrorism policy given the closed

nature of US policy-making on national security matters, have meant that participation is not an appealing choice for NGOs in the US. Many NGOs also feared retribution should they engage in vocal opposition to new laws. A report by OMB Watch and Grantmakers Without Borders (2008, 8) found that "Executive directors and boards fear reprisals ranging from freezing assets to seizing of equipment and materials—and all cloaked under secrecy." NGOs' concerns were reinforced by ACLU accusations of FBI spying on advocacy groups engaged in legal protest activities (Washington Post, 12/20/2005; Guinane 2007; Sidel 2008; Guinane et al. 2008).

Hiding and shirking are thus preferred responses for many NGOs within the US. A survey conducted by the Council on Foundations in 2005 found most large NGOs were revising their due diligence procedures and checking terrorist lists. Smaller public charities usually conducted list-checking, but with less regularity than large NGOs. Small NGOs with strong domestic mandates were the least likely to comply because their administrators believed their current policies were appropriate given their low risk of funding terrorism (Buchanan 2005). Other large NGOs also shirked, however. A survey by the Chronicle of Philanthropy (8/19/2004) revealed that many major international NGOs, including Doctors Without Borders, Eagle Forum Education and Legal Defense Fund, and the United Way of America, had not verified their employees against government terrorist lists as quickly or as often as required. Many NGOs also shirked new provisions for accounting more precisely for their foreign income and expenditures within 990 tax forms by not filing promptly, thus leading to new laws making loss of tax status automatic for failure to file several years in a row.

NGOs have also used court challenges to clarify provisions for "material support," due process, and necessary probable cause to freeze NGO assets (Humanitarian Law Project et al. v. Gonzales et al. 2005; Holder, Attorney General, et al. v. Humanitarian Law Project et al. 2010; KindHearts for Charitable Humanitarian Development, Inc. v. Geithner et al. 2009; Al-Haramain Islamic Foundation, Inc., et al. v. Obama et al. 2010). Cases have generally been brought by NGOs founded by lawyers or as the last resort of NGOs being targeted by the US government for dissolution under new counterterrorism regulations.

### *Canada*

Although neither as formally institutionalized nor as powerful as the Charity Commission in the UK, the Voluntary Sector Initiative (VSI) in Canada created in 1995 has provided a means of participation for NGOs in policy-making and implementation via coordinated partnership opportunities with the Government of Canada (<http://www.vsi-isbc.org/eng/about/history.cfm>). The VSI also helped NGOs in Canada overcome collective action problems to work together for regulatory changes. It is thus consistent with our expectations that participation has been the dominant NGO response in Canada. Representatives from the Canadian Bar Association, Canadian Civil Liberties Association (CCLA), Amnesty International, the Canadian Red Cross, World Vision, the International Civil Liberties Monitoring Group, the Canadian Council for Refugees, the Canadian Islamic Congress, the Muslim Council of Montreal, and Imagine Canada all participated in legislative debate prior to the passage of the Anti Terrorism Act and during the 2005 review of the Act. These NGOs each submitted written and/or oral testimony to multiple Senate and Commons committees (Bloodgood and Tremblay-Boire 2010).

Uncertainty about the scope of some provisions in the new counterterrorism regulation, particularly the definition of terrorist activities and concerns that this may outlaw previously legal forms of political dissent, has sparked some litigation for clarification. In the 2006 case *R. v. Khawaja*, Justice Rutherford of the Ontario Supreme Court determined that parts of the definition violated section two of the Charter of Rights and Freedoms, however the list of offenses included in the Anti-Terrorism Act was acceptable (Carter et al. 2008, 50; Roach 2007). Given the scope of changes in counterterrorism regulation after 2001, and thus the potential risks for political targeting of NGOs via a broad application of government powers, a mix of litigation and participation is largely consistent with our expectations. It is unclear, however, if the VSI has eliminated hiding and shirking by most NGOs, given the close working relations many NGOs have with the government, or if participation simply overshadows incidents of shirking or hiding.



## *United Kingdom*

Although civil society's response to counterterrorism measures in the UK has been slow and relatively isolated until 2007 (CCS 2007, 5), there appears to be a movement toward more involvement by NGOs, mostly of the participatory type. Some NGO responses are more confrontational. For instance, because civil society had not been "meaningfully" consulted in the drafting of the Home Office review on the protection of charities from terrorist abuse, the National Council for Voluntary Organisations (NCVO) produced its own report on the impact of counter-terrorism measures on civil society (Quigley and Pratten 2007). Others responses are more conciliatory. Numerous charities participated in the consultations launched by the Charity Commission (almost 200 organizations, according to the Commission's website) and by the Home Office and HM Treasury in May 2007 and July 2010 (see for example the response prepared by Liberty at <http://www.liberty-human-rights.org.uk/pdfs/policy10/from-war-to-law-final-pdf-with-bookmarks.pdf>). Some NGOs, like BOND (British Overseas NGOs for Development), are actively cooperating with the Charity Commission in the preparation of compliance toolkits for counter-terrorism laws. Whether confrontational or conciliatory, these responses are all participatory in nature because they seek to engage government regulators and arrive at mutually beneficial legislation.

Considering that the regulatory environment did not change drastically after 9/11 in the UK, a participatory response by NGOs mostly confirms our expectations. The increase in the severity of counter-terrorist regulations was minimal in the UK, with the addition of the "glorification" provision but unchanged penalties for acts of terrorism. Based on our hypotheses, this would potentially suggest hiding, but no evidence confirmed such a reaction. However, NGOs have easy access to political institutions and a sense of political efficacy in the UK, which enables participation. The UK government demonstrated its willingness to enforce counter-terrorist legislation by expanding the powers of the Charity Commission, but the position of the Commission as both independent enforcer and adviser to the NGO community limited active NGO resistance. By actively seeking NGO feedback, the Charity Commission ensured that NGOs had a mechanism to participate in the legislative process. Moreover, by demonstrating its independence from the American government and its impartiality, notably in the Interpal case, we believe that the Commission was able to establish a relationship of trust with civil society that is not as present in the other countries under study.

## *Japan*

Japanese counterterrorism measures have traditionally and contemporarily targeted emergency response and civil defense, rather than any perceived threat from an overlap between civil society and terrorist organizations. As changes to counterterrorism regulations post-2001 have been minor and unrelated to NGOs' activities or interests, the lack of NGO response to counterterrorism regulation in Japan is unsurprising. NGOs in Japan have not needed to hide or shirk counterterrorism regulation. Their participation in policy-making is institutionally limited, given the corporatist nature of Japanese governance (Lijphart and Crepez 1991) and NGOs' strict control by executive agencies (Pekkanen 2006). There have been no attempts at litigation on counterterrorism regulations by NGOs in Japan.

## *Germany*

Vocal opposition has clearly been the favored resistance type in Germany. A group of German NGOs, led by Humanistische Union (Humanist Union), produces an annual report detailing state human rights abuses, notably through its increased surveillance powers. Amnesty International (AI), Privacy International (PI), and the International Helsinki Federation for Human Rights (IHF) also publicly criticize Germany for human rights violations related to the country's counter-terrorism laws. Some of the accusations include inappropriate treatment of refugees and asylum seekers, excessive use of force by police officers, unconstitutional investigations and raids against journalists, and violations of privacy (see for example AI, 2008; Banisar, 2008; IHF, 2003). The European Federation of Journalists (EFJ) opposed a counter-terrorism law that would force journalists to divulge their sources if asked. The law was passed, leading journalists, lawyers, and doctors to initiate judicial procedures, arguing that the law is unconstitutional (IFJ/IFEX, "German Parliament Defeats Anti-Terrorism Law"; IPI/IFEX, "More German Journalists Join Battle"). Other groups, such as the *Einstellung der §129(a)-Verfahren* -

sofort! (Coalition for the Immediate End to the § 129(a) Proceedings), have focused on the abolition of specific terrorism provisions (in this case, § 129(a)) and on the liberation of individuals, including academics, accused under these provisions.

In Germany, more than any other case, regulatory changes directly and explicitly targeted INGOs. Although new counter-terrorist regulations were largely consistent with prior regulations, there were some significant departures, such as the suspension of the religious privilege. The German government also markedly increased surveillance powers by providing new technological tools and allowing agencies to put individuals under surveillance without informing them. Major regulatory changes and demonstrations of governmental capacity and willingness to enforce the new regulations suggest active NGO resistance, either through vocal opposition or participation. The evidence corroborates our expectations as major acts of protest, often by reputable NGOs, have taken place in Germany. Furthermore, we argued that uncertainty about regulations and the failure of other means of response should lead to resistance through litigation. The German experience supports this expectation. There were no clear boundaries to the vast expansion of surveillance powers in Germany, leading to abuse by police forces and multiple appeals to courts by NGOs and interest groups to reestablish a balance.

### Conclusions and Implications for Future Change

We find that in five cases of relatively similar countries experiencing a common threat in the form of transnational terrorism, the responses of NGOs have varied substantially. In the case of Japan, where regulation changed little and did not target NGOs as a security threat, NGOs did not respond at all. In the cases of the US and Germany, where regulations changed the most, NGOs engaged in vocal opposition and litigation, the most active and confrontational responses. In the UK and Canada, where regulation changed somewhat but in ways consistent with past regulation, NGOs participated in policy-making processes to refine and reform the new rules. Our hypotheses were roughly supported—minor changes in rules (Japan) brought less active responses than major changes (US and Germany); major changes that created uncertainty produced litigation to clarify new rules (US, Germany, and Canada); increased monitoring by the government reduced shirking (US and Germany); and in cases in which governments provided institutions to enable NGOs to participate, they did so (UK and Canada). While we have focused on counterterrorism regulations, we believe that the same ideal type NGO responses—hiding, shirking, vocal opposition, participating, and litigating—would be found in response to changes in other aspects of NGOs' regulatory environment. Furthermore, the same three factors—the extent and nature of any change in regulations, the uncertainty (and risk) that changes create, and the nature of institutions for political participation—would be important for explaining why NGOs respond as they do to national changes in regulation. Efforts to clarify and specify counterterrorism measures, and their direct impact on NGOs, would likely help to reduce vocal opposition and litigation. That said, if counterterrorism measures are highly constraining and authoritarian, NGOs are likely to continue to work to change these measures, some working collaborative with government, some shirking, and others acting openly in opposition to government. NGO hiding and shirking is likely to prove threatening for both national security and NGOs' political development in the long run. These behaviors may result in a loss of accountability and legitimacy as well as deteriorating relationships between NGOs and government. Hiding and shirking are also symptoms of collective action failure, and a coordinated global campaign may be needed by NGOs to press for more NGO-friendly and effective counterterrorism measures cross-nationally.

Country	NGO Response to National Counterterrorism Regulations				
	Hiding (Minimal Compliance)	Shirking	Vocal Opposition	Participating in Policy-making	Litigating
United States	X	X			X
Canada				X	X

United Kingdom				X	
Japan					
Germany			X		X

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## Notes

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