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Criminalizing Humanitarianism? How Counterterrorism Measures Obstruct Humanitarian Action

December 13, 2012

The report [Safeguarding Humanitarianism in Armed Conflict](http://www.charityandsecurity.org/studies/Safeguarding_Humanitarianism_in_Armed_Conflict) is available at http://www.charityandsecurity.org/studies/Safeguarding_Humanitarianism_in_Armed_Conflict

Moderator (Joanne Mariner- JM): Good afternoon and welcome to Roosevelt House. I'm the Director of Hunter College's Human Rights Program and I have the pleasure to welcome you to today's panel, which will be a discussion of the impact of counterterrorism sanctions on humanitarian action. Our discussion today could not be more timely. With the humanitarian situation in northern Mali worsening and large areas of northern Mali under the control of groups that the U.N. and the U.S. deem to be terrorists, it's a very good moment to explore the impact of counterterrorism sanctions on humanitarian action and, also, to assess whether these counterterrorism sanctions are consistent with international humanitarian law.

So, we have a very impressive array of speakers today whose full bios you have in front of you, so I will be very brief in introducing them. Our first speaker is Kay Guinane, who is the Director of the Charity and Security Network, and a co-author of a recent report titled, "Safeguarding Humanitarianism in Armed Conflict," and you can pick up a copy of this report...or the executive summary of the report as you leave. The report describes the conflict between counterterrorism measures and international humanitarian law, and it concludes that these overbroad measures should be amended to be more consistent with international humanitarian norms. Our second speaker, to Kay's left, is Denise Fernell, who is Senior Director of Global Safety and Security at the International Rescue Committee. Denise will describe the impact of counterterrorism measures on IRC's work in countries such as Somalia, Pakistan and Afghanistan. Our third speaker is Shalini Nataraj, a Public Policy Analyst at the Global Fund for Women. Shalini will describe the impact of counterterrorism measures on human rights' defenders, as well as the disproportionate impact of such measures on women. And our final speaker, to Shalini's left, is Naz Modirzadeh, a Senior Fellow at Harvard Law School, and member of the Harvard Law School's Brookings Project on Law and Security. Naz is going to

present compelling recent research on the impact of counterterrorism measures on humanitarian action. So, we'll start with Kay.

Kay Guinane (KG): I think I'll stand up so that I can see the PowerPoint that you're seeing at the same time. I want to thank Joanne and Hunter College very much for sponsoring this event and making this information available to our civil society and other colleagues in New York City. The Charity and Security Network is a Washington, D.C.-based advocacy campaign made up of nonprofit stakeholders from a variety of interests – grant makers, international NGOs, civil liberties, faith-based organizations, human rights, who have all come together to develop reform proposal to address the places where human rights and humanitarian law and U.S. counterterrorism measures are misaligned. And so we have been working on that in D.C. for several years, making slow but steady progress.

The reform proposals we have developed are based on the Geneva Conventions, the Bill of Rights and human rights law. Those are the screens or the lens that we think counterterrorism laws need to be looked at through. I know there are other ways of looking at it from a security standpoint, which is perfectly legitimate, or from an anti-terrorist financing viewpoint, but those should not supersede humanitarian considerations. So we published this report in the summer and have been going around to different places in the county presenting these principles, in the U.S., to nonprofits and stakeholders for the purpose of getting humanitarian concepts and principles into the discussion about security. We've talked about the Constitution and about moral principles a lot in the public dialogue, but we haven't really in, at least in D.C., adequately included humanitarian principles, so that's the purpose of this report. It has a section that describes U.S. law, a section that summarizes international humanitarian law (IHL), which is specific to armed conflict and protection and aid to civilians, and then a section that compares the two and shows where there are inconsistencies or misalignments and, in some cases, outright clashes.

So, what I will do is very quickly to set the stage for the other speakers and talk about the U.S. counterterrorism laws and what I call a "double whammy" that applies to civil society groups in the U.S. There are two different laws that cover the same situation. One is economics sanctions laws which the Department of Treasury administers and these are sanctions that allow them to, by Presidential executive order, put groups on the terrorist list and then their assets are frozen, they're not allowed to operate in the U.S., and then anyone who is deemed to be supportive of them is also put on the list with the same kind of sanctions. These, as national security sanctions, are considered civil penalties. There are no real, meaningful appeal rights at this point, and two courts, federal courts, in the United States have held that the current appeals system through the Treasury Department is constitutionally deficient, and that's something we're working to change.

The material support prohibition is separate, and it's a criminal law that prohibits just about any kind of aid you can think of, either tangible or intangible, to a terrorist

organization on a U.S. list. And that includes expert advice, assistance and training, as well as humanitarian items like food and medical services, shelter, blankets, things like that. And in 2010, the United States Supreme Court upheld the constitutionality of the law as applied to efforts to train terrorist groups in using peaceful means to address their grievances.

So, a little bit more about the material support law, because that's been incorporated into economic sanctions regime through executive order, but also because it's really the basis of the U.S. approach here. And, as this says, "All support of a terrorist organization is presumed to help them achieve their ends, regardless of the nature of that support." The Secretary of State and Attorney General under the statute can make it legal for nontangible things, expert advice and assistance, if they find it is not a threat to national security, although that power has not been invoked adequately. So, for example, it's still illegal for the Carter Center in a peace-building project to provide direct training to terrorist organizations to get them involved in a peace process. The exemptions for humanitarian aid are very limited. All that it allows is religious materials and medicine, so medical services, food, water, things like that are prohibited.

Comparing this to international humanitarian law, which is also derived from the law of armed conflict, it applies in conflict situations, in international armed conflict and non-international armed conflict. It is enshrined in the Geneva Conventions, particularly Article Three. Additional protocols to the Geneva Conventions which were agreed to in 1977, Protocol II addresses non-international armed conflict, which is where we mostly run into problems in dealing with terrorist organizations. Customary international law and the International Committee of the Red Cross commentary are also very good sources to find international humanitarian norms of what are the generally accepted practices.

Key concepts of international humanitarian law – one is that countries, states must distinguish civilians from combatants who can be appropriately attacked – that's an issue we see discussed now in relation to what's going on in Syria – and that the means of warfare are not unlimited. Then, important for humanitarian assistance, is what's called "the right of initiative" for aid groups to offer their assistance to states who are controlling powers and territory to provide aid to civilian populations. In order to be covered by this right of initiative, the aid organization has to be neutral in the conflict. They have to follow the principles of humanitarian action, which include, also, impartiality, so that aid needs to be provided on needs alone. So, for example, the fact that your uncle might be a member of Al-Shabaab is not supposed to be a factor in deciding whether or not you're eligible for aid, or who you voted for in an election – so, organizations that adhere to the principles of neutrality in the conflict, humanity and independence from government. In other words, not functioning as an arm of the government and having government be the Wizard of Oz, the control behind the NGO. States do have the right under international humanitarian law to limit access, aid groups' access, for humanitarian purposes for security reasons. But they can't arbitrarily and capriciously refuse that access. They may impose conditions on access. You might be

told you have to move food through one route and road instead of another one, for example, but they must be temporary. And third states, who are not directly involved in the conflict, must respect the conventions and cannot arbitrarily block aid in another country.

So, looking and comparing all this to the U.S., we see there is under the economic sanctions law a provision and regulation that allows the Treasury Department to give a license to a non-profit organization to provide aid that would otherwise be prohibited under transactions with the terrorist group. They can do a general license, so that everyone could just use it and see what the terms are, or they could do a specific license, which is most often what is used, where the group has to apply and say exactly who they're going to be dealing with and what kind of programs they'll be operating. The problems with this are twofold. One, it's extremely slow and inefficient. I've talked to NGOs who can't even find out the name of the person in the Treasury Department who's handling their application in order to follow-up. I had lunch with an NGO attorney on Tuesday who told me they have had a license application pending since 2009. So this is not the, not the answer to our problem. And even if it were made to operate efficiently and had clear standards that everyone could go by, the problem is that it makes the presumption they're supposed...in international humanitarian law, it turns it upside down, and under IHL, it's only when there are temporary and concrete security needs that government can step in and interfere with access. Under the licensing system, everything is banned and then aid becomes the exception. InterAction, the largest association of international NGOs in the country, have cited licensing as a significant barrier to aid in their briefing book for 2011, and nothing has substantially changed since then. I imagine their 2013 briefing book will make the same point.

So, other ways the material support law is not aligned with IHL. There's really no discussion or separate provision made for civilians. So, my take on that is that a lot of the confusion in the way that the law has become overreaching is because there has not been an understanding or a distinction between civilians under the control of terrorists and terrorists. For example, the exemption for medicine and religious materials applies to aid to the terrorist group, but if what the NGO wants to do is aid civilians, they're not trying to aid the group, but they may have to deal with them to get access to the civilians. And that structure, that on-the-ground reality, is not something that the law understands or accommodates very well. And the other is that it's a blanket prohibition, rather than kind of temporary, security-focused, context-specific restrictions that IHO would allow.

The limited exemption in the material support law is made worse also by Executive Order 13224 in the economic sanctions regime. The economic sanctions law does have a humanitarian exemption. It includes food and water, but it allows the President to reverse that exemption for security reasons and in every executive order that's come down the pike since 2001, the President has exercised that power, both Bush and Obama, without explanation. So we still, we have two limitations on humanitarian action there. But under Common Article Three, relief organizations are supposed to be allowed to offer their services to address civilian suffering, and under Common Article One, third states,

like the United States, are not supposed to intervene or interfere and prevent humanitarian assistance to civilians in other places. The U.N. has approved humanitarian exemptions in several contexts, including the example here in Darfur, but U.S. organizations can't take advantage of these exemptions, because we would be in violation of U.S. law, even if it's non-lethal military equipment meant solely for humanitarian human rights monitoring or protective purposes, as was the exemption for Darfur. We have seen, increasingly, militarization of aid with the U.S. boots on the ground in the Middle East and becoming involved in the delivery of aid, but it's not humanitarian when it's controlled by the government.

The USAID has a partner-vetting system they call, it's operational in the West Bank and Gaza and some places in Afghanistan. It requires an NGO to collect detailed personal data on any local entity, NGO, or company it's working with to get their Social Security number equivalent and that kind of detailed information and provide it to the US government. And that is seen as a fundamental violation of independence from government, essentially collecting data like an intelligence agency. And what happens to it once it goes into USAID's database, it's checked against intelligence databases and then, so that feeds and undermines the relationship that U.S. NGOs have. An example of the impact of the law: In Sri Lanka, after the tsunami, the area controlled by the Tamil Tigers was one of the hardest hit, but aid from the U.S. government and the Tamil government avoided that area, focused on other parts of the country, because it was illegal to deal with the Tigers. So then considerations other than need were controlling the decisions to the detriment of the people who needed the aid.

So, the conclusion in our report is we ask that the U.S. reassess the economic sanctions regime and the material support prohibition and look at it through that international humanitarian law lens. We're not advocating for kind of strict legal enforcement. We think this is good policy, but it is also something that reflects our values as a country, and that we should do without having to be forced to, and that the government should work with civil society in the US to develop the kind of comprehensive approaches that can accommodate both security and humanitarian needs. So I hope you get – there's copies of the executive summary on the table in the back. The report is also available on our website. So, thank you very much.

[applause]

Moderator (JM): Thank you, Kay. Our next panelist is Denise Fernell, from the International Rescue Committee.

Denise Fernell (DF): Thanks Joanne. Thanks Kay. I'll follow Kay's lead, 'cause it's actually slightly more comfortable being up here than trying to talk from a table. For some reason we're trained that way.

I get to be the slightly different view, given I come from an operational humanitarian organization. Additionally, I am the senior security person in our organization and have

oversight of all their footprints, whether they're international, domestic, or headquarters offices, or internal policy regarding safety and security of staff, assets and beneficiaries. I come from the field. I come from thirteen years fieldwork, predominately in al-Qaeda affected countries of Afghanistan, Pakistan, worked Chechnya, Chad, Sudan – I didn't actually get boots on the ground in Iraq, but I did an awful lot of planning for it. Done an awful lot of planning for Mali, done an awful lot of planning for racing a mission into Nigeria. And we are currently running four, in four adjoining countries to Syria, we're running programs currently, and you better believe my eyes are a little close on Syria, because what's going on on the inside is going to serious continue to affect the refugee numbers, exponentially up, unfortunately.

So, let me tell you some stories about what it's like for a humanitarian organization, U.S.-centric as we are, and counterterrorism laws and sanctions. It's a bit of a challenge. It's not an impossible one, but it's a bit of a challenge. Some of the impacts, particularly when it comes to things like partner vetting systems, means we have to start running names of everything – suppliers, staff, everybody we partner or need to do business with – through an interesting database. Now, one of the interesting things about the introduction of new legislation that impacts on humanitarian aid that I find, and this could be a little controversial in some cases, but everybody adapts. Not just us, the humanitarians, but, also, those who are being targeted on the ground. They also adapt. So, sometimes you're sort of like, "I'm sure this is going to come up clean," and it usually does and you get, "Ah, I don't think I want think about it anymore," 'cause you're never too sure. We, however, are fairly certain when we ran a whole lot of the first, when the first vetting came in, we ran it through, all of our suppliers at the time, through the base, we had one that came up not a complete black band, flashing red, warning bell alarm system, but just like, "Humm." We actually severed the contract with that supplier. It does, additionally, impact us when we set up in Mogadishu, in Somalia, where we're trying to rent houses and rent office spaces, "Who owns the house?" That's complicated at the best of times; aggravated when you're trying to work out who's who in the zoo. I'm sorry – I'm an Australian, so if my accent gets a bit tough... And I also use different English to everybody else, but it makes it kind of easier for me.

One of the challenges around negotiating access for programming purposes, one of the ways we use a best practice solution, in actual fact, is we reach out into the community leadership itself and negotiate with the community regarding the program. We talk about it; it's all open and transparent. And we also form a MOU with the community leadership to ensure the safety and security of our program staff and assets, so it becomes beholden on the community to ensure the safety and access, and transit access as well. So in certain parts of Afghanistan, eastern Afghanistan, particularly, that bump up against Waziristan – just to give a bit of an idea of the map – the leadership will, occasionally we will have one of the senior community members in our vehicle, effectively escorting us through an area. And that might seem a little strange, however it's completely consistent with the Pashtunwali code, and the whole concept of, "These people are my guests and therefore are under my protection, and therefore, you – bad person – cannot, without retaliation, attack." Okay? So it is deliberately using an existing community structure.

It's completely consistent. The community leaders are not, not problem children, for want of a word. They come up through the list quite nicely, so it's all right.

Program design. I mean the implication of program design, security, counterterrorism laws, sanctions, all of the peculiar restrictions, security informs programming design and program design informs security. If we, as we do in IRC, when we're talking about areas that are, you know, affected – the Malians, Somalis, Afghanis Pakistanis, Iraqis, – and we've got programming in sensitive or challenging areas, program design and security start working at minute one. The program needs to reflect the context on the ground; the context on the ground is going to inform various implementation strategies, and when you get that synergy working, believe you me, those programs are durable, they run, they deliver well and you end up with the community honestly becoming your advocate. And once the community members or beneficiaries start becoming your advocate, then you actually don't have half the problems on the ground that other people do. We remain remarkably mindful, even at a headquarters level, about profile, about acceptance, whether we're branding, how do we describe ourselves, how do we explain mission and mandate – that's an everyday discussion from the president of the organization down to the guard and the cleaner. Literally, everybody in the organization's an advocate, so is every beneficiary, so is everybody we touch. That's one of the ways we can get through some of those slightly more structured things.

One of the other interesting things in some listed and designated groups, if you want to pick on, say, the Taliban, and also, on Al-Shabaab. Both of those groups, if you think in terms of the Taliban, version one – I refer to the Taliban in various versions. We're up to about version four and a half at the moment, 'cause they insist on evolving. So the version one Taliban did not unilaterally throw out humanitarian organizations. More commonly, so long as you were culturally acceptable, they would tell you, "It's your job to look after the people. We've got a war to fight." So some terror organizations actually really do understand humanitarianism. They understand looking after people. Very common in an Islamic environment, given it's part of the belief system anyway. Al-Shabaab, the good old Al-Shabaab of Somalia, interestingly enough, not only did they send in, in the big Al-Shabaab surge, not only did they send in a media group, deliberately, to manage the Al-Shabaab media machine, they also sent in Al-Shabaab humanitarians. They ran one of the refugee camps north of Mogadishu reasonably effectively, actually. So, the humanitarian message and the diversity of what groups can and will potentially deliver aid, and one of the challenges is, if a U.S. organization can't do it, believe you me, somebody else is going to do it. And that we are seeing more and more in the sort of the new areas of access, whether it's northern Mali, Somalia and Syria, even now, you're finding more and more community-based organizations or Islamic organizations, humanitarian division of Al-Shabaab or humanitarian division of al-Qaeda or whichever version. Everybody has someone to help somebody. So, if it's not us, it can be somebody else who's doing it. Mogadishu we had something like forty different Islamic organizations in providing help and it was the most amazing, uncoordinated thing you've ever met. It confused the world out of all of us. But we need... There was too much to do. Everybody had something to do. So it was okay, in that sense.

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One of the challenges and things I just want to raise to think about, and the complexities of counterterrorism laws and what that does and doesn't mean, have a look at Syria in the last forty-eight hours. December, the 11th, the U.S. Government designates one of the Islamic rebel groups that is fighting alongside the Free Syrian Army as a terror-listed organization, as well as a couple of members of government, so it's just not unique to a group, but a couple of people. The next day, America, nicely, recognizes the opposition coalition of which the Free Syrian Army is part thereof. So, hang on a second. Now, you've got a designated terrorist group fighting alongside in the group you've just said is the valid opposition and representation of the people. Now how are you going to function? How do you know who's who? It's the same challenge that we would say in the PRT days of Afghanistan of saying, "Okay, the PRT is a civilian military," – for want of a term. How does an average Afghan recognize the difference between a combat soldier and a helpful soldier? They both carry guns. So, in the Free Syrian Army, how do you tell the difference between the person with the gun who belongs to the designated group versus the person with the gun who belongs to the other Islamic rebel group who is not yet designated? And then how do you actually work out – to add the additional support that's going to be happening in Turkey to train, additional training for the Free Syrian Army – how do you work all that out? And how complex is that going to become? For the record, IRC does not work inside Syria. Okay? Just before you ask me the question. The reason I look at Syria, as we said, what happens inside Syria affects our programs in four adjoining countries. That's pretty much the bottom line. It's possible, it's complex, it's difficult. Everybody adapts and overcomes, but it would be a lot smoother if we didn't have the challenges – that's for certain. Thank you.

Moderator (JM): Thanks, Denise. Our next speaker is Shalini Nataraj from the Global Fund for Women.

Shalini Nataraj (SN): Good afternoon. I'll start by giving a little bit about, you know, who the Global Fund for Women is and what we do. So we are the largest fund that is focused solely on supporting women's rights organizations around the world. So, so there is a distinction here. I didn't say we were the largest funder of women's rights organizations, but we are the largest entity that focuses solely on supporting women's organizations and initiatives around the world. So how we do that is organizations that are women-led, women-focused, from anywhere in the world, can apply to us and we, after a vetting process and conducting due diligence, then make grants to support their work, and this work can be on a range of issues, as identified by the women themselves. It could be education, or health care, or human rights advocacy, legal reform, domestic violence interventions. So we do not set out what our priorities are and make the organizations, you know, fit those priorities. So, as you can see – and we are global. We operate in five regions of the world and in our twenty-five year history, we've worked with organizations in a hundred and seventy-two countries. So right there you can see that we are operating in a lot of countries that are considered high-risk by the United States Government – countries such as, you know, the Mindanao region in the

Philippines, or Afghanistan, or northeast Sri Lanka, Palestine, Libya, so, you know – not Syria, because Syria is a sanctions country. So, so these counterterrorism measures have, you know, impacted the way we work.

So just to give you a sense, you know, Kay mentioned that a lot of the language of the new laws are very imprecise, and then as a way of trying to make it, trying to be helpful to charitable organizations such as the Global Fund for Women, the U.S. Treasury Department then issued voluntary guidelines. Now, unfortunately, the language of those voluntary guidelines are no less imprecise or vague. And, so the sense you get is that the U.S. Government has created this net through which it can target an organization if it wants to, and have enough, you know, sort of things that will justify that within the law. So this makes it very difficult for those of us who have been supporting, for many decades now, legitimate community-based organizations on the ground. And where we differ from the kind of work that the IRC does is that we are actually working with local groups, local organizations who are embedded in communities. So if we are supporting a women's group in Jaffna, they are operating within the territory of the LTTE-controlled areas. They may be doing something that's very, you know, needed, especially for the women there, but then there are complications as to how you can work with that. And, again, as Denise said, we all adapt.

Now the Global Fund for Women, you know, we take the stance that we are innocent until proven guilty, which means that we are actually putting ourselves and our donors at risk in certain circumstances because of the imprecise nature of these laws. So, for example, the law doesn't make any concessions for good intent. If you say, "We followed the guidelines. We did what you said would be good practice and yet somehow, you know, this has happened," they don't give you any credit for that. You are still going to go to jail, have your assets frozen, have the leadership fined or thrown in jail or whatever.

So this has a very chilling effect on our donors as well. So following 9/11, we actually had many donors say that they were not comfortable supporting our work in the Middle East and North Africa, because in a region like Palestine, there are at least five organizations that are on the designated terrorist list. And the other issue is, an area like Palestine is very, very small. So someone's uncle **is** going to be a member of Hamas, someone's niece **is** going to be the secretary taking notes for the Popular Liberation Front for Palestine, so how do you make that distinction? And as one of our grantees said, "If my daughter gets married, and I invite my relatives, you can be sure in that crowd, there are many people who are on the designed terror list."

So this creates a situation where right now the Global Fund for Women is like, "We're going to do what we're going to do. We trust our grantees. We have built up these relationship of trust and we," you know, "we do what is required by law," which is things like the list checking. And, you know, when I, you know, towards the end, I'll give you an actual example of something that came up in the course of that list checking. But the language is so imprecise, so it can be, you know, a charity can be shut down for innocent

dealings with an individual who, in turn, has the most tenuous contact with an individual who has the most tenuous dealings with an organization on the designed terrorist list. So it's just, you know, a morass of risk, if you will. And big foundations, like the Ford Foundation, are now completely held hostage by their legal departments, because anything that they need to do, they have to get vetted by the lawyers, and lawyers, as you all well know, will always advise you to go in the path of least risk and, you know, least resistance. So this has had a chilling effect on what is needed at the ground level.

And from our point of view, a lot of the interventions that we support, and especially that are focused on the welfare of women and children, are actually, they can mitigate the climate that breeds terrorism. So if you have a situation, high poverty levels, conflict-ridden, and people are, you know, don't have access to basic health care, education or, you know, other things, then what are they going to do? And, as Denise said, someone's going to come into that vacuum, and very often, the someone is that, you know, the extremist organization who wants to win the hearts and minds of the people through distributing food and aid and medicine. So this is, in our view, actually increasing the vulnerability of community-based organizations whose work could be mitigating terrorism to actually increasing the prevalence of those factors.

And one of the surprising things is that the penalties are harsher for charities than for corporations who are caught supporting terrorism. So as we've said before, if a charity has some, through some, you know, sort of Byzantine way, been seen to have provided material support, you can face fifteen years in prison, excessive fines, frozen assets, shut-down, *et cetera*. But, meanwhile, some large corporations, for example, who were sourcing fruit from Columbia, were proved to have had dealings with the FARC and with other terrorist-designated organizations, but face no consequences. I mean they faced a fine that was just a tiny fraction of the profits that they were generating.

So, I just want to also, you know, say that the list checking has created, it is a diversion of resources. So we have, you know, very limited staff and now they have to, you know, divert time to doing all of this. We also, it damages trust-based relationships as has been mentioned before. Many organizations, especially in the Middle East and North Africa don't even want to take U.S. money anymore, because – as a matter of principle – because it comes with all these, they see, as hypocritical conditions.

And so I just want to end with, you know, a couple of examples. Last year, you know, our work in Burma, we had to, you know, we were putting different organizations through the list checking process and one organization, you know, a name popped up. Now, if any of you are familiar with Burma and the community there, they have names that are very, very common. Every third person will have the same name. So that's one issue. But the other issue was that we immediately wondered if it was indeed that person who was meant to be on the list, then how did that name get on the list? Now this is a human rights defender, with a women's rights organization, who has been strongly advocating against the Burmese regime. So what this allows is for repressive regimes such as the Burmese regime to give names to the U.S. Government and say, "So-and-so's

a terrorist.” Right? So now what did we do? We just did further due diligence and then we said, you know, “We are pretty comfortable that this person and this organization is not providing material support to the Burmese regime who is actually the terrorist in this whole scenario,” and so we went forward with the grant. But it took a lot of time, a lot of resources, held up the grant for at least, you know, a few months.

And, then, you know, there are other examples of our work in northeast Sri Lanka, in Palestine, as I mentioned before, where we have come down on the side of, “We trust our grantees. We have a long-term relationship with them, and we know that they’re not supporting terrorist activities.” So, I’ll just end with that.

[applause]

Moderator (JM): Thanks, Shalini. The final panelist is Naz Modirzadeh.

(Naz Modirzadeh) NM: We short people like podiums. [laughter] Thanks very much. I’m going to just say a few words – I mean you’ve just heard the most important aspect of this issue, which I think is the impact that it’s having on organizations that are doing this work. I wanted to just take my time to maybe pan out a little bit, and say a few words about research and activities going on in this area, and maybe picking up on a point that Denise made, say a bit more about the legal context of what’s been happening over the last seven days. We’ve had quite a bit of activity on this issue regarding northern Mali and Syria and I just wanted to give some concreteness to the legal issues there, because they can often seem, even for lawyers, so simultaneously bizarre and boring that it becomes very difficult to follow all of the various legal threats that affect exactly what Denise and Shalini have talked about.

So, I work for, I run a project called the Counterterrorism and Humanitarian Engagement Project at Harvard Law School, and for the last two and a half years, I’ve been doing research and policy work focusing on this intersection between counterterrorism laws and policies both in the U.S., but also global, U.N. counterterrorism regulations, as well as counterterrorism laws in other governments, donors and recipients, and the intersection of that with humanitarian action, so lifesaving, humanitarian assistance, impartial and independent, that has a space to operate in situations of armed conflict. And very specifically looking at, “What are the ways in which these two arenas seem to conflict or create tensions for humanitarian activity?”

So I just wanted to say a few words about where I think these issues tend to become a perfect storm, and where some of the strategies that Shalini has just described tend to become much more difficult to apply. We tend, when we talk about this issue, to use as the most difficult example – and we are in a moment right now, December 13th, 2012, where we have an alarming number of these examples in the real world – where an armed group in an armed conflict controls territory. So this is not always the case, right? You can have lots of armed groups that are fighting in a conflict and they are, they’re battling the government or they’re battling each other, but they don’t actually control territory.

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Criminalizing Humanitarianism? How Counterterrorism Measures Obstruct Humanitarian Action

So I would say for most of the conflict in Iraq, al-Qaeda and Iraq, and then al-Qaeda Mesopotamia and the various branches, were very much an armed actor in the conflict in Iraq, but they didn't control large sections of the country. So if you were a humanitarian actor, and you were going into Iraq to deliver services, you were generally dealing with actors that you're familiar with – either governments, the United States Government, various coalition members – and you were negotiating with those governments in order to be able to have safe passage or facilitation to deliver goods, or you were dealing with armed groups, break-out armed groups in Iraq that may have in a certain area or even in a certain village, they were the people you need to deal with in order to make sure that goods and services can be safely delivered to the population. And that's exactly the kind of activity that Kay referred to when she talked about how humanitarian law protects access.

Then we have this very unique situation where an armed group in an armed conflict actually controls the territory where the humanitarian actors wish to go. So the Tamil Tigers in Sri Lanka, for many years, controlled territory, the FARC in Columbia currently controls territory, Hamas controls territory in Gaza, and now in northern Mali, we have a coalition of actors seemingly led by the MOJWA, the Movement for Unity and Jihad in West Africa, and the Ansar Dine in northern Mali, along with a number of other groups, some of them whom seem to be self-identifying as secular. And in Syria, there are portions of the country that are clearly controlled by the, now, Syrian National Coalition made up of the Free Syrian Army and a whole host of other groups.

So in that context, international humanitarian law would say that while the government of the state on which the armed conflict is occurring is the primary actor that you have to deal with if you want access to their territory – right? So, if you want access to Sri Lanka, law says that first you have to deal with the Sri Lankan government. That makes sense, right? The law would never say that, “Well, it turns out this armed rebel coalition controls part of our territory, so we have nothing to do with it. Please go ahead and engage in diplomatic relations with them.” States would never agree to such a thing. But humanitarian law says for purposes of this very narrow thing, which is life-saving assistance, you, the humanitarian organization, have a “right of initiative” to the armed group that controls territory, because we recognize that civilian lives depend on your ability to get through that checkpoint, if you will, controlled by the armed group, you may approach them in order to facilitate humanitarian assistance. And for many, many years, this has been an understood part of humanitarian law. No state every really liked this idea. It was not something they enjoyed talking about publicly, because, of course, most states do not want to recognize that their territory is controlled by an armed group that is fighting against them. Right? That's a profound recognition of vulnerability for most states. A very good example of this is that Russia, for the years of the conflict in Chechnya, never recognized it as an internal armed conflict. The entire conflict, the position was that they were dealing with criminals, terrorist, gangs, but it wasn't an armed conflict. Now if you were a humanitarian on the ground, believe me, you were dealing with the Chechens, but Russia never wanted to acknowledge that that's what was going on. Right?

So this, I want to just contextualize it. This is a very pre-9/11 set of issues that we're dealing with. What happens when we have these counterterrorism laws and policies, these counterterrorism regulations look at the exact set of facts I just laid out and say, "That armed group is a terrorist organization and we're going to put them on a list of terrorist organizations, and because we want to end terrorism – something which disproportionately affects civilians, of course – we want to set in place a series of laws that make it a crime to give any benefit, good, money, to those terrorists." I think most of us can recognize that as a pretty reasonable thing for governments to do. And if you look at it from a government perspective, if those terrorists control territory, then you would be even more committed to the idea that you would want to block those terrorists from getting any goods, services, expertise, anything, right? Because if you look at it from a government perspective, the situation in northern Mali has been called, as of last week, it is "the number one safe haven for al-Qaeda." If that's what you believe from a security perspective, then you have a very, very serious security interest in ensuring that nothing gets to the group that is providing a safe haven for al-Qaeda. Okay.

So this is where these two worlds clash is when you have an armed conflict, you have civilians in need, you have an armed group that, as we said, under IHL, it's an armed group. It's not a value judgment. You have armed groups, you have states, they're fighting in a war. As a humanitarian actor, you simply need to know, "Who do I have to go to in order to negotiate the safe passage of assistance?" But, now, under the counterterrorism lens, you have a terrorist organization that must be prohibited from gaining access to goods, services, and, most certainly, must be prohibited from gaining access to taxpayer, humanitarian assistance funding. Again, from a government perspective, what could be more horrifying if you are – let's take it out of the U.S. context, because that's loaded. Let's say you're Sweden. Sweden provides a tremendous amount of humanitarian assistance funding all over the world, and your taxpayers, your good Swedish citizens, have been providing a solid percentage of their taxpayer money for this foreign assistance. Sweden, I believe, last year – I don't know about this year – had one of the highest percentages of their GDP dedicated to foreign assistance. And a picture comes on the front page of the *International Herald Tribune*, five top Swedish newspapers – which I would never make the mistake of attempting to pronounce – and a number of other CNN, Al Jazeera, take your pick, a picture of a number al-Qaeda militants holding up a blanket sack that says, "Given from the Swedish people." As a domestic political actor, that's a very, very terrifying scenario, right? You don't want to have to answer for that the next day in Parliament that, "Why was our taxpayer money going to al-Qaeda in another country?" And, so, this is where a lot of the counterterrorism laws and prohibitions that we might understand if we looked at them from a purely security perspective, then began to have a very, very serious effect, the kind that you've heard already today from our esteemed panelists, and that it becomes very difficult to try to figure your way out of the layers of law that you're dealing with if you're on the ground.

So let me just take – I don't have a clock, so you can just yell at me if I start to go over. Let me just take a minute to use Syria as an example. And I'm going to ignore, for the time being, that Syria had a set of sanctions already on it – very, very strict sanctions that were placed on the Syrian government. So let's not – let's ignore that part of the picture. You have a, of course, a very intense armed conflict going on in Syria right now. The latest estimates are that upwards of forty thousand people have been killed in the Syrian conflict, most of them thought to be civilians. The government has imposed very recently an Internet blackout, meaning that it is very difficult to get information out of Syria. And due to the incredible dangers on the ground, there are very, very few journalists operating from within Syria. Under IHL, you have a clearly organized armed group that is fighting against a government that is using its military to fight against the rebels. It seems like a very clear non-international armed conflict. And IHL recognizes that humanitarian actors in this context would need to deal with the Syrian government and with the armed groups. You have a coalition of rebels that, over the last month, have gained official recognition as the representatives of Syria, from – and correct me if I make mistakes here, but – France, the EU, the UK, Qatar and, as of yesterday, the United States of America. The coalition has been asked to lay out a plan for the way that it will administer the territory that it controls and deal with the international community. And, interesting, one of the first things that was reported that they did in order to impress the Americans that they were a good coalition, a reliable one, a representative one, was to come up with a plan for humanitarian assistance. How would they move hundreds of millions of dollars of humanitarian aid into territories that they control?

So, you're a humanitarian actor – there are very few of them in Syria, but – you're a humanitarian actor in Syria and you will soon be deluged with funding to deal with this coalition that has been officially recognized by your donors, to go into Syria and provide humanitarian assistance to civilians that are suffering incredibly on a day-to-day basis. And forty-eight hours ago, as Denise told us, the United States listed the Jabhat al-Nusra or the Nusra Front as a branch or an alias of al-Qaeda in Iraq. In doing so, it not only lists that branch within the United States, but it also creates an expectation that other governments, and most likely the United Nations Sanctions Committee, will need to think about whether or not they, too, consider the Nusra Front to be a branch of al-Qaeda in Iraq – al-Qaeda is listed by virtually every country in the world, and the U.N. So, now, you're in Syria, you're in a high-risk environment as it is. You're keeping someone like Denise up late every night, because she has to deal with all the security issues that are raised. You have a lot of money to spend because the donors want to show that they support humanitarian activity in Syria. You're dealing with a coalition that has been officially recognized by your donors as the representatives of Syria. This isn't Al-Shabaab, these are rebels that have been recognized by the world, and as you're sitting in those meetings, or as you're requesting access, you have to think, “Which one of these is the Nusra Front? Where's al-Qaeda? Am I in a meeting with al-Qaeda right now? Did I just make an agreement to channel twenty million dollars of food aid to al-Qaeda? Is al-Qaeda the one that's running the checkpoints that I'm sending my drivers to go through? Does al-Qaeda own the warehouse where I'm paying fees to keep my perishable foodstuffs?” If those are difficult questions for the CIA to answer, they are surely

difficult questions for most humanitarian organizations with very little experience in intelligence gathering and security to try to figure out in the midst of trying to carry out their responsibilities in as complex of an environment as Syria.

I won't go into northern Mali, but, suffice it to say that there has been a very similar set of moves recently with northern Mali, with one of the groups being listed, the MOJWA has been now listed by the United States and the United Nations, and, similarly, for the several organizations that are active right now in northern Mali, they have to be asking themselves, "What does it mean? What are our responsibilities?" and, "What risks are we willing to take with staff and with our own organization in order to deliver much needed assistance?" Thanks.

Moderator (JM): Naz, thanks for laying out the issues so clearly and compellingly. We're going to open it up for questions, but I'd actually like to start by asking just a couple of my own. We have a student in the audience from Mali, so I'd like to ask the panelists and, perhaps, Denise and Shalini, especially, if your organizations work in Mali, to talk about what you see coming up in Mali, you know, what the current situation, what are the predicaments that you guys are facing in terms of getting services or funds to people in Mali? And, then, also, you guys did a very good job of laying out all the difficulties and, you know, the limitations that you face in working in these conflict areas. Can you talk a little bit about potential remedies? I know there's been thought of draft legislation to change the law to make it more accommodating to humanitarian action.

Moderator (JM): Whoever wants to jump in?

DF: Yeah, I got nominated. Fantastic question. Thank you. Sorry if it takes me thirty seconds to remember the file on Mali. It's a very similar challenge to the Syria in some regards. When we first went into Mali, obviously when the fighting erupted and the whole uprising in the north occurred, and we did some predictions around the way we thought the line of control, that change controlling that point was going to be, and declared that the river was roughly about where it would be, predicted by, you know, language, culture, history. Most of the people who'd want to fight usually do what they know, as opposed to what they're still learning, so you usually try to stay with what you know and who you can actually talk to, and there's, in Mali, particularly, there's a big linguistic change once you pass the river. So we sort of made that call fairly quickly and then did some assessments and made some predictions about where we could possibly work in the north. And we were, there were many heated discussions around, "Do we work at the left?" – you look at the map, in the north – "Above the river to the left or above the river to the right?" ended up being the sort of discussion we ended up in. The very sensible decision that we would not only program in the affected north, but we would also program in the affected south, 'cause nothing in the north happens independent of the south. There are displaced people, there are still challenges and problems in the south, so we deliberately, organizationally, choose to deliver in both zones.

It is going to get awfully a lot more complex. The question is, for us, that we're grappling with – and I'm going to admit that right now, today, the dynamics in northern Mali and which way it's going to go is running kind of second to Syria, sorry. But I've got five hundred thousand refugees bolting out of Syria and the number's probably going to double. At the moment it's a bit tricky. We continue to work through implementing partners where we can, people who come from the community, who are acceptable to the community, and that strategy is expected to continue, even with the changes that are occurring, apart from having to have the discussion, "Is this person, who do they really belong to?" We have less of that occurring to us in the right hand side of the, above the river and to the right, than you would if you were above the river and to the left. If were above the river and to the left, I would be having very, very nasty conversations saying, "Slow up. Stop. We need to think about what this is all going to mean," because if I can't tell who is who, we can't, in good faith, continue, despite how gut wrenchingly difficult that is – and our program staff are employed because they are mentally and DNA-programmed to solve problems, deliver and think outside the box, despite the fact that they want to help everybody, we would have to put brakes on them. The reasoning for that, simply, organizationally, is we're a four hundred million dollar organization. We have fifteen thousand staff. We're in twenty-nine countries. We have twenty-two offices in the states. We make a big mistake in one zone, we shut down a very big organization. So, I'm constantly using a triage theory of, "How do we do the most good to the most number of people?" and that's our staff, our beneficiaries and regional and geopolitics as well. That's as best as I can give you.

Moderator (JM): Can you just mention the human stakes in northern Mali? I don't know if everyone in the audience is familiar with... I mean what are, what is your sense of the crisis there in terms of human need?

DF: Oh, human need aggravated by drought, lack of resources anyway. One of the reasons, the rationales behind working above the river and to the right for us was when we did the needs assessment, it was actually the physical, geographic area that had the most need regardless of the fight. So you're talking about, you know, water shortages, food, the drought impact, blah, blah, blah, blah, blah. The longer the conflict continues, all of those commodities are reducing, everything is, I mean everything's just getting knocked out the longer this goes on.

I will draw an example from Syria. You know, the Syrian government has actively been destroying infrastructure inside Syria. You had five thousand health workers in Aleppo and you've got about twenty now, or some number. It's horrifying. You've got a natural escalation of desperation in Mali much more than you do in the excessive combat zone of Syria. So Mali's not going to be comfortable. Northern Mali was never very comfortable in the first place. It is not going to get any more comfortable in at least – if you want to put me a timeline on that one, we've got five years at least in there, at least, if not longer. Because even if you get over the fight, then you've still got rebuilding and

you've still gotta stand everything back up, you've still gotta get people back and, at the same time, make sure that other groups with alternate interests don't move in.

When northern Mali first started, just for the, from my understanding, northern Mali was always going to become a natural collection point for al-Qaeda fighters from other theatres because currently it's one of the only areas in northern Africa that is not under the drone surveillance campaign of the U.S. It's a black hole to aerial surveillance. It's a natural collection point. Sorry, I do a strange job. I look at this stuff, 'cause I have to work out where the al-Qaedas are going. It's like, "Where are they going to go? If I was al-Qaeda, where would I go? Where there are no drones. Ah, that's a good idea." All right.

Moderator (JM): Ah, and then reform efforts? Or, you know, reform initiatives?

KG: I'll address that, since that's one of our primary goals at the Charity and Security Network. What was something of a game changer in the conversation about the need for reform was the impact of the famine in Somalia over the last few years. Before that, officials in Congress and even in the new Obama Administration, very little interest in doing something about the material support prohibition because they were afraid if you had any kind of exception or exemption, bad actors will take advantage of it. But then we saw that the application of the law in Somalia was contributing to the drought and contributing to the consequences of – the number of deaths there. So there were hearings in Congress and members on both sides of the aisle expressing a lot of frustration with the Department of Treasury's licensing process and its failure to make it possible for NGOs to operate in Somalia. In the House, in the Africa Subcommittee of the Foreign Affairs Committee, Representative Chris Smith, Republican of New Jersey, held a hearing in September 2011, at the end of which he said that he wanted to introduce legislation to correct the situation. That hasn't happened, yet, but he is working with the civil society, community and international NGOs, in particular, to craft something that would, essentially, target aid to civilians and make a narrow exemption for dealings with terrorist organizations that were incidental and necessary to get access to civilians. So the concept is that you would not choose Al-Shabaab to be your local NGO partner in implementing a program on the ground, but if you have to pay them some kind of a permit fee to get access to those civilians, or if you have to meet with them to do that and have some kind of transaction that would be a violation of law. The other concept is on speech aimed at reducing violence that is currently criminalized under the material support law, it would legalize that kind of peace-building activity. So, right now, it's a matter, I think, of getting enough, sufficient bipartisan support for a bill before it's filed, so that it doesn't become a sitting duck for people who are willing to sacrifice humanitarian principles for security. So that's where things are on that front.

In the meantime, there are incremental steps the Administration can take. For example, as I mentioned, under the economic sanctions law, the President can cancel the humanitarian exemption that would cover food, water, medicine and other essential items. And that has been done in every executive order. The executive order that listed Al-

Shabaab is coming up for annual renewal in April 2013, and we are talking with offices of members in the Senate who are concerned about the situation in Somalia about approaching the Administration and say, "Let's not rubber-stamp the renewal this time. Let's look at why cancelling food aid or making it very difficult to get food aid into Somalia would be a threat to national security, and would it, in fact, be a threat? Let's have a conversation about that." So we're hoping that by addressing these executive order renewals and the various sanctions regimes we have an opportunity to raise these issues and build more of a public record and get a conversation going about what specifically can be done to address it.

Moderator (JM): Okay. Well, that was a lot of really interesting, um, material. I'm sure there's questions. Please use the microphone, because it's being audio and video-recorded and we'd like to get your question. Don't all rush up at once!

Audience 1: Do I have to use that or I can just...

Moderator (JM): Yeah, if you could use it, that would be great.

Audience 1: All right, so – ha, kind of loud – [laughter]. So, basically, I just wanted to know if you guys touched on – I got here late so... I just wanted to know if you guys talked about, basically, who designates who's a terrorist and who's not a terrorist group. I know that the United States is the one who usually, you know, like basically says, "Oh, this group's a terrorist group and this group is not."

And, on top of that, I wanted to just, I guess, clarify something on the concept of, when it comes to Palestine, you know, the case of Palestine, it's a little different from, you know, what's happening in Somalia and Sri Lanka in the case, in the fact that we're talking about an occupation and we're talking about an apartheid state and basically Israel establishing an apartheid state in Palestine and keeping an illegal occupation in, you know, the Gaza Strip and the West Bank. So when we talk about Hamas, both the United States and, obviously, Israel, calls it a terrorist group. You know, under international law, Hamas is actually – well, if you look at Hamas, it's a political party. There are factions of Hamas which are the armed resistance, which under international law, they have the right to, when they're being occupied by, illegally being occupied, they have the right to, you know, resist themselves. So, basically... Yeah, so... Yeah, so, basically, I guess, that was my...

Moderator (JM): Yeah. Talk about, a little bit about the listing process and...

NM: So the listing process is complex and there are multiple ways that you can be listed at this point. So one of the things that the U.N. Security Council Resolution 1373 requires is that every country in the world create domestic counterterrorism law, and encourages them to have a domestic listing mechanism. So you're going to see these things where they don't exist popping up everywhere. But I'll just use the U.S. and the U.N. as examples, as opposed to cataloguing every single country's listing mechanism.

In the United States, multiple government agencies can activate listings, so the Secretary of State can list an organization as a foreign terrorist organization or can designate individuals and groups under this executive order as “specially designated global terrorists,” or, “specially designated nationals,” and, thirdly, through the Immigration Nationality Act, can designate “foreign terrorist organizations.” All of those designations have slight variations in their impact. The most important one is that Department of Treasury, by basically agreeing with the State Department’s listing, can activate, immediately, the blocking and freezing of assets and all the other things that flow from that in the U.S. and through U.S. banking mechanisms. And then it also activates this material support statute, so criminal sanctions for providing support are turned on and off based on whether or not you are listed. So the Iranian organization, the Mujahideen-e-Khalq was recently delisted after many, many years on the U.S. list. That means that in that, on that day when it came off the list, material support was criminal up until the day it was listed and no longer criminal the day after.

For the U.N., the 1267 list is a Al-Qaeda list, at this point. Mostly it was Al-Qaeda and Taliban, previously. All countries can present names that they suggest should be on the list. There’s a committee that deals with both the approval of listing as well as the delisting of names, if they are challenged. And – can I very quickly say something about the Palestine issue?

Moderator (JM): Sure

NM: I just wanted to say, without getting the whole question of occupation and everything else, your point is exactly why this issue is so tricky. It’s because when you say, “But Palestine is different because international humanitarian law applies because it’s an occupation,” that’s exactly why the lens of counterterrorism, is almost on a parallel track, right? It’s a different conversation, because counterterrorism doesn’t care about that. Counterterrorism just said, “ Hamas is, for these reasons, a listed organization. It’s a terrorist group,” and once we say that, this whole other body of law and policy comes to bear on that group.

Moderator (JM): And just to clarify one thing. Do these listed groups under either the U.S. or the U.N. list, do they get notice of their listing and do they have the ability to contest and to provide evidence to show that they shouldn’t be listed? Is there a process in that sense?

NM: I don’t know that anyone, even on the security side, would say that it’s fair. There is a process. In the U.N., there is now an ombudsperson to who one can go and say, “I’ve been listed. I think it’s unfair. These are the reasons,” and they now need to deliberate on that, and I believe sixteen people have been delisted since the ombudsperson has gotten involved. But you have to first know you’re listed, which usually happens once you’re dinged. So you’ll go to your bank and all of a sudden the flags are raised – that may be the first time you know that you’ve been listed. And then you have to know that

an ombudsperson exists and you have to be able to contact her, not all of which are easy for everyone in these circumstances.

At the E.U. level – or not the E.U... For European states there's been a very recent European Court of Human Rights' decision that raises some very serious questions about due process and human rights for asking to be taken off the list. It remains to be seen what Europe does with that.

In the U.S., you can file suit or seek to challenge your listing. I think up until now it's been quite clear that, the government seems to have preferred recently that upon challenge, if they determine that the person really shouldn't have been on the list, they would rather remove them than to go through the full litigation of defending the listing, but Kay may know a lot more about the details of U.S. delisting.

KG: In the U.S., under the Treasury sanctions of listing, there is a regulation that basically says if you are put on the list, the notice that's given with the reasons is generally a press release that they will put out. It's not very specific. If you want them to reconsider their own action, you can write them a letter and ask, and they will answer you by a letter, but there is no timeframe or deadline for when they have to do that. There's also no process for you to get enough specific information about the charges against you so that you know what to answer when you write that letter and ask for reconsideration. So you kind of have to, the organizations that have been through this said they have to guess of what they think the government is concerned with. And, in addition, when classified information is used, there is no way you can find out what that information is or have any way to respond to it.

In the case of *Al-Haramain of Oregon* and *KindHearts*, a charity that was based on Ohio, they were put on the U.S. list and, in both cases, U.S. Federal Courts have held that there was inadequate notice of the reasons and that the government has to provide the reasons you're put on the list, there has to be some process to confront that evidence, and that your assets can't be frozen unless there's probable cause found that there's a need to do that. So, since these court decisions have ended, there's been no further shutdown of a U.S. charity in the Obama Administration, so we haven't seen what Treasury would do going forward. We did write to Treasury and say, "We think you need to rewrite your regulations to comply with these two court cases," and they basically took about five months to write back and say, "No, we think we're okay as we are." So, that's where we are in the U.S.

I wanted to address the Palestine question, too. That's an example to think of how counterterrorism law fails to distinguish civilians from combatants. So is everyone in Gaza considered a member of Hamas, because Hamas won the election? And there tends to be an approach that assumes that, and you have to almost prove you're not a terrorist, which is, under international humanitarian law – I pulled this out because I wanted... Additional Protocol II, Article 14, has a prohibition on use of starvation as a method of combat, refusing to grant consent for aid under circumstances that could amount to

extermination or intentional infliction of conditions of life, the deprivation of access to food and medicine, calculated to bring about destruction of part of a population. That's what IHL says about blocking access to whole populations. So we have a different approach under IHL whereas in counterterrorism law it fails to make that distinction. Sometimes people will make it and sometimes they won't. But I did have one person at the Treasury Department say to me, "We understand how hard it is to operate in a place like Gaza, because a million people voted for Hamas, and how do you know who they are?" Does that mean if you voted for Hamas, you can't get aid if you're starving? That would be a fundamental violation of IHL, which that would be a form of discrimination that would not be permissible.

Moderator (JM): More questions? Yes.

Audience 2: Hello. Good afternoon. My name is Mariam and I'm from Mali. So how – several questions, but I'm going to just ask a few of them. My first question is you, have you said several times that Qatar is financing like directly the terrorist group in northern Mali, so they use humanitarian aid as an excuse to infiltrate weapons and give it to the rebels group. So I want to know how international community can prevent those kind of transactions, or even control or stop those kind of transactions, 'cause I know Malian government do not have the power to control those transactions.

And my other question is that Algeria is a key player in our conflict, and I know Touareg, rebel Touaregs, are present in Algeria, Mauritania, Niger and Burkina Faso, so I want to know how those countries, if they have interests in our conflict or if they do not have it, how you're going to cooperate with those countries.

And I, my other question is like how humanitarian work are going to operate inside of northern Mali, because I know the government is undemocratic. They don't want any involvement of the Western power or of Westerners inside of northern Mali. They want to implement Sharia. So I want to know how they're going to operate, if they are going to operate to provide aid, and if it's going to be a border, like they're going to have to stay in the border, or they're going to have to stay where the army – I know, I, I don't think so there are Malian military again in northern Mali, but I don't know, I want to know how they claim to operate, because right now in northern, women can not go outside alone, children, they destroy school, they destroy institutions, They just destroy all of them, so I want to know how they plan to operate if they are going to operate. Thank you.

Moderator (JM): Okay, thanks. Three good questions. Who wants to take a stab at any one of them?

NM: I'll just say a word about – and chime in here on the groups – but just your two last questions, I think you're absolutely right that the regional context is, perhaps, the most important factor here. And it seems like, as Ansar al-Din was sort of going around on this tour of PR, it almost seems like, that they were talking to everyone and it seemed like they were trying to really say, "We're different from the other groups, and we will work

with the international community,” and I have no idea if that has anything to do with why the U.S. and the U.N. listed one group and not the other. But, I mean, it sounds to me like your question is in some ways, “What happens when foreign countries support an armed group that is fighting the government and that is committing pretty profound violations of human rights law on the ground?” as these groups – it’s been documented that they have. And there’s no easy answer to that. It becomes a question of whether or not those governments are seen as participating in the conflict in Mali, are they so much supporting the rebels that they actually are taking a role in the conflict? And I think the big question there will be what will happen with the military planning that seems to be going on both in the AU and ECOWAS and at the U.N. in terms of supporting a possible military intervention supporting the government against the actors in the north. If that happens, then what happens in terms of, say, those humanitarian actors that, as you said, and I think many people who’ve been in these environments would say, are often perceived as following the military into the territory. And if you’re a humanitarian actor that wishes to appear neutral, it can be a very difficult thing to figure out how to not seem like you’re coming in on the back of the military intervention.

And in terms of the perspective of the groups, I mean so far my sense has been that it’s not clear that the groups in northern Mali are as opposed to humanitarian action, as, for example, the very late stage Al-Shabaab was, where it was very clear that they were kicking groups out, they were killing humanitarian workers. They were clearly, had reached a level of frustration or whatever their reasoning, that that was happening. So far, my sense has been that in northern Mali, the groups appear to be willing to engage with humanitarian actors, but that, of course, could change very quickly if the international community is seen as going to war against them.

Moderator (JM): Denise or Shalini, do you want to add anything to the difficulties, on the difficulties of access to northern Mali or potential to do work there?

SN: Well, we, we don’t have grantees – you know, how we’re different is that we don’t provide relief. We don’t provide humanitarian aid in times of conflict or disasters. We work with the community-based organizations and we usually tell them that they can use our funding if they so want to provide aid to their communities. So, right now, we’re not working with any organizations in northern Mali.

I mean the other thing is that we fund organizations that are, you know, the women come together and organize a group, and in many contexts, they’re not able to do that, which then means we can’t then fund them. You know, so in cases like Afghanistan, many parts of Iraq or, you know, in northern Mali, the conditions aren’t right for women to self-organize and, you know, we are constrained by our own mandate. We can’t go in there and organize them. So, so I can’t speak to the issues of access, but I think Denise is...

[laughter]

SN: So, yeah. I mean in other countries, like Burma, for instance, you know, we had to work with groups who operate on the borders, because Burma was under U.S. sanctions, so we could not fund organizations inside. But even now, with the sanctions lifted, many of the border areas, which are comprised of ethnic groups, cannot, you cannot have access to them unless you work with groups who are able to cross the border. So, that's in another context, but you can speak to Mali. There you go.

DF: Sorry. I had to do some quick notes. It's about accessing that file in your head. Literally, what I'm going to explain to you is exactly the thinking that we will do and do around continuing humanitarian access for northern Mali in a very fluid and changing environment. I have already taken our teams back to, "Let's have a think about day one of how did that uprising start?" It came from the Touaregs. There was whole – as I understand – there was a whole issue around the Touaregs wanting their own nation and then the breakaway and reclaiming the Sahel as the traditional land zone, and then there was an addition, there's some additional Islamic supportive groups to come in and fight. And then we had, after that, it then escalated and you got the al-Qaeda component coming in. There was the tension there where everybody was headed towards the al-Qaeda piece, which is really common, when I say al-Qaeda slid in like a bit of spilled ink, it slowly spreads. Groups who were aligned typically with al-Qaeda, because they're suddenly grateful for the additional resources, different set of skills, a different injection of funding, and they, everybody's against it, but as soon as the al-Qaeda elements start then pushing to impose an al-Qaeda style Sharia law – in the northern Mali case, we saw a lot of pushback, of groups saying, "No, we don't want the Sharia law. We want this, our version." All right? So the Touaregs are still holding onto that identity and culture, realizing that a lot of the Touareg fighting skill is actually from some of the returnees who have come back from Libya. All right? There was a couple hundred who came back. Then you have a bit of a military coup, below the river. And then you get a, you know, a whole bit of a tussle and a fight about that. And thirty-six hours ago, the President got arrested and then he resigned as President, and we've just reelected a new President. It's kind of all it messy.

So, you've basically – in my mind, we've got two things running. For us to maintain humanitarian access for the long haul in the north, it is absolutely critical that we stay aware, aligned demonstrably with the culture of, the truth of the culture of the north. Okay? There's no point in my trying to bring in, of suggesting to our guys to bring in something that is inconsistent, not needed, not identified. What I've discovered in the world is most people who are actually in trouble and suffering, actually know what they need, and really don't need me to come in and say, "Oh, you need this?" because it's complete rubbish. 'Cause if somebody did that to me, I would tell 'em to go away. So, why would I do that to anybody else? That's the basis of acceptance and negotiation. Okay? So you're staying as culturally, true culturally consistent as you can be, you learn and you make sure your staff are the right people from the right area who have the good track record of being interlockers, they're not actually from the fighting family. They're not the merchant trader, they're... Because every tribal grouping, everyone's got a job, and there's the boss. There's a sort of tribal leader system that has an advisory system

naturally in place in most all cultures around that way, and it's a variation on a theme of, you know, State Department. Every tribe's got a State Department. Every tribe's got their own listing system. "Well, these ones can't come into our zone, and..." you know, anyway. That's what it's going to take to deliver humanitarian aid, from my organization's point of view.

The challenge is going to be with the reaction to what is going to be perceived as foreign intervention. Whatever, whoever sets that up, depending on how that's done and if that's a really nasty boots on the ground, let's go storm-troopering in and go chase al-Qaeda, for example, say, it's never been proven to be successful. Everyone keeps trying to do it and it always fails. Again, people do what they know; they don't necessarily do what they're learning.

Interestingly enough, the groups that we deal with northern Mali know very well where the money comes from. They know exactly what country it comes from, and there isn't a problem because it's addressing a need that everybody believes in. Even in places like the troubled areas of Pakistan, where you'd think U.S. money would be the, like untouchable for anything. It's not true. If the program fits the needs of the people, is delivered in a manner that is consistent and respectful of people, the cultures, we're all going to say, "Okay, we can handshake." It's when you misalign that and come in with a bravado or an attitude, that's it's going to get rejected. I mean we, we will do the same thing. So does everybody else. New groups, new humanitarian groups going in, if their approach is not what I would say of a handshake type, to work with, will have problems. Anybody classically going, doing the classic, humanitarian after the military, that's going to be a problem, because straight up, "Where's the trust? Where were you when we were struggling? Where were you when you when... Where were you?"

I mean forty years programming in Pakistan, we're kind of like more Pakistan in some ways. Twenty-eight years in Afghanistan and we've had some pretty tough stuff happen to us in Pakistan. Our staff, it's really cute. And my senior staff will tell the story with, almost with tears in his eyes, of saying, "When I walked back over the border into Afghanistan with our refugee clients," and he was a refugee himself, but he was our staff member and he walked back over that border. It's about the long haul. That's what it takes. That's the hard thing for donors, is long haul mon... what I call "long haul money." "Don't give me money for six months; give me money for six years." Yeah, give me a break. You've gotta build trust' you've gotta learn it. People have gotta understand, trust takes a lifetime to build and a second to destroy – no matter who you are.

Moderator (JM): Okay, we've gone a bit over, but we have time for one more question, if there is one. Okay.

Audience 3: I just have a question about the ease of access to the U.S. listings for organizations on the ground. So an organization in Afghanistan, how easy or difficult is it for them to access the list, how frequently is it updated, and how are they sure that they're complying with these U.S. laws? Coming from a perspective of a funder, who's

funding organizations on the ground and is just concerned about their ability follow the U.S. law. Thanks.

Moderator (JM): Who wants to...

KG: Let's make sure I understand the question correctly. How does a funder back here in the U.S. make sure a local partner is following the law or the requirements that go with the money?

Questioner 3: How... Where and how do you go to find out who is on the list... So if we make a grant to an organization and they're going to be one of the people who receive funds. And then we're asking them to run a check to make sure that they're not on the list so that our money isn't indirectly supporting someone who maybe on the list?

KG: I guess there's two levels of answer. One is the strictly legal, and the other is the practical real world. On the strictly legal there's no specific requirement that a sub-grantee check the list of every beneficiary. So far, U.S. law hasn't pushed it that far, because then the discrimination problems would just be very obvious and severe. What they generally ask is you check that local NGO or peace-building group, you check their board of directors, their key employees against the list. And you don't, if you're not using USAID money in Gaza or the West Bank, you don't report that to the U.S. and you make your own decision about what to do if you get a hit or what you think might be a hit. You can look into that.

But the, what often is happening both on the peace-building front and the humanitarian aid front is what Tufts University, who studied the earthquake in Pakistan, 2005, called "Don't Ask, Don't Tell," kind of regime where people are adapting as best they can, but may not be able to comply with the letter of the law, strictly. American officials in some of these countries see an extreme need and manage to just look the other way. So this allows some, something of an escape valve for groups to operate, but the problem is you never know when they might decide to turn around and take a look at what you're doing. And so the enforcement could be very politicized or discriminatory, and it also, there are several, many groups who don't want to assume the risks that something might be interpreted broadly. So, that's what I think would be the answer to that question.

Moderator (JM): Okay. Well, thank you all for the great questions and please join me in thanking our panelists for a really wonderful discussion.

[applause]

[end of recording]