

Safeguarding Humanitarianism in Armed Conflict:

A Call for Reconciling International
Legal Obligations and Counterterrorism
Measures in the United States

Introduction and Executive Summary

June 2012



Safeguarding Humanitarianism in Armed Conflict:

A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States

The unabridged version of this report is available free of charge, at www.charityandsecurity.org/SafeguardingHumanitarianism

The Charity & Security Network was launched in November 2008 by charities, grant makers, and faith-based and advocacy groups to address challenges to humanitarian, development, and peacebuilding activities posed by U.S. counterterrorism measures. Our work includes:

- Increasing public awareness and knowledge of this often overlooked problem;
- Promoting alternative regulatory and legal approaches that reflect the realities and needs of nonprofit programs and grant making; and
- Coordination and support for nonprofit stakeholders to take joint action for reform.

Acknowledgments: The report was supported in part by a grant from the Open Society Foundation, the Catholic Organization for Relief and Development (Cordaid), the Nathan Cummings Foundation, Moriah Fund, Muslim Legal Fund of America, Proteus Fund, and an Anonymous donor. We extend our thanks for your support.

The report was written by Kay Guinane, director of the Charity & Security Network, Karen Siciliano Lucas, an attorney consultant with the Charity & Security Network, and Elizabeth Holland, an associate attorney with Foley Hoag LLP. Editing was by Suraj K. Sazawal and Nathaniel J. Turner. The views expressed in this report are those of the authors, and are not attributable to their employers. This report is for educational purposes only. It conveys general information and a general understanding of the law. It does not constitute legal advice.

Editorial suggestions from Jonathan Benthall, Sharon Bradford Franklin, Dustin Lewis, Kate Mackintosh, Naz Modirzadeh, Gabor Rona, and Sue Smock were greatly appreciated. Any errors are solely those of the authors and not the reviewers.

Cover and report design by Nathaniel J. Turner. Cover photo by Colin Crowley/Save the Children. All photos used in this report were licensed under the Creative Commons at the time of publishing.

This report is available free of charge, at www.charityandsecurity.org/SafeguardingHumanitarianism.

The Charity & Security Network
110 Maryland Ave., NE, Suite 108
Washington, D.C. 20002
Tel. (202) 481 6926
info@charityandsecurity.org
Twitter: [@charitysecurity](https://twitter.com/charitysecurity)



Introduction

Enshrined in all major moral, religious, and legal codes, and not specific to any particular culture or tradition, the protection of civilians is a human, political, and legal imperative that recognizes the inherent dignity and worth of every human being.

-- Report of the UN Secretary-General on the Protection of Civilians in Armed Conflict, 2007

Counterterrorism measures enacted by the U.S. government both before and after the attacks on September 11, 2001, continue to have long-term negative consequences for U.S. charities and their donors and beneficiaries around the world. This is particularly true when laws are applied to humanitarian assistance activities in areas where terrorist groups are active or control territory.

These counterterrorism measures have been criticized as a matter of policy¹ and subjected to constitutional challenges, but significantly less attention has been paid to how they stack up against the international obligations of the U.S., particularly in the context of humanitarian activities during armed conflict. To introduce this issue, the Charity & Security Network (CSN) convened a panel discussion in July 2009 at which experts outlined the international legal framework governing humanitarian aid and the ways through which civilians in armed conflict are protected.²

CSN set out to learn more, reviewing sources such as multilateral treaties, customary international law, and United Nations resolutions, which represent a rich history and experience, striking a balance between security interests and humanitarian need. This report is the result of that inquiry. It examines where and how the international obligations of the U.S. conflict with domestic counterterrorism measures in the context of humanitarian action in armed conflict.

Part 1 shares basic information about U.S. counterterrorism measures, including the broad prohibition on material support of terrorism and the procedures used to put charities on terrorist lists and freeze their assets. **Part 2** describes the legal framework of international humanitarian law (IHL) that addresses relief operations during situations of armed conflict.³ IHL is the body of law seeks to limit the effects of armed conflict, and it protects those who are not or are no longer participating in the fighting. **Part 3** examines how U.S. counterterrorism laws, particularly the current provisions prohibiting material support to terrorism, contradict a number of key precepts of international law. This is because they apply blanket preemptory restrictions that ignore the carefully calibrated and context-specific balancing of security and humanitarianism that is inherent in international law.

¹ American Civil Liberties Union, *Blocking Faith, Freezing Charity: Chilling Muslim Charitable Giving in the War on Terrorism Financing*, (New York: American Civil Liberties Union, 2009), and Jude Howell and Jeremy Lind, eds., *Civil Society Under Strain: Counter-Terrorism Policy, Civil Society and Aid Post 9-11*, (Sterling VA: Kumarian Press, 2010), and Kay Guinane, Vanessa Dick and Amanda Adams, *Collateral Damage: How the War on Terror Hurts Charities, Foundations and the People They Serve* (Washington DC: OMB Watch and Grantmakers without Borders, 2008).

² Panel discussion, *The Dilemma for U.S. NGOs: Counterterrorism Laws vs. the Humanitarian Imperative*, (Charity and Security Network, Washington D.C., June 1, 2009), <http://www.charityandsecurity.org/csnevents>.

³ International humanitarian law is also referred to as the law of war and the law of armed conflict.

Our goal in this report is to stimulate a public discussion of how the U.S. can move from a reactive emergency mode, reflected by the USA PATRIOT Act (Patriot Act), to a set of long-term, forward looking, and sustainable rules for non-governmental organizations (NGOs) that are consistent with humanitarian principles and national values.

This report argues that the U.S. should take the necessary steps to reconcile U.S. counterterrorism measures with obligations under international law. In urging action that is in accord with international obligations, we do not focus on whether or not the U.S. can be legally compelled to do so in any particular instance. Instead, we argue that the U.S. should be guided by its moral obligations and long-held commitment to humanitarianism. We can, and must, work together to fashion workable rules for charities that are both consistent with security needs and in keeping with modalities of humanitarian action laid out in international law.

Our goal in this report is to stimulate a public discussion of how the U.S. can move from a reactive emergency mode, reflected by the USA PATRIOT Act (Patriot Act), to a set of long-term, forward-looking, and sustainable rules for non-governmental organizations (NGOs) that are consistent with humanitarian principles and national values. The timing for such a discussion is ripe. In November 2011 State Department Legal Advisor Harold Koh told the International Committee of the Red Cross and Red Crescent that, "I come here today to affirm the United States' deep and abiding commitment to international humanitarian law."⁴ The 2011 famine in Somalia created bipartisan concern in Congress over legal impediments to getting aid into the most severely affected areas, raising the profile of the issue.⁵

The humanitarian stakes are high, making the need to address the misalignment between U.S. counterterrorism laws and humanitarian action a pressing one. We urge readers in and out of government to take proactive steps to solve this problem.



Kay Guinane
Director, Charity & Security Network

⁴ Statement by Harold Hongju Koh, Legal Adviser, United States Department of State, to the 31st International Conference of the Red Cross and Red Crescent, November 28, 2011, <http://geneva.usmission.gov/2011/11/28/icrc-conference/>

⁵ Letter from Senator Patrick Leahy to Hillary Clinton, Secretary of State on August 2, 2011, <http://leahy.senate.gov/imo/media/doc/080311LeahyToHolderClinton-SomaliaAidRelief.pdf>. See also, Rep. Chris Smith "Assessing the Consequences of the Failed State of Somalia," (Joint Congressional hearing, Africa, Global Health and Human Rights Subcommittee and Terrorism, Non Proliferation and Trade Subcommittee, July 7, 2011), http://chrissmith.house.gov/UploadedFiles/2011_07_07_Somalia_hearing.pdf.

Executive Summary

Domestic counterterrorism measures enacted by the U.S. government over the past two decades pose serious challenges to humanitarian activities of nongovernmental actors operating in conflict zones around the world. The current balance struck between compelling counterterrorism concerns and urgently needed humanitarian assistance comes down heavily in favor of the former. This disequilibrium significantly impedes humanitarian operations, particularly in situations of armed conflict, where non-state armed groups are active.

The United States has a long history and commitment to addressing humanitarian need throughout the world. In urging greater respect for international provisions governing relief operations in armed conflict, we argue for concurrent efforts to ensure that U.S. counterterrorism measures reflect these international principles and American values. This report does not address technical enforcement of international legal obligations. Rather, it lays out an argument predicated on legal and moral grounds in favor of refining the current counterterrorism measures to bring them in line with international law and national ideals.

The report provides basic information about international humanitarian law (IHL) and demonstrates how the U.S.'s international obligations under this framework often conflict with domestic counterterrorism measures. This is particularly prevalent in the context of humanitarian operations in armed conflict. Non-governmental organizations are finding their work in armed conflict situations increasingly constrained as a result of these counterterrorism measures. IHL sets out the nature and scope of engagement with parties to a conflict, considered practically necessary to ensure safe and predictable access to the civilian population in need of assistance. Many types of acceptable, limited interaction are prohibited, however, by U.S. counterterrorism regulations, and ultimately it is the civilian population in need of assistance that pays the price. This report suggests a recalibrated approach to domestic counterterrorism regulations that acknowledges the importance of humanitarian assistance in armed conflict, and ensures that the necessary activities of truly impartial and humanitarian actors are not impeded.

Part 1: United States Counterterrorism Law and Policy Impacting Humanitarian Obligations

Designed to stop the flow of money and services to designated terrorist organizations (DTOs), U.S. criminal statutes, administrative regulations, and executive orders are so broad in their prohibition of any engagement with designated groups that they create barriers for legitimate humanitarian assistance to civilian beneficiaries. The U.S. counterterrorism framework does this in two ways. First, it prohibits humanitarian actors from engaging in a wide range of activities that involve listed terrorist organizations, regardless of the purpose or intent behind such engagement. Violating the U.S. material support statute (18 U.S.C. § 2339B) can result in criminal prosecution, extensive jail time, and significant fines. Second, it allows the government to decide to list U.S. charities as supporters of foreign terrorist organizations and thereby seize their assets, including donated funds. This can occur during the investigation period, which raises serious due process concerns.

The Broad Prohibition on Providing "Material Support" to Terrorists

The material support statute prohibits provision of funds, other tangible and intangible property, and services such as "expert advice and assistance" and "training." It has a very narrow humanitarian exception; only medicine and religious materials are permitted. This exemption does not include medical services, food, water, blankets, shelter, clothing, or other materials necessary to adequately respond to situations that endanger the lives of victims of armed conflict or natural disasters. The material support statute contains a very low intent standard. It requires only that an individual know a group is a DTO, or that the group in question has engaged or engages in terrorist activity or terrorism (as defined by the statute). Thus, any activity that falls within the broad definition of material support, even if there is no intent to support or further the aims of the designated group, may incur civil or criminal liability under the statute.

In places where DTOs control territory, are elected to government, or administer local institutions (e.g., schools or medical services), the material support prohibition makes aid distribution to vulnerable people nearly impossible. Basic logistics of aid delivery to civilians usually necessitate some minimal operational engagement with the group in control of territory. This can include interaction to obtain permits, pay road tolls, or share technical information. Additionally, members of a DTO may derive some incidental, indirect benefit as a result of assistance provided to civilians among, and with whom, they live. Despite efforts to limit this type of engagement, in situations where a DTO is a key actor, it may often be practically impossible for a humanitarian organization to operate without some type of cooperation of a technical or similar nature.

...any activity that falls within the broad definition of material support, even if there is no intent to support or further the aims of the designated group, may incur civil or criminal liability under the [material support] statute.

In *Holder v. Humanitarian Law Project*, the U.S. Supreme Court upheld the constitutionality of the material support statute's provision prohibiting the provision of "training," "expert advice or assistance," "service," or "personnel" to designated Foreign Terrorist Organizations. The Supreme Court said that although the statute's regulation of speech is restrictive, it would defer to the executive branch on matters concerning national security and foreign affairs. Although the case was about the activities of a peacebuilding organization, many activities of humanitarian organizations fall within the broadly defined "training," "expert advice or assistance," "service," or "personnel" provision, and thus would also be prohibited under the material support statute.

Powers Authorizing Listing (Designation) of Charities and Freezing Assets

Passed in 1977, the International Emergency Economic Powers Act (IEEPA) authorizes the president to declare a state of emergency relating to "any unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security,

foreign policy or economy of the United States.” People and organizations deemed to constitute such a threat are put on terrorist lists.

After Sept. 11, 2001, President George W. Bush signed Executive Order 13224, pursuant to his authority under IEEPA. The Executive Order declared a national emergency and authorized the Department of Treasury, in consultation with the Attorney General and the Secretary of State, to designate foreign *and domestic* individuals and organizations, including U.S. charities, as supporters of terrorism. In October 2001, the USA PATRIOT Act expanded IEEPA sanctions even further, allowing the government to freeze assets “during the pendency of an investigation” into whether a charity should be listed as a DTO.

Executive Order 13224 prohibits U.S. persons and charities from having any financial transaction with the listed organization or providing them with material support. While the Executive Order allows a variety of sanctions to be imposed, over the past decade, Treasury has invoked some of the harshest sanctions against charities. Nine U.S. charities have been shut down and had their assets frozen, and 40 foreign charities have also been listed as supporters of terrorism, according to the Department of Treasury's website.

Two federal district courts have found Treasury's process for listing and freezing assets to be unconstitutional as applied to two U.S. charities: KindHearts for Charitable and Humanitarian Development and the Al Haramain Foundation of Oregon. In each case, the court found that the charity was not given sufficient notice of the accusations against it or an adequate opportunity to defend itself. The Ninth Circuit Court of Appeals affirmed this decision in the case of *Al Haramain of Oregon v. Treasury* in September 2011. In May 2012, Treasury agreed to a settlement, ending the litigation by allowing KindHearts to pay its debts and distribute the remaining funds among a list of approved charities before it dissolves. At that point Treasury will remove KindHearts from its terrorist list and pay its attorney's fees. Neither side admitted to any wrongdoing.

Part 2: International Humanitarian Law Obligations of the United States

International humanitarian law (IHL) is a set of rules that applies during armed conflict (as well as occupation) that seeks to limit, for humanitarian reasons, the effect of hostilities by protecting persons who are not, or no longer, directly participating in hostilities. It also seeks to minimize unnecessary suffering of those involved in hostilities. IHL reflects centuries of practice and laws delineating legitimate and prohibited conduct during conflict. As Gabor Rona, international legal director of Human Rights First, stated, “[IHL] has existed ever since man first decided against a scorched earth policy or fighting to the death.”

The basic instruments of IHL are the four Geneva Conventions of 1949, and their Additional Protocols. The Geneva Conventions are almost universally ratified (including by the U.S.). IHL is a delicately conceived balance between military necessity and humanitarian need. Fundamental to IHL are the ideas that:

1. Parties to an armed conflict must distinguish between, on the one hand, civilians and civilian objects, and on the other, military objectives, and never directly target the former; and
2. Parties' choice of means and methods of warfare is not unlimited.

Based on IHL, and developed through practice, are three core principles of humanitarian action in armed conflict:

1. The "right of initiative" for impartial humanitarian organizations to offer their services to all parties to an armed conflict in order to address the needs of the civilian population;
2. Impartiality in aid delivered to civilians, predicated distribution of aid based solely on need; and
3. The adherence to the principles of humanity, impartiality, neutrality, and independence by humanitarian organizations.

The IHL framework is supplemented by the concept of the "humanitarian imperative." It is defined in the Humanitarian Charter as the "belief that all possible steps should be taken to prevent or alleviate human suffering arising out of conflict or calamity, and that civilians so affected have a right to protection and assistance." It is a principle that guides the policies and operations of international organizations engaged in humanitarian action.

This discussion focuses on an analysis of humanitarian operations undertaken during an armed conflict referencing the framework of IHL. It does not address human rights law, refugee law, or legal principles and instruments governing internal displacement. These frameworks contain some provisions on point but are applicable to range of conditions including, but stretching beyond, armed conflict. Similarly, this discussion draws a legal distinction between humanitarian operations and peacebuilding, development, and diplomatic efforts undertaken during armed conflict. IHL contains provisions regarding humanitarian access and assistance; it does not address activities—as critical as they are—such as peacebuilding and development work.

Non-international Armed Conflicts, Non-state Armed Groups and Designated Terrorist Organizations

The rules of IHL reflect a binary framework. There is one set of treaty-based rules (totaling nearly 600 articles) applicable to international armed conflict; there is a second set of such rules (totaling less than 30) applicable to non-international armed conflicts. It is in the context of non-international armed conflict that engagement with armed groups regarding the delivery of humanitarian assistance is of greatest concern. A conflict in which a non-state armed group (or groups) is a party is qualified as a non-international armed conflict. Many of the armed groups involved in contemporary non-international armed conflicts are also DTOs. Thus, for a humanitarian organization wanting to deliver humanitarian assistance to segments of the civilian population in proximity to, or under the control of, these groups, the measures contained in the U.S. counterterrorism framework effectively pose a bar. It is often necessary to have some type of limited interaction with parties that control the territory on which an actor would like to conduct humanitarian operations. For instance, giving someone a ride to the negotiations meeting, or providing someone with a telephone to ensure communications regarding convoys

would fall within the definition of a prohibited activity under U.S. counterterrorism measures. This sweeping proscription on almost all interaction, no matter how operationally necessary, is directly contrary to the pragmatism and right of initiative carved out by IHL.

The Right of Initiative and the Role of Civil Society Organizations

The Geneva Conventions recognize that humanitarian nongovernmental organizations (NGOs) may be critical to the protection of vulnerable populations. IHL fully supports the principle that, during armed conflict, civilian populations in need have a right to request humanitarian assistance, and that nations and non-state armed groups may not arbitrarily or capriciously refuse humanitarian NGOs' offers to provide such assistance. Article Three, common to the four Geneva Conventions (referred to as Common Article Three), codifies what the International Committee of the Red Cross (ICRC) has called humanitarian NGOs' "right of initiative." This right of initiative is understood to protect the right of a humanitarian organization to offer its services to a party to a conflict in an effort to address the needs of the civilian population.

IHL fully supports the principle that, during armed conflict, civilian populations in need have a right to request humanitarian assistance, and that nations and non-state armed groups may not arbitrarily or capriciously refuse humanitarian NGOs' offers to provide such assistance.

The right of initiative contained in Common Article Three has evolved to include the operational principles of neutrality and independence, for humanitarian and impartial organizations. If there is a need on the part of the civilian population in an armed conflict, such an organization may make an overture to the relevant authority to gain access. Of course, any organization may approach a state and request permission to gain access. Common Article Three provides for impartial humanitarian organization a legal entitlement to offer their services. Further, a state may not consider such an overture an unfriendly act, or, in other words, a prohibited attempt to interfere in the domestic affairs of the sovereign state. This authority may be a state or a non-state armed group; in some cases circumstances may require an NGO to gain permission from both. The commentary to the Geneva Conventions and Additional Protocols argues that state consent, stemming from the ordering principle in international relations of state sovereignty, should not be withheld for arbitrary or capricious reasons.

Humanitarian Access and Assistance to Civilians during Armed Conflict

IHL provides critical guarantees for civilians caught up in the tumult of armed conflict. The specific IHL provisions regarding humanitarian access depend on whether the armed conflict is international or non-international in character (and whether if, during an international armed conflict, a situation of occupation exists). Generally speaking, IHL places an onus on parties to an armed conflict to allow and facilitate humanitarian relief to civilians in need, subject to the state's right of control. While the obligation of the parties to allow and facilitate aid is not absolute, in practice the obligation at a minimum requires parties to accept offers of humanitarian relief where not doing so would violate IHL's prohibition on the starvation of the

civilian population as a method of warfare. In short, this prohibition may be triggered if a state arbitrarily or capriciously refuses offers of humanitarian assistance necessary to avoid starvation on the part of the civilian population.

Additional Protocol II is a multilateral treaty that applies to non-international conflicts. Article 18 of Additional Protocol II allows humanitarian and impartial organizations to offer their services in the event the civilian population is in need. The provision requires relief to be provided on the basis of need alone. There may be no adverse distinction in the distribution of humanitarian assistance. In the context of non-international armed conflict humanitarian relief is defined narrowly, generally restricting it to such lifesaving or life sustaining items as foodstuffs, medical supplies, clothing, shelter, etc.

Core Principles of Humanitarian Assistance

Humanitarian assistance to civilians in need is fundamental to the protection afforded them under the framework of IHL. Although there may be real and compelling security reasons for restricting or suspending humanitarian operations, a state may not categorically or arbitrarily deny or suspend access to the civilian population in need. Drawing from IHL, the core principles of humanitarian action include neutrality, independence, and impartiality.

Neutrality is critical to an NGO's ability to provide effective relief operations in a conflict or war because NGOs provide assistance without taking sides in hostilities or engaging at any time in controversies of a political, racial, religious, or ideological nature. Similarly, NGOs should maintain their independence from state or military influence, ensuring they develop and abide by their own mandates and strategic goals. Maintaining a clear distinction between the role and function of humanitarian actors from that of the state or military is a major factor in creating an operating environment in which humanitarian organizations can conduct their assistance efforts both effectively and safely.

The requirement of impartiality requires that assistance be given on the basis of need alone, regardless of race, sex, nationality, etc. This is related to the principle of non-discrimination that underpins all of IHL. Common Article Three states that "persons taking no active part in hostilities . . . shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria."

Neutrality is critical to an NGO's ability to provide effective relief operations in a conflict or war because NGOs provide assistance without taking sides in hostilities or engaging at any time in controversies of a political, racial, religious, or ideological nature.

There is no provision in IHL that obliges every organization active in assistance operations during an armed conflict to be neutral, independent, or impartial. The right of initiative, however, is predicated on an organization being humanitarian and impartial. Thus, organizations that do not fulfill these criteria are not in a position to assert an argument for access based on the right of initiative under IHL. The state whose territory an organization is trying to gain access to maintains discretion to allow whichever group(s) it chooses into its

territory. A humanitarian and impartial organization, however, will likely present a more compelling argument under the IHL-based right of initiative when it offers its services to address civilian need during armed conflict.

Part 3: The Need to Reconcile the U.S. Counterterrorism Framework with International Legal Obligations

The U.S. counterterrorism framework does not reflect the approach of IHL toward humanitarian operations. Currently, there is no effective escape valve for the pressure this contradiction puts on humanitarian NGOs. For instance, although there is a licensing process that allows the Treasury Department to make exceptions under one set of regulations for limited humanitarian action, this process is often described as excruciatingly slow and ineffective. It lacks any consideration of international law in its decision-making procedures. The licensing regime contains no explicit exceptions for critical humanitarian assistance. If a license is granted, the conditions of it may compromise the core operating principles of humanitarian organizations, particularly neutrality. The result of such a process is to make addressing urgent humanitarian need the exception, rather than the rule.

U.S. Material Support Statute and Economic Sanctions Block Access to Civilians in Need

U.S. counterterrorism laws do not accommodate the space carved out by IHL to undertake humanitarian activities aimed at alleviating the suffering of the civilian population. Instead, U.S. counterterrorism measures turn the balance struck by IHL between military necessity and humanitarian need on its head by prohibiting virtually all engagement or transactions involving a DTO. Although it is not clear exactly what constitutes a transaction or coordinated engagement, what is clear is that not all contact with a DTO is necessarily prohibited by the counterterrorism measures. The prohibition is based in the argument that any such actions could be used by the DTO to “[free] up other resources within the organization that may be put to violent ends.” This rationale, put forward in the *Holder v. Humanitarian Law Project* decision, is often referred to as the “fungibility thesis.” It ignores the balance struck by the drafters of the Geneva Conventions that presumes limited engagement with such groups may be necessary to undertake humanitarian operations for civilians in some conflict areas. This categorical approach ignores the operational reality that a DTO may gain some incidental, nominal indirect benefit as a result of humanitarian activities undertaken in the community. It fails to recognize that, in an effort to ensure that humanitarian operations are undertaken in an effective, efficient, and safe manner, some practical interaction with a DTO may be necessary.

While fungibility of resources may be possible, it is not inevitable. IHL has addressed this possibility by acknowledging the role of the state in withholding consent or suspending consent. This may be due to serious security concerns. Similarly, a state may predicate consent on certain conditions (such as arrangement of transits according to specified routes, times, etc.) if there are concerns regarding diversion or misappropriation of goods. The Commentary to Article 18 of Additional Protocol II even states that “[i]f relief actions were carried out with great care and precision as to technical detail, it may be possible to overcome [such] political or security objections which might be raised.” Furthermore, the NGO sector has decades of experience

working in conflict zones, and has developed standards and norms that protect against diversion of tangible items or financial resources to DTOs, both directly and indirectly.

NGOs often gain access to civilians most effectively and efficiently by partnering with local charitable organizations. But selecting local partners creates difficulties because generally accepted best practices, due diligence procedures, and good faith provide no legal protection from facing criminal or civil penalties.

NGOs often gain access to civilians most effectively and efficiently by partnering with local charitable organizations. But selecting local partners creates difficulties because generally accepted best practices, due diligence procedures, and good faith provide no legal protection from facing criminal or civil penalties. Such penalties may include being shut down or having assets frozen if the U.S. government decides the local partner is a DTO or controlled by one. For example, the United States Agency for International Development (USAID) bars grantees in Gaza from having any contact with private Palestinians or public officials unless "they are not affiliated with a designated terrorist organization (DTO)." "Contact" is defined as "any meeting, telephone conversation, or other communication, whether oral or written." In the Gaza strip, where Hamas is the governmental authority, this bars organizations operating USAID-funded programs from making any logistical arrangements with government officials, or using government facilities, such as public schools or clinics, to access civilians in need.

The scope and language of the counterterrorism measures may appear so restrictive that in some dire situations U.S. officials have simply turned a blind eye to NGO interaction with listed DTOs and their affiliates. This was evident in areas hit by natural disaster. In 2008, the Feinstein International Center at Tufts University published a comprehensive examination of the relief efforts after the 2005 earthquake in northern Pakistan. The study found that the humanitarian imperative to save lives and alleviate suffering largely trumped any political, military, or ideological interests. Local, national, and international actors, including groups connected to listed terrorist organizations, organized and mobilized to meet the massive demand for immediate assistance. This combined effort prompted one senior UN official to characterize the American government's response when U.S. NGOs worked alongside listed charities as "don't ask, don't tell."

U.S. Counterterrorism Rules Compromise the Neutrality of Nongovernmental Organizations

Sustained humanitarian access to populations affected by armed conflict is practicable only when it is perceived as independent of military or state action. That does not mean that both actors cannot operate in the same area. Implementation of programs, however, must respect and demonstrate a clear distinction between military and humanitarian actors. The local population's perception of the neutrality and independence of humanitarian organizations is essential to the safety and efficacy of humanitarian operations. But U.S. government policies, particularly after 9/11, disregard these principles and jeopardize the ability of truly impartial, humanitarian organizations to continue their activities for those in need. Rather than aid being

distributed by humanitarian organizations whose mandate is to provide impartial assistance to civilians in need, U.S. security policy often views aid as a tactic to promote a certain foreign policy agenda. Provision of assistance under this rubric is not impartial, and the actor delivering it is not neutral. Thus, when the distinction is blurred between the two types of activities, it is the humanitarian organizations that are jeopardized. For example, military actors have steadily expanded their humanitarian and reconstruction missions. This comes at a significant cost. InterAction, the largest association of U.S. NGOs, has said:

Expanded military involvement in relief and development as part of counter-insurgency efforts dangerously blur the line between the military and NGOs acting in accord with humanitarian principles. The military's pursuit of political and security objectives can endanger humanitarian workers' lives and compromise both missions. The increase in military development operations has made it more difficult for NGOs to retain their independence from government.

USAID's Partner Vetting System (PVS) is a prime example of misdirected national security programs that violate the neutrality of NGOs. PVS, now operational in the West Bank and Gaza, requires foreign assistance grant applicants to submit detailed personal information on leaders and staff of local partner charities to be shared with U.S. intelligence agencies. PVS puts NGOs in the position of intelligence gathering for the U.S. government. USAID has proposed expanding PVS worldwide, and announced that it will conduct a five-country pilot of the program some time in 2012.

Neutrality is one of the core principles of humanitarians, in part because it directly affects aid worker safety. Working in places where security is uncertain, aid workers and their local employees and volunteers are exposed to attacks and kidnappings from armed groups. According to the Overseas Development Institute's (ODI) Humanitarian Policy Group, the likelihood of attacks or kidnappings of aid workers increases when they are perceived to be an extension of a greater military agenda or are in actual partnerships with government actors. Violence directed toward aid workers has surged since 2003.

Conclusion

The inescapable conclusion of our analysis is that the space established by IHL to facilitate humanitarian efforts in situations of armed conflict and occupation has been severely and unnecessarily compromised by U.S. counterterrorism measures. For decades, the balance struck by IHL between security considerations and humanitarian need has been appropriate and sufficient. This balance should be reflected in U.S. counterterrorism measures because the current approach has severely curtailed the ability of humanitarian NGOs to provide badly needed assistance to the civilian population.

Going forward, the U.S. should reassess both the material support prohibition and the process for listing charities and freezing their funds. The government should work with civil society to develop comprehensive approaches that align U.S. counterterrorism measures with the values of generosity and humanity long espoused by the U.S. International law, both developed and agreed to by the U.S., should play a guiding role in this task.



The Charity & Security Network

110 Maryland Ave. NE, Suite 108

Washington, D.C. 20002

(202) 481 6926