

Safeguarding Humanitarianism in Armed Conflict:

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

June 2012



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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.

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www.charityandsecurity.org/SafeguardingHumanitarianism.

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Glossary

The following acronyms, terms, and definitions may be used by various actors to mean different things. What follows are acronyms, terms, and definitions as used in this report.

AEDPA: Anti-terrorism and Effective Death Penalty Act.

Article 3 Common to the Geneva Conventions: An article found in all four Geneva Conventions. It is said to constitute a "mini-Convention" in itself. It lays down the rules that must be respected by all parties to an international armed conflict, as well as all parties to a non-international armed conflict. It provides, *inter alia*, that persons taking no active part in the fighting, or no longer taking part in the fighting, must in all circumstances be treated humanely and without discrimination. It also establishes the right of initiative for humanitarian and impartial organizations.

Customary law: Rules that exist independently from treaty law, are binding on all states, and that (according to Article 38 of the Statute of the International Court of Justice) derive from "the general practice of states accepted as law." Thus, customary law has two distinct components: (1) actual state practice; and (2) *opinio juris*, or acceptance by states of these rules as law.

Designated terrorist organization (DTO): Any entity or organization that is designated and listed pursuant to a U.S. law or regulation. This includes entities listed as Foreign Terrorist Organizations (FTO), Specially Designated Terrorists (SDT), and Specially Designated Global Terrorists (SDGT).

High Contracting Party: a country that is party to a treaty.

IEEPA: International Emergency Economic Powers Act.

International humanitarian law (IHL): Alternatively called the law of armed conflict (LOAC), IHL encompasses the customary law and treaty obligations that define the laws of war (or *jus in bello*). IHL is the body of law that seeks, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or no longer participating in hostilities and restricts the means and methods of warfare.

NGO: Nongovernmental organization.

SDGT: Specially Designated Global Terrorist listed pursuant to Executive Order 13224.

SDT: Specially Designated Terrorist listed pursuant to Executive Order 12947 January 23, 1995, for acts of violence that disrupt the Middle East peace process.

State: A nation or country.

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, including providing protections for 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>.

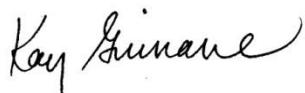
³ International humanitarian law is also referred to as the law of war and the law of armed conflict.

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.



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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.

Part I: United States Counterterrorism Law and Policy Impacting Humanitarian Action

Overview

When Mercy Corps and other Western aid agencies reached this devastated village on the front line of the battle between Israel and Hezbollah with food and medicine, they quickly discovered they had a big problem: the United States. Like all other international relief agencies here that receive financing from the American government, Mercy Corps is barred from giving out money or aid through Hezbollah, the Shiite militant group that is considered a terrorist organization by the United States. But as with all the most demolished areas in southern Lebanon, where whole villages have been flattened by Israeli bombs and there is no food, water or electricity, this village is the domain of Hezbollah – and little seems to bypass the group.

-- Hassan M. Fattah and Robert F. Worth, "Relief Agencies Find Hezbollah Hard to Avoid," *New York Times*.⁶

The *New York Times* reported this story in 2006. What U.S. laws or policies could possibly have created such a difficult situation for humanitarian aid organizations trying to reach civilians in need? Designed to stop the flow of money and services to terrorist organizations, U.S. criminal "material support" laws and financial embargo laws are so broad that they end up building a wall between legitimate humanitarian assistance and civilian beneficiaries in need of services.

U.S. law does this in two ways, which are described in detail in this section. First, it prohibits humanitarian actors from engaging in a wide range of broadly defined activities that involve listed terrorist organizations, regardless of the purpose or intent behind such engagement. Violating this "material support" law can result in criminal prosecution, extensive jail time, and fines. Second, it allows the government to decide to list U.S. charities as supporters of designated terrorist organizations and thereby seize their assets, including their donations, without the benefit of basic due process rights such as notification or adequate opportunity to challenge the listing.

Criminal prosecutions are conducted by the Department of Justice. The Department of State maintains the list of Foreign Terrorist Organizations, and the Department of the Treasury maintains a much larger list of both designated terrorist groups and individuals. Asset freezes are imposed by Treasury's Office of Foreign Assets Control (OFAC).

⁶ Robert F. Worth and Hassan M. Fattah, "Relief Agencies Find Hezbollah Hard to Avoid," *New York Times*, August 23, 2006, <http://www.nytimes.com/2006/08/23/world/middleeast/23lebanon.html>.

Chapter I

The Broad Prohibition on Providing “Material Support” to Terrorism

The Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, amended by the USA PATRIOT Act in 2001,⁷ makes it a crime for any person or organization to knowingly provide, or to attempt or conspire to provide, material support or resources to a Foreign Terrorist Organization (FTO)—a type of Designated Terrorist Organization (DTO)—regardless of the character or intent of the support provided.⁸ The sanctions that individuals and charities face for violations are severe: up to 15 years in prison or more, if death results, and fines of up to \$500,000 for organizations and \$250,000 for individuals.⁹

A. The Definition of Material Support

The statute defines material support as:

Any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (one or more individuals who may be or include oneself), and transportation, *except medicine or religious materials* (emphasis added).

Basic necessities such as food and shelter are tangible property within the meaning of the statute and cannot be provided to anyone, including non-combatants, if any part of the delivery system provides support to a DTO. Furthermore, the breadth of the terms “training,” “expert advice and assistance” and “personnel” suggest that “material support” could include anything from medical treatment to conflict mediation projects. Litigation¹⁰ challenging these terms as unconstitutionally vague pushed Congress to pass the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA) in December 2004.¹¹ IRTPA attempted to provide greater clarity to the following three terms:

- Training: “instruction or teaching designed to impart a specific skill, as opposed to general knowledge.”¹²
- Expert advice or assistance: “advice or assistance derived from scientific, technical, or other specialized knowledge.”¹³

⁷ “Material Support for Terrorism,” Patriot Debates, <http://www.abanet.org/natsecurity/patriotdebates/act-section-805>.

⁸ Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214. See material support provision at “Providing Material Support to Terrorists,” 18 U.S.C. § 2339A(b)(1).

⁹ “Providing Material Support or Resources to Designated Foreign Terrorist Organizations” 18 U.S.C. § 2339B.

¹⁰ On Jan. 23, 2004, U.S. District Judge Audrey Collins of Los Angeles ruled that the expert advice or assistance “could be construed to include unequivocally pure speech and advocacy protected by the First Amendment.” This ruling was made one month after the Ninth U.S. Circuit Court of Appeals ruled the terms “personnel” or “training” were unconstitutionally vague and could apply to such activities as advising a terrorist group to seek a peaceful resolution to its conflict.

¹¹ Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. 108-458, 118 Stat. 3638, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_public_laws&docid=f:publ458.108.pdf

¹² 18 U.S.C. §2339A(b)(2)

¹³ 18 U.S.C. §2339A(b)(3)

- Personnel: when a “person has knowingly provided, attempted to provide, or conspired to provide a foreign terrorist organization with 1 or more individuals (who may be or include himself) to work under that terrorist organization’s direction or control or to organize, manage, supervise or otherwise direct the operation of that organization. Individuals who act entirely independently of the foreign terrorist organization to advance its goals or objectives shall not be considered to be working under the foreign terrorist organization’s direction or control.”¹⁴

Domestic federal courts have only added to the confusion and danger to charities by continuing to read the terms of the statute broadly. Two court cases in particular – the Humanitarian Law Project and the Holy Land Foundation litigations – demonstrate just how overly broad the material support of terrorism laws are. Each case is discussed below.

B. The Narrow Humanitarian Exemption

The material support statute has a very narrow humanitarian exemption, allowing only medicine and religious materials to be provided to FTOs.¹⁵ The 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. Under AEDPA, the only exceptions possible are for non-tangible support. AEDPA allows the secretary of state and attorney general to approve exceptions for humanitarian aid in the form of “training,” “personnel,” and “expert advice or assistance,” where the secretary determines that the aid may not be used to carry out terrorist activity.¹⁶ To our knowledge, this power has not been invoked.

C. The First Amendment, “Coordinated Speech,” and the Humanitarian Law Project Decision

The material support statute stipulates that “[n]othing in this section shall be construed or applied so as to abridge the exercise of rights guaranteed under the First Amendment to the Constitution of the United States.”¹⁷

Nevertheless, in 2009 the Department of Justice (DOJ) asked the Supreme Court to hear a case involving the Humanitarian Law Project (HLP), which wanted to provide human rights and conflict resolution training to the Kurdistan Workers Party (PKK) and the Liberation Tigers of Tamil Eelam (LTTE), both designated Foreign Terrorist Organizations by the secretary of state. The U.S. Ninth Circuit Court of Appeals had previously found the definitions of training and expert advice or assistance to be unconstitutionally vague despite Congress’s attempts to address the definitional issues in the statute by passing IRPTA.

The Supreme Court accepted the case, and on June 21, 2010, it upheld the application of the material support laws to HLP’s conflict resolution training project, even though that project

¹⁴ 18 U.S.C. §2339B(h)

¹⁵ 18 U.S.C. §2339A(b)(1)

¹⁶ 18 U.S.C. §2339B(j)

¹⁷ 18 U.S.C. §2339B(i)

involved only speech and no tangible or financial assistance. The 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.¹⁸

The Court also accepted, without factual review, DOJ's hypothetical arguments that:

- Any contribution, even in the form of speech, to a terrorist organization legitimizes the organization's terrorist activity;
- The legitimacy gained by the HLP's human rights training would facilitate the organization's ability to recruit, raise money, and ultimately persist in its terrorist activities;
- HLP's non-monetary, speech-related support frees up the designated organization's resources to redirect them toward violent, unlawful acts; and
- Providing designated groups with any form of material support strains U.S. relations with its allies and undermines international efforts to combat terrorism.

The court said HLP remained free to speak and write about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law, so long as it did not do so in coordination with, or under the direction or control of, the PKK and LTTE. The Court failed to define what it meant by "coordinated speech."¹⁹ However, it was clear that the kind of conflict resolution training HLP wished to provide fell within the prohibited "coordinated speech" category, thereby making it a crime.

D. Knowledge Requirement and the Holy Land Foundation Litigation

The material support statute has no intent requirement. That is, any behavior that can be construed as material support will be a crime even if it is not at all intended to support terrorism. The statute has a knowledge requirement instead: a person must have "knowledge that the organization is a designated terrorist organization ... that the organization has engaged or engages in terrorist activity... or that the organization has engaged or engages in terrorism" to be found to have provided "material support or resources" to a designated terrorist organization.²⁰

This limited protection has been undermined by a federal district court judge in the criminal case *U.S. v el Mezain et al.*²¹ That case involves the 2008 convictions of leaders of the now-defunct Holy Land Foundation (HLF) on a variety of charges, including providing material support. The judge instructed the jury to find the defendants guilty if the jury found that HLF donated to local charities in Palestine that are not on the terrorist lists, but were alleged to be

¹⁸ Holder et. al. v. Humanitarian Law Project et. al., 130 S.Ct. 270, 177 L. Ed. 2d 355 (2010).

¹⁹ The dissenting opinion said that before the law can prohibit HLP's speech and association-related activities, it should be required to show such restrictions on First Amendment protected activities serve its compelling interest to combat terrorism. The dissent said the government failed to meet its burden and thus HLP's activities should not be prohibited. Otherwise, the dissent said the Court could avoid ruling on the constitutional issues by requiring the government to show knowledge or intent for the First Amendment protected pure speech and association to assist the designated organization's terrorist activities.

²⁰ IRTPA amended the material support statute to include this requirement. 18 U.S.C. §6603(b)

²¹ United States v. El-Mezain, et. al., 664 F.3d 467 (2011).

controlled by Hamas, which is on the lists. The jury's instructions did not require a finding that the defendants *knew* the local charities were controlled by Hamas, or even that they should have known.²² The Fifth Circuit Court of Appeals dismissed the appeals of both HLF and its leaders. Regarding HLF, the court said it did not have jurisdiction to hear an appeal, since due to its designation as a supporter of terrorism, there was no one authorized to engage an attorney to represent it.²³

One can readily see the danger this reading of the law poses for charities. If the trial court's failure to include a knowledge requirement in jury instructions is upheld, no charity may be free of potential criminal liability even if it carefully checks all government lists of "designated terrorists" and avoids supporting any of them. The government may later assert that, unbeknownst to the donor, its grantee was connected to a designated group. In these ways, under the HLF interpretation, the statutory knowledge requirement provides absolutely no protection from criminal liability for humanitarian actors.

²² On Oct. 26, 2010, a diverse group of U.S. organizations filed a friend-of-the-court brief in the U.S. Court of Appeals for the Fifth Circuit arguing that individuals may not be convicted under a statute barring "material support" to "designated terrorist groups" if they have not knowingly supported any designated terrorist group. "Amicus Brief of Charities, Foundations, Conflict-Resolution Groups, and Constitutional Rights Organizations in Support of Defendants and Urging Reversal of Conviction of Counts 2-10," *United States v. El-Mezain, et al.*, <http://www.charityandsecurity.org/system/files/Charities Amicus Brief.pdf>

²³ *United States v. El-Mezain*.

Chapter II

Powers Authorizing Listing (Designation) of Charities and Freezing Assets

A. The President's Broad Authority to Impose Economic Sanctions

By what authority may the government designate any person or entity, including U.S. charities, as a terrorist organization? In addition to putting the charity on the terrorist list, what sanctions does U.S. law impose once a designation is made?

Passed in 1977, the International Emergency Economic Powers Act (IEEPA) amended the World War I-era Trading With the Enemy Act to grant the president authority 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."²⁴

Designation of Terrorist Groups

The secretary of state has the power to designate Foreign Terrorist Organizations (FTOs).

Under Executive Order (EO) 12947, the secretary of Treasury is authorized to list Specially Designated Terrorists (SDTs) who threaten the Middle East Peace process. The secretary may also list Specially Designated Global Terrorists (SDGTs) under EO 13224.

This paper will refer to these listed groups all together as "Designated Terrorist Organizations" or DTOs.

These emergency powers authorize the president to name specific countries, organizations, or persons as constituting such a threat. Once named, the law prohibits U.S. persons and charities from having any financial transactions with the listed organization, and permits the freezing of any assets that the entity has in the U.S. While IEEPA allows the president to choose among a variety of sanctions, including investigations, regulations, and control over transactions,²⁵ since 9/11 the Department of the Treasury has only invoked the harshest sanctions against charities. Nine U.S. charities have been shut down with their assets frozen, and 39 foreign charities have been listed as supporters of terrorists.²⁶

The IEEPA sanctions regime was originally designed to target foreign nations. In 1995, however, President Bill Clinton expanded the use of IEEPA sanctions to non-state entities, in this case, to a list of "specially designated terrorists" that threatened to undermine the Middle East peace

²⁴ "Unusual and Extraordinary Threat; Declaration of National Emergency; Exercise of Presidential Authority," 50 U.S.C. §1701-06

²⁵ "Presidential Authorities," 50 U.S.C. §1702(a)(1)(B)

²⁶ "Specially Designated Nationals List," Treasury Department of the United States, last modified March 20, 2011,

<http://www.treasury.gov/offices/enforcement/ofac/sdn/>.

process, by issuing Executive Order (EO) 12947.²⁷ After September 11, 2001, President George W. Bush expanded the use of IEEPA sanctions once again, this time to target not only foreign but also U.S. non-state entities, including public charities.

Shortly after 9/11 President George W. Bush signed EO 13224, which declared a national emergency pursuant to IEEPA and authorized Treasury, in consultation with the attorney general and the secretary of state, to designate foreign *and domestic* individuals and organizations, including U.S. charities, who:

1. have themselves "committed, or pose a significant threat of committing, acts of terrorism"; or
2. who "assist in, sponsor, or provide financial, material, or technological support," either for acts of terrorism or for persons who have committed (or pose a significant threat of committing) acts of terrorism; or
3. who provide "financial or other services to or in support," either of acts of terrorism or of persons who have committed (or pose a significant threat of committing) acts of terrorism; or
4. who are owned or controlled by any of the above persons; or
5. who are "otherwise associated with" persons who have committed (or pose a significant threat of committing) acts of terrorism.²⁸

Treasury regulations define what it means to be "otherwise associated with" a terrorist organization:

- (a) To own or control; or (b) To attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services.²⁹

The combination of these alternative criteria radically expands the sphere of entities that may be listed by Treasury.

Historically, one of the primary goals of the policies and regulations that implement the IEEPA sanctions regime against Designated Terrorist Organizations (DTOs)—known as the anti-terrorist financing regulations—has been to choke off financial support and funding to terrorists. But because of the over-breadth of EO13224, not only may entities "otherwise associated" with terrorists be listed, but the law also now prohibits much more than financial transactions. EO 13224 prohibits a wide range of engagements with DTOs, including humanitarian action and peace-making by explicitly prohibiting "the making or receiving of any contribution of funds, goods, or services to or for the benefit of those persons listed..."

²⁷ William Jefferson Clinton, "Executive Order 12497- Prohibiting Transactions with Terrorists who Threaten to Disrupt the Middle East Peace Process," *Federal Register* 60, no. 16, (January 25, 1995).

<http://www.ustreas.gov/offices/enforcement/ofac/legal/eo/12947.pdf>

²⁸ George Walker Bush, "Executive Order 13224- Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism," *Federal Register* 66, no. 186, (September 25, 2001).

²⁹ "Terrorism Lists Governments Sanctions Regulations," 31 C.F.R. 594.316

In October 2001, the USA Patriot Act expanded IEEPA sanctions even further to block the assets of a non-state entity “during the pendency of an investigation” into whether it should be listed as a DTO.³⁰ In other words, the government can freeze a U.S. organization’s assets indefinitely, prohibit engagement with it, and criminalize all transactions with it *before formally listing the organization as a DTO*. The law does not limit the length of time the government may spend investigating the organization. Any organization that is subjected to this sanction is effectively shut down and, as will be explained later in this chapter, has little recourse to regain its assets or clear its name.

B. Treasury’s Procedures for Listing (Designation) and Freezing Assets Lack Basic Due Process

What procedure does Treasury use in determining whether to list foreign or domestic organizations as DTOs? How can an organization appeal a designation? Do those procedures provide basic due process guarantees?

Under EO 13224, Treasury has the power to place individuals and entities on the DTO list based on a “reasonable suspicion” that they have supported a terrorist organization. Once Treasury’s internal process results in a decision to place a U.S. charity on the list, the Department issues an order blocking all of its U.S. assets. Federal agents then appear unannounced at the charity’s office, post a notice that the group has been listed and take away equipment, business and financial records, and other property. Banks that hold the charity’s assets are notified that the relevant accounts must be frozen.

In 2003, Treasury issued regulations³¹ allowing designated entities to seek administrative reconsideration of their designation and to petition for the release of seized property. These regulations, however, do not require adequate notice of the reasons for designation be given, that the evidence against the charity be provided, or that the charity be given the opportunity to defend itself.

Rather, once a charity is listed as a DTO, Treasury’s enforcement office need only provide it the *unclassified* portion of the administrative record and the opportunity to provide responsive evidence in writing. Classified evidence does not have to be provided to the charity’s attorneys, even to those with security clearance. This is a well-established practice in federal courts for dealing with classified evidence. This means that decisions to designate a charity may be based on hearsay, rumor, uncorroborated foreign intelligence, or coerced testimony. Charities are not entitled to cross-examine witnesses or to present witnesses of their own. Nor can charities present evidence on appeal to a federal court. In short, once a charity is listed as a DTO, getting off the list is nearly impossible.

³⁰ 50 U.S.C. §1702(a)(1)B

³¹ “Reporting, Procedures and Penalties, Regulations,” 31 C.F.R. 501.807

Before December 2010, an attorney could not represent a DTO without a license from Treasury.³² To provide legal representation to a DTO without a license could have been construed as material support. In addition, organizations that wished to pay their legal fees with assets frozen by the Office of Foreign Assets Control (OFAC)—which are typically the only funds an accused DTO has available—had to ask for a separate Treasury license.³³ On Dec 7, 2010, however, Treasury issued new regulations that now permit attorneys to provide free legal services and, in certain cases, allow DTOs to pay for these services, without obtaining a license.³⁴

C. Courts Have Recognized Constitutional Defects in the Listing and Asset Freezing Process

Two federal courts have found Treasury's process for listing and freezing assets to be unconstitutional as applied to two U.S. charities. 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.

One ruling was upheld by the Ninth Circuit Court of Appeals , which said the procedures used by Treasury to shut down the Al Haramain Islamic Foundation of Oregon (AHIF-OR) in 2004 were unconstitutional.³⁵ The court said the Fifth Amendment's guarantee of due process requires Treasury to give adequate notice of the reasons for which it puts a group on the terrorist list, as well as a meaningful opportunity to respond. In addition, the court ruled that freezing the group's assets amounts to a seizure under the Fourth Amendment, so that a court order is required. Treasury had failed to provide notice for eight months between the time it froze the charity's assets "pending investigation" in February 2004 and the time it designated the charity a Specially Designated Global Terrorist (SDGT) in September 2004.

In the second case, a federal judge ruled the government's seizure of the Ohio-based charity KindHearts for Humanitarian Charitable Development, Inc.'s (KindHearts) assets without notice

³² "Terrorism Sanctions Regulations," 31 C.F.R. 595.204. Treasury issued a new rule after the court found its action on attorneys to be arbitrary (*KindHearts v. Treasury*) and another case challenging the attorney rules was pending. *KindHearts for Charitable Humanitarian Development v. Geithner*, Case No. 3:08CV2400 N.D. Ohio (May 5, 2010) <http://www.aclu.org/national-security/federal-court-finds-freezing-charitys-assets-unconstitutional>

³³ OFAC may issue licenses authorizing a designated entity to access frozen funds for paying attorneys' fees. 31 C.F.R. 595.506; *Global Relief Foundation, Inc. v. O'Neill et. al.*, 207 F. Supp. 2d at 786.

³⁴ For listed groups to pay costs of legal representation, no license is necessary if the representation relates to specific types of cases and one of two payment methods spelled out in the regulations is used. The types of cases that can take advantage of this rule are as follows:

- Legal advice and counseling on the requirements of and compliance with U.S. law as long as it does not facilitate transactions in violation of the blocking order;
- Representation of persons named as defendants or parties to domestic U.S. legal proceedings, including arbitration or administrative proceedings;
- Domestic U.S. legal proceedings to defend interests in property subject to U.S. jurisdiction;
- Representation before any federal or state agency regarding enforcement of U.S. sanctions against the client;
- Representation of persons detained within the jurisdiction of the United States, regardless of location, regarding any charges made against them, including, detention, military commission prosecutions and federal court proceedings; and
- Any other legal services where U.S. law requires access to legal counsel at public expense (31 CFR 594.506).

If the legal issue does not fall into these categories, a specific license is still required for payment of attorneys, which can be from the client's sources outside the U.S. or a legal defense fund at a U.S. financial institution that is subject to reporting requirements.

³⁵ *Al Haramain Islamic Foundation Inc. v. U.S. Department of Treasury*, 9th Cir. 10-35032.

or means of appeal was a violation of the Fourth and Fifth Amendments.³⁶ In 2006 Treasury issued a blocking order "pending investigation" and froze KindHearts' assets totaling close to \$1 million, effectively shutting it down.

The judge ruled that:

- Treasury never properly informed KindHearts of the basis for freezing its assets.
- Treasury's refusal to allow the charity to pay legal fees with its own money "arbitrary and capricious."
- Treasury "has effectively shut KindHearts down" by freezing its assets, which amounted to a "seizure" under the Fourth Amendment and was "unreasonable" because the government did not first obtain a warrant based on probable cause.
- Treasury violated the Fifth Amendment's guarantee of due process because it "violated KindHearts' fundamental right to be told the basis and reason the government deprived it of all access to all its assets and shut down its operations."



Photo by Kay Guinane

This sign was posted at the KindHearts' booth at the 2006 Gulf Charities Conference in Doha, Qatar after their assets were frozen "pending investigation" by the Treasury Department. A settlement was reached between KindHearts and the Treasury that allowed for the distribution of the funds to charitable causes after a civil suit called into question the government's practices in shutting down the charity.

³⁶ *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner, et. al*, 676 F. Supp. 2d 649, (October 26, 2009). http://www.charityandsecurity.org/system/files/KindHearts%20order%208.18.09_0.pdf

On May 10, 2010, the judge ordered new proceedings to remedy the constitutional violations that occurred when the government blocked KindHearts' assets. The day after the ruling, KindHearts co-counsel and Georgetown Law Professor David Cole said, "[f]or years, the government has insulated its terrorist-designation decisions from any meaningful review by denying the frozen charities even the most basic constitutional requirements of due process. Yesterday's decision confirms that such freezes are unconstitutional by requiring the government to provide KindHearts what it has been denied all along – a fair chance to clear its name."³⁷ In May 2012 lawyers for KindHearts announced a settlement agreement with Treasury, ending the litigation on terms favorable to the charity. The settlement allows 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.³⁸

The courts in the European Union have reached similar conclusions. In September 2008, the European Court of Justice's decision in *Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities* held that because the UN system does not respect due process rights guaranteed by the EU system, EU member countries are not obligated to implement the sanctions within their borders." Kadi's assets were immediately re-frozen by the European Commission, using different regulatory authority. But on January 10, 2010, the Seventh Chamber of the General Court ruled that Kadi was entitled to a "full and rigorous review" of the evidence against him, and that the procedures used were insufficient. The UN has since created an ombudsperson to consider delisting requests.

D. The Humanitarian Exemption Waiver in Sanctions Law

The humanitarian exemption issue also arises in the context of economic embargoes under IEEPA. It bars the president from blocking "donations of food, clothing and medicine, intended to be used to relieve human suffering," unless the president determines that such donations would "seriously impair his ability to deal with any national emergency."³⁹ This national emergency exception was invoked as the basis for the executive powers asserted in EO 13224, signed by President George W. Bush on Sept. 24, 2001.⁴⁰ It has since become routine for these powers to be invoked in Executive Orders.

EO 13224 placed humanitarian aid on the list of prohibited transactions with designated terrorist organizations, covering everything from negotiating access to civilians to coordinated rescues during earthquakes and floods. It essentially incorporates the definition used in criminal provisions (AEDPA) into the civil sanctions regime for placing groups and people on terrorist lists and freezing their assets.⁴¹

³⁷ "Court Announces Unprecedented Remedy for Constitutional Violations of U.S. Charity Kindhearts," *Charity and Security Network*, May 17, 2010.

http://www.charityandsecurity.org/news/Unprecedented_Remedy_for_Constitutional_Violations_of_KindHearts

³⁸ Settlement agreement available online at http://www.aclu.org/files/assets/kindhearts_v_geithner_settlement.pdf

³⁹ 50 U.S.C. §1702(b)(2)

⁴⁰ 50 U.S.C. §1702(b)(2)

⁴¹ The definition of material support is in the Anti-Terrorism and Effective Death Penalty Act, 18 U.S.C. §2339A(b)

E. Problems with Treasury's Licensing Process

Treasury regulations permit otherwise-prohibited transactions with DTOs only through the issuance of two types of licenses:

- General License: authorizes categories of otherwise prohibited transactions under appropriate terms and conditions.⁴²
- Specific License: authorizes, on a case-by-case basis, a successful applicant to engage in transactions otherwise prohibited and not authorized by a general license.⁴³

Treasury's website lists eight General Licenses on counterterrorism,⁴⁴ which provide largely for certain transactions with the Palestinian Authority.⁴⁵ Additional licenses are available for some country-based sanctions, such as in Syria.⁴⁶

This process could be applied to transfers of frozen funds of listed charities for charitable purposes. Under the regulations, the applicant charity must submit the names of all parties "concerned with or interested in" the proposed transaction and "any further information as is deemed necessary."⁴⁷ There are no set standards to guide decisions on granting licenses, and no deadlines for OFAC to make a decision.

Instead, OFAC has broad discretion in considering license applications, and can place conditions on them, including reporting requirements" in such form and at such times and places" as it wishes.⁴⁸ It can "exclude any person, property, or transaction from the operation of any license."⁴⁹ If a license is granted, OFAC maintains control of the licensee's activities and has discretionary power to amend or cancel it at any time.

If the application is denied, the applicant or "other party in interest" may request an explanation by letter or in person, or it may subsequently ask for the application to be re-opened. It can also file a new application.⁵⁰ However, there is no independent review process of Treasury's decision and no appeal to the courts. As of the date of publication of this report, Treasury has refused all requests to transfer frozen funds for charitable purposes.

⁴² 31 C.F.R. 501.801(a)

⁴³ 31 C.F.R. 501.801(b)

⁴⁴ "Counter Terrorism Sanctions" United States Department of the Treasury, <http://www.treasury.gov/resource-center/sanctions/Programs/Pages/terror.aspx>.

⁴⁵ Procedures for the issuance of Specific Licenses give Treasury tight control over implementation of any transactions authorized. Specific licenses are not transferable, and may be revoked or modified at the discretion of the Secretary of the Treasury. (Sec. 803) The license application process is exempt from the Administrative Procedure Act (Sec. 804) because it involves foreign affairs and OFAC's decision to grant or deny the license constitutes final agency action (Sec. 802). OFAC can require reports periodically and at any time, either before or after transactions are completed. (Sec. 602). See, 31 C.F.R. 501.

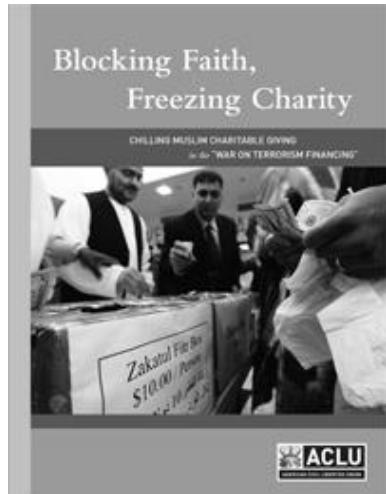
⁴⁶ "General License No. 11: Authorizing Certain Services in Support of Nongovernmental Organizations' activities in Syria," The Office of Foreign Assets Control, September 26, 2011, http://www.treasury.gov/resource-center/sanctions/Programs/Documents/syria_gl11.pdf.

⁴⁷ 31 C.F.R. 501.801(b)(3).

⁴⁸ 31 C.F.R. 501.801(b)(5).

⁴⁹ 31 C.F.R. 501.597.502.

⁵⁰ 31 C.F.R. 501.801(b)(4).



Blocking Faith, Freezing Charity

For a more thorough description of counterterrorism laws impacting U.S. charities, see the 2009 report *Blocking Faith, Freezing Charity Chilling Muslim Charitable Giving in the War on Terrorism Financing*, produced by the American Civil Liberties Union.

Available online at: <http://www.aclu.org/human-rights-religion-belief/charitable-giving-and-war-terrorism-financing>

Part 2: Armed Conflict and International Humanitarian Law Obligations of the United States

Overview

Part 2 of this report presents the rules and principles of international humanitarian law (IHL) that are applicable to humanitarian relief operations in situations of armed conflict. One type of activity that is particularly hindered by the counterterrorism measures of the United States is humanitarian relief. Aimed at alleviating the suffering of the civilian population in conflict, this type of activity—often urgently needed—is expressly provided for in IHL. The current counterterrorism measures adopted by the United States, however, severely curtail the possibility of undertaking such activity. These restrictions seem unnecessarily stringent and broad, particularly when compared to the approach adopted by IHL, which accommodates both humanitarian considerations and military necessity.

This discussion focuses on an IHL framework of humanitarian operations undertaken during an armed conflict. It does not address human rights law, refugee law, or other legal principles and instruments governing internal displacement. These frameworks contain some provisions on point, but are applicable to a 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.

This section of the report aims to provide clarity where public discussions of IHL principles suggest a degree of unfamiliarity or ambiguity. It will provide a brief overview of the structure of public international law, situating IHL within this framework. Next, the IHL norms regulating humanitarian access and assistance in situations of non-international armed conflict will be discussed. Last, we address obligations of states, both those that are and are not party to an armed conflict.

Terminology

See the Glossary, page 4, for a full list of terminology used throughout the report.

Designated terrorist organization (DTO): Any entity or organization that is designated and listed pursuant to a U.S. law or regulation. This includes entities listed as Foreign Terrorist Organizations (FTO), Specially Designated Terrorists (SDT), and Specially Designated Global Terrorists (SDGT).

High Contracting Party: term often used to refer to countries that are parties to a treaty.

Humanitarian operations: Covers all elements of humanitarian access and assistance undertaken in accordance with fundamental principles of humanity, impartiality, neutrality, and independence. This definition does not reach to include operations undertaken by military or private firms in which food, medicine, etc. are distributed.

State: A nation or country. This use is particularly prevalent in international law.

Chapter III

The Framework of International Humanitarian Law

A. Public International Law

Public international law (PIL) is a broad framework of treaties, customary law, principles, and norms. Traditionally these rules regulated only the relationships between states. PIL has evolved to cover international organizations as well as—though to a lesser extent—natural and juridical persons.⁵¹

The international legal landscape reflects the centrality of state sovereignty in international relations. The sovereign equality of all states is enshrined in the UN Charter.⁵² Recent developments in international law have allowed for some erosion of state sovereignty. States have drawn up and adopted international legal instruments that regulate some affairs that otherwise would be exclusively subject to domestic authority, such as those rules of international law regulating internal violence. As a whole, however, state sovereignty and the concomitant prerogative of the state to address its internal affairs in a manner it sees fit is alive and widely respected. International law often reflects trade-offs among states. States consent to varying degrees of regulation of what would otherwise fall within the domestic sphere of the state. States do so for various reasons. What is important is that international law reflects the agreement of states to act in accordance with certain rules, reflected in treaties and customary international law.

Article 38 of the Statute of the International Court of Justice provides a list of what are considered the sources of international law: treaties, customary international law, general principles, and judicial decisions and teachings of experts.⁵³ Treaties and customary international law have the most significance, as they are directly binding on states. In the context of IHL, they are also binding on non-state armed groups.

A treaty is defined as “an international agreement concluded between States in written form and governed by international law.”⁵⁴ For a rule to attain the status of customary international law, there must be “a general and consistent practice of states followed by them from a sense of legal obligation.”⁵⁵ The International Court of Justice described this as requiring that “the acts concerned amount to a settled practice” and that these acts are “carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.”⁵⁶

⁵¹ See, e.g., *Restatement of the Law (Third), the Foreign Relations of the United States*, (The American Law Institute, 1987) section 101.

⁵² See, e.g., “Charter of the United Nations, Chapter 1: Purposes and Principles, Article 1,” United Nations, <http://www.un.org/en/documents/charter/chapter1.shtml>.

⁵³ International Court of Justice, *Statute of the International Court of Justice*, article 38.

⁵⁴ United Nations, “Vienna Convention on the Law of Treaties,” *Treaty Series* 1155, article 1(a).

⁵⁵ *Restatement of the Law*, section 102(2).

⁵⁶ *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)*, I.C.J., 1969, paragraph. 77. This is referred to as *opinio juris sive necessitatis*.

Treaties and customary international law are of equal authority, and in the event of conflict between the two, the later rule prevails over the earlier contradictory rule.⁵⁷ There is an exception to this in the case of a peremptory norm of international law. Such a norm, also referred to as a *jus cogens*, is defined as "a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."⁵⁸ Examples include the prohibition of slavery, genocide, apartheid, and piracy. The Vienna Convention on the Law of Treaties, itself considered to reflect customary international law, states that "a treaty is void, if, at the time of its conclusion, it conflicts with a peremptory norm of international law."⁵⁹



Signing of the First Geneva Convention by
Charles Édouard Armand-Dumaresq

The Statute of the International Court of Justice lists sources of international law as treaties, judicial decisions, general principles, customary international law, and the teachings of experts. Of these, treaties and customary international law are considered to be the most significant.

There are a number of "soft law" instruments, which are not legally binding but highly persuasive, that address humanitarian operations in armed conflict. These include United Nations General Assembly Resolutions and the Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief. These are not legally binding *per se*, but they amount to persuasive texts in terms of how, and in accordance with what principles, humanitarian operations should be undertaken. They expand on the state-centricity of IHL in so far as these instruments address explicitly the responsibilities and behavior of non-governmental organizations (NGOs).

⁵⁷ See, e.g., *Restatement of the Law*, section 102, comment j.

⁵⁸ "Vienna Convention on the Law of Treaties," article 53.

⁵⁹ *Ibid.*

B. The Material Scope of International Humanitarian Law

*Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.*⁶⁰

--Lieber Code, Art. 15

IHL is the body of rules applicable in situations of armed conflict. IHL is a legal framework that applies only to situations of armed conflict. Its application is based on a factual assessment of the circumstances, and is independent of any formal proclamation or recognition of an armed conflict. If the threshold of an armed conflict is reached, then IHL rules apply to the parties to the conflict. Demonstrating a progression in international law IHL applies to both states and non-state armed groups that are parties to an armed conflict.

IHL aims to alleviate the effects of armed conflict by restricting the means and methods of warfare and protecting those not, or no longer, participating in the conflict.⁶¹ In addition to regulating the conduct of hostilities, this framework articulates the scope and conditions for the delivery of humanitarian assistance during armed conflict. Because IHL applies only to situations of armed conflict, it does not address humanitarian operations that are undertaken, for instance, in situations of natural disaster absent an armed conflict.

IHL comprises both treaties and customary international law. The primary treaties are the four Geneva Conventions and the associated Additional Protocols. The U.S. played a central role in drafting the Conventions and Protocols. Both represent a balance between military necessity on the one hand and humanitarian considerations on the other. As Professor Marco Sassoli, an expert on humanitarian law, explains, IHL is not the product of "professional do-gooders or professors."⁶² It is drafted by "experienced diplomats and military leaders" who took into full account "the security needs of a state confronted with dangerous people."⁶³ The *Study on Customary International Humanitarian Law*, published by the International Committee of the Red Cross (ICRC), lays out 161 rules that the ICRC believes have attained the status of custom. Some states, including the United States, have criticized the methodology and the findings of the *Study on Customary International Humanitarian Law*.⁶⁴ Despite these criticisms, states are in general agreement regarding the customary status of most of the rules articulated in the study.

⁶⁰ "Instructions for the Government of Armies of the United States in the Field (Lieber Code)" International Committee of the Red Cross, April 24, 1863, article 15, <http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument>.

⁶¹ The Commentary to Fourth Geneva Convention states "[a]ll international conventions, including this one, are primarily the affair of Governments." Jean S. Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, (Geneva: International Committee of the Red Cross, 1960), 24.

⁶² Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, Occasional Paper, Program on Humanitarian Policy and Conflict Research, Harvard University 19 (Winter 2006, No. 6).

⁶³ *Ibid.*

⁶⁴ See, e.g., John B. Bellinger, III and William J. Haynes II, "U.S. government response to the International Committee of the Red Cross study Customary International Humanitarian Law, *International Review of the Red Cross* 89, no. 866, (2007):448.

IHL is distinct from the body of international law that regulates the recourse to force. IHL is sometimes referred to as the *jus in bello*, while the rules governing under what conditions a state uses force are referred to as the *jus ad bellum*. The latter is regulated by the UN Charter and customary international law, and is always distinct from IHL.

i. Non-international Armed Conflict

The rules of IHL were developed as 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 fewer than 30) applicable to non-international armed conflicts.⁶⁵ It is the latter that is of most significance when discussing the delivery of humanitarian assistance against the backdrop of U.S. counterterrorism measures. An armed conflict involving a non-state armed group as one of the parties is qualified as a non-international armed conflict.⁶⁶ Currently, a number of armed groups that have been involved, or continue to be involved, in armed conflicts are designated terrorist organizations (DTOs).⁶⁷ Thus, for an NGO wanting to deliver humanitarian assistance to segments of the civilian population in proximity to, or under the control of, these groups, the prohibitions contained in the material support statute (explained in Chapter 1) erect very significant barriers to engagement and aid delivery.

A non-international armed conflict is defined as an "armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."⁶⁸ A non-international armed conflict may arise between the armed forces of a state and non-state armed group, or it may arise in the context of hostilities between non-state armed groups. The relevance of the seemingly restrictive phrase "occurring in the territory of one of the High Contracting Parties" is arguably lessened by the near-universal ratification of the Geneva Conventions.

Non-international armed conflicts may be governed by two sets of rules depending on the conditions: one type is governed by Common Article Three⁶⁹ (often referred to as a Convention

⁶⁵ Treaty-based regulation is complemented by customary international humanitarian law. See, e.g., Jean-Marie Henckaerts & Louise Doswald-Beck eds., *Customary International Humanitarian Law, Volume I: Rules* (Cambridge MA: Cambridge University Press, 2005); Jean-Marie Henckaerts & Louise Doswald-Beck eds., *Customary International Humanitarian Law, Volume II: Practice*, (Cambridge, MA: Cambridge University Press, 2005), cataloguing treaty, case-law, state practice relevant to rules listed as customary in volume I. See also, Susan Breau and Elizabeth Wilmhurst eds., *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge, MA: Cambridge University press, 2007).

⁶⁶ *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, articles 2 and 3. [Hereinafter, Fourth Geneva Convention].

⁶⁷ See, "Foreign Terrorist Organizations," Office of the Coordinator for Counterterrorism, U.S. State Department, November 4, 2010, <http://www.state.gov/s/ct/rls/other/des/123085.htm>. Al-Shabaab, Hamas, Hizballah, Jemaah Islamiya, Lashkar-e Tayyiba, al-Qa'ida are examples of FTOs active in recent or ongoing armed conflicts in Somalia, Lebanon, Israel, Pakistan and Afghanistan (spelling adopted from cited source).

⁶⁸ Fourth Geneva Convention, article 3.

⁶⁹ Common article 3 refers to language common to all four Geneva Conventions. See, International Committee for the Red Cross, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* article 3, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea* article 3, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War* article 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; and, *Geneva Convention Relative to the Treatment of Prisoners of War* article 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

in Miniature) and customary international law, and the second type is governed by Common Article Three, Additional Protocol II and customary international law. Additional Protocol II, adopted in 1977 and drafted to provide more regulation to non-international armed conflict, applies in more narrow circumstances than Common Article Three. Additional Protocol II "develops and supplements" Common Article Three "without modifying its existing conditions of application."⁷⁰ For Additional Protocol II to apply to a conflict, a number of elements must be satisfied. First, there must be a state that is a party to the armed conflict. Thus, Additional Protocol II by its terms does not apply to a situation in which only non-state armed groups are parties to an armed conflict. Such a situation is governed only by Common Article Three and customary international law. In addition to a state being engaged as party to the conflict, the state must be bound by Additional Protocol II. If a state is not a party to the treaty, the state is not bound by it. Lastly, the armed group against whom the state is fighting must be organized, under responsible command, and "exercise such control over a part of [the state's] territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."⁷¹

Although Common Article Three provides a set of minimum rules applicable to non-international armed conflicts, it does not address the threshold of hostilities required to trigger the application of IHL. It is generally accepted that the threshold set out in the treaty text of Additional Protocol II applies by analogy.⁷² It states: "[t]his Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."⁷³ Humanitarian professionals should consider carefully the implications for arguing that IHL does or does not apply. If the violence in a situation does not reach the threshold, then the relevant rules are those found in human rights and domestic law. If the violence does reach the threshold articulated in Additional Protocol II, then IHL applies. It bears noting that once conditions trigger the application of IHL, though there may be rules regulating humanitarian assistance, there are also rules that allow for broader detention authority and more permissive use of force. This is the reality of IHL.

⁷⁰ International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, June 8, 1977, 1125 UNTS 609, <http://www.unhcr.org/refworld/docid/3ae6b37f40.html>. [Hereinafter referred to as Additional Protocol II].

⁷¹ *Ibid.*, article 1.

⁷² Elizabeth Holland, "The Qualification Framework of International Humanitarian Law: Too Rigid to Accommodate Contemporary Conflicts?", *Suffolk Transnational Law Review* 34 (2011): 145, 156.

⁷³ *Ibid.*, article 1(2). Jurisprudence of the International Criminal Tribunal for the former Yugoslavia provides two key criteria for determining the existence of a non-international armed conflict: the intensity of the conflict and the organization of the parties. See, e.g., Prosecutor v. Tadić, Trial Opinion and Judgment, ¶ 562, Case No. IT-94-1-T (May 7, 1997) (stating "[t]he test . . . focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal or mixed character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law.")

Common Article Three and Additional Protocol II are significant because they bind all parties to the conflict – state and non-state.⁷⁴ Although neither grants a new legal status to the non-state armed group, they bind the group as a party to the conflict.⁷⁵ To address any concerns that any engagement pursuant to Common Article Three could be construed as bestowing legitimacy on non-state armed groups, the treaty text categorically states that doing so would “not affect the legal status of the Parties to the conflict.”⁷⁶

Although the U.S. is not a party to Additional Protocol II, many of its provisions are widely considered to reflect customary international law. As such, the U.S.—and all other states that are not parties to the treaty— are bound by the rules articulated in Additional Protocol II so far as they reflect customary international law. Furthermore, in March 2011, the Obama Administration indicated its support for Additional Protocol II, urging the Senate to act by providing its advice and consent.⁷⁷ Thus, when the United States is a party to a non-international armed conflict, it is bound by Common Article Three as well as those rules articulated in Additional Protocol II that reflect customary international law.

⁷⁴ See, e.g., Jean S. Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, (Geneva: International Committee of the Red Cross, 1960), 37.

⁷⁵ Fourth Geneva Convention, article 3.

⁷⁶ *Ibid.*

⁷⁷ “Fact Sheet: New Actions on Guantanamo and Detainee Policy,” White House Office of the Press Secretary, March 4, 2011, <http://www.whitehouse.gov/the-press-office/2011/03/07/fact-sheet-new-actions-quant-namo-and-detainee-policy>

Common Article Three

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, 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.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - b. taking of hostages;
 - c. outrages upon personal dignity, in particular humiliating and degrading treatment;
 - d. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
2. The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

ii. International Armed Conflict

International armed conflicts are those that arise between two or more states. This type of armed conflict is governed by the four Geneva Conventions and Additional Protocol I, as well as customary international law. This type of armed conflict does not arise in discussions regarding the impact of counterterrorism measures on humanitarian obligations during armed conflict, because, by its definition, international armed conflict does not include conflicts in which a non-state armed group (the type of group that could be a DTO) would be involved.⁷⁸ Humanitarian

⁷⁸ Occupation is a subset of international armed conflict. Though not as common as situations of non-international armed conflict involving a DTO, there may be cases of occupation in which a DTO is active. To the extent a DTO is present in occupied territory, a similar discordance will exist between the IHL rules regulating humanitarian access and assistance and U.S. counterterrorism regulations.

access and assistance in situations of occupation and international armed conflict are regulated in large part by the Fourth Geneva Convention and Additional Protocol I. Although the rules for humanitarian access and assistance in international armed conflict are more detailed than those applicable to situations of non-international armed conflict, it is the latter set that is of most relevance. This is because the restrictions established by U.S. counterterrorism measures apply largely in situations of non-international armed conflict due to the fact that this is the type of armed conflict to which a non-state armed group would be a party. A number of treaty provisions regulating humanitarian access and assistance in situations of international armed conflict are referenced below because they arguably reflect customary international law that is applicable in both international and non-international armed conflicts.

Chapter IV

Humanitarian Access under International Humanitarian Law (IHL)

Under IHL, the state has primary responsibility for the well-being of the civilian population within its borders.⁷⁹ The nature of armed conflict, however, is often one of deprivation, difficulty, and hostility. Thus, a state may not be willing or able to provide for a segment of the population if it is engaged in a conflict with an armed group. The Additional Protocols applicable to international and non-international armed conflict implicitly recognize an entitlement on the part of the civilian population in need to receive humanitarian assistance.⁸⁰ Additional Protocol II states that "if the civilian population is suffering undue hardship . . . relief actions for the civilian population which are of an exclusively humanitarian and impartial nature . . . shall be undertaken."⁸¹ This entitlement, however, is not tantamount to a blanket right of access for NGOs to enter a state and deliver humanitarian assistance.⁸² A state still has discretion as whether to grant access to a humanitarian organization. Under the IHL framework, state discretion and prerogative do not reach so far as to allow arbitrary denial of access to humanitarian and impartial organizations offering to provide humanitarian assistance to the civilian population in armed conflict. As the following sections explain, IHL does provide for a right of initiative that allows impartial humanitarian organizations to offer their services to a party to the conflict.⁸³



Photo by WFP/Crispin Huges

"Access is the fundamental prerequisite for humanitarian action and protection, and for millions of vulnerable people caught in conflicts it is often the only hope and means of survival."

United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, (Geneva: United Nations Security Council, 2010).

⁷⁹ See, e.g., Yves Sandoz et. al. eds., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), 1479.

⁸⁰ See, e.g., Additional Protocol I, International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, June 8, 1977, 1125 UNTS 3, article 70, <http://www.unhcr.org/refworld/docid/3ae6b36b4.html>. See also, Additional Protocol II, article 18. The text states humanitarian relief operations "shall be undertaken."

⁸¹ Additional Protocol II, article 18. Additional Protocol I, article 70 contains similar language.

⁸² See, e.g., Michael A. Meyer, "Humanitarian Action: A Delicate Balancing Act," *International Review of the Red Cross* 27 (1987): 485-6. See also, Yoram Dinstein, "The Right to Humanitarian Assistance," *Naval War College Review* (2000), <http://ihl.ihlresearch.org/index.cfm?fuseaction=page.viewPage&pageID=808&nodeID=2>.

⁸³ See, e.g., Fourth Geneva Convention, article 3(2).

A. Definition of Assistance

IHL defines *humanitarian assistance* as well as the conditions under which such assistance to the civilian population should be provided. IHL adopts a narrow definition of humanitarian assistance, restricted to basic, life-saving materials such as food, medical supplies, and shelter.⁸⁴ This definition should not be read as a limit to what activities humanitarian organizations may undertake. The Fourth Geneva Convention and its Commentary affirm the principle of protection undergirding IHL stating that truly humanitarian activities aimed at ensuring the broad protections afforded protected persons in international armed conflict should be allowed.⁸⁵ Such activities, which must be humanitarian and impartial in character, include "representations, interventions, suggestions and practical measures affecting the protection accorded [to the civilian population] under the [Fourth Geneva] Convention."⁸⁶ Although similar language does not appear in the rules of non-international armed conflict, the principle may be applied analogously to situations of non-international armed conflict.

In non-international armed conflict assistance is defined as "supplies essential for [the civilian population's] survival, such as foodstuffs and medical supplies."⁸⁷ The commentary to Additional Protocol II acknowledges the impossibility of "drawing up an exhaustive list of criteria to determine at what point the population is suffering undue hardship."⁸⁸ It does suggest that the determination should be based on considerations of the usual standard of living of the population, as well as the effects of, and needs provoked by, the hostilities.⁸⁹ Such a narrow definition is one way states have established safeguards within the IHL framework to ensure that humanitarian relief is distributed only to, and for, the benefit of the civilian population. There is a clear limit to the utility of such basic supplies in terms of contributing to the capacity of an adversary (whether state military or armed group) to engage in hostilities.

In addition to delimiting what is considered humanitarian assistance, IHL clearly and expressly restricts the provision of this assistance to the civilian population. In the treaty text applicable to international armed conflict, civilians are defined as any person who is not a member of the armed forces.⁹⁰ Although the treaty text for non-international armed conflict does not include such an explicit definition, it is understood that civilians are all those who are not members of the armed forces of a state or of a non-state armed group engaged in the conflict. The Commentary to Additional Protocol II identifies civilians as "all persons who do not or no longer participate in hostilities, including those deprived of their liberty for having committed an act

⁸⁴ See, e.g., Fourth Geneva Convention, article 55 (referring to "necessary foodstuffs, medical stores"); Additional Protocol I, Article 69 (listing "clothing, bedding, means of shelter, other supplies essential to the survival of the civilian population").

⁸⁵ See, e.g., Article 10 and 27 of the Fourth Geneva Convention, International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, <http://www.unhcr.org/refworld/docid/3ae6b36d2.html>. See also, Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 94.

⁸⁶ Ibid.

⁸⁷ Additional Protocol II, article 18.

⁸⁸ Sandoz et. al. eds., *Commentary on the Additional Protocols*, 1479.

⁸⁹ Ibid.

⁹⁰ See, e.g., Additional Protocol I, article 50.

related to the conflict.⁹¹ Such a restriction reinforces the fundamental principles of impartiality and neutrality, and precludes those who are engaged in the hostilities from benefiting from humanitarian assistance.

Strengthening Cooperation in Emergencies

"The magnitude and duration of many emergencies may be beyond the response capacity of many affected countries. International cooperation to address emergency situations and to strengthen the response capacity of affected countries is thus of great importance. Such cooperation should be provided in accordance with international law and national laws. Intergovernmental and non-governmental organizations working impartially and with strictly humanitarian motives should continue to make a significant contribution in supplementing national efforts."

"Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations," United Nations General Assembly Resolution, December 19, 1991.

B. Right of Initiative

In situations of non-international conflict, Common Article Three provides for the right of initiative. It states that; "[a]n impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict."⁹² This wording is important. Non-international armed conflict, by its definition, involves one or more armed groups, which is why the article uses the word "parties," as opposed to "High Contracting Parties."⁹³ The term "parties" includes in its scope both states and non-state armed groups.

Common Article Three establishes the legal right of an impartial humanitarian organization to offer its services to any of the parties in the case of civilian need.⁹⁴ Such an offer may not be considered as interference in the internal affairs of a state or as an infringement on the sovereignty of the state.⁹⁵ This offer of assistance may be made to the state or the non-state armed group, whichever is the party controlling the territory that the organization wishes to reach with the humanitarian assistance.

⁹¹ Sandoz et. al. eds., *Commentary on the Additional Protocols*, 1479. In practice, determination of civilian status so as to be eligible to receive assistance is distinct from the determination of civilian status discussed in the context of "direct participation in hostilities." An assessment of whether or not an individual is directly participating in hostilities determines whether or not that individual may be targeted with lethal force. Though the criteria of the latter type of assessment could be applied analogously to the former type, the two are legally and technically distinct analyses with very different determination results. See, e.g., International Committee of the Red Cross, *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* 90, no. 872 (Geneva: International Committee of the Red Cross, 2009), <http://www.icrc.org/eng/resources/documents/publication/p0990.htm>

⁹² Fourth Geneva Convention, article 3(2).

⁹³ *Ibid.*

⁹⁴ Yves Sandoz, "'Droit' or 'Devoir d'ingérence' and the Right to Assistance: The Issues Involved," *International Review of the Red Cross* 32 (1992): 215, 224

⁹⁵ Sandoz, et. al. *Commentary on the Additional Protocols*.

External humanitarian assistance is described as "complementary" or "auxiliary to" the actions of the state, undertaken when the responsible authority cannot, or will not, provide for the "basic necessities of the civilian population whose survival is in jeopardy."⁹⁶ This reinforces the principle that the state has the primary responsibility for the well-being of its civilian population. This responsibility of the state does not, however, preclude a humanitarian and impartial organization from offering its assistance. Organizations may still make such overtures. Although the need for their assistance may be reduced in the face of state-led operations, the state may still welcome such offers from NGOs. It is firmly within the prerogative of the state to consider offers of assistance from various groups, even those which may not be impartial or neutral.

It is the organizations that are humanitarian and impartial, and operate in accordance with the principles of neutrality and independence, that are best-placed to make offers under IHL. These principles are embraced by states because they safeguard against intervention (whether intentional or unintentional) in the conflict.⁹⁷ In the case of a demonstrated need on the part of the civilian population that is unfulfilled by the state, IHL states that humanitarian operations respecting the principle of impartiality "shall be undertaken subject to the consent of the High Contracting Party concerned."⁹⁸ As important as this right of initiative is, it must be understood as distinct from any categorical right of an NGO to enter a state and undertake humanitarian operations. Based in large part on the role state consent plays in granting access, it cannot be said that a blanket right of access exists. Despite this deference to state sovereignty, the rules regulating humanitarian action are protective of the right of initiative, and strictly limit the conditions under which a state may deny access in the case of civilian need. In fact, the requirement of state consent does "not imply that the [States] concerned ha[ve] absolute and unlimited freedom to refuse their agreement to relief actions. A [State] refusing its agreement must do so for valid reasons, not for arbitrary or capricious ones."⁹⁹ All of this represents an acknowledgement by states of the importance of addressing the urgent needs of the civilian population suffering in armed conflict.

C. Humanitarian Principles

If the need for humanitarian assistance exists on the part of the civilian population, there are two important components to such an offer. The first is that the organization and activities undertaken must be humanitarian. "Humanitarian" is defined as being "concerned with the condition of man, considered solely as a human being without regard to the value which he represents as a military, political, professional or other unit."¹⁰⁰ The Commentary states that the "humanitarian" character of humanitarian assistance is demonstrated "once it is clear that the action is aimed at bringing relief to victims."¹⁰¹ It goes on to make clear that what is of primary

⁹⁶ *Ibid.*, 1477, 1479.

⁹⁷ See, e.g., Sandoz, et. al. *Commentary on the Additional Protocols*, 1479.

⁹⁸ Additional Protocol II, Article 18.

⁹⁹ Sandoz, et. al. *Commentary on the Additional Protocols*, 820.

¹⁰⁰ Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 96.

¹⁰¹ Sandoz, et. al. *Commentary on the Additional Protocols*.

importance is to "avoid deception . . . using the relief action for other purposes."¹⁰² The second qualifier of an organization is impartiality, which relates to the delivery of the assistance. Delivery must be based on need and priority, and not "prejudice or...considerations regarding the person of those to whom he gives or refuses assistance."¹⁰³ There may be no diversion of relief supplies or favoring of a specific group or individuals on any grounds other than need.¹⁰⁴

Although IHL treaty text requires an organization to be humanitarian and impartial, practice over the past decade has developed to require such organizations also act in accordance with the principles of neutrality and independence.¹⁰⁵ Neutrality is understood to require humanitarian actors refrain from taking sides in hostilities or engaging in controversies of a political, racial, religious, or ideological nature.¹⁰⁶ Independence requires humanitarian actors be autonomous from the political, economic, military, or other objectives held by an actor (usually a state), particularly as it may impact how they would like to see humanitarian action implemented.¹⁰⁷ These principles, along with the requirement of state consent, are built-in safeguards, crafted and agreed to by states in the Geneva Conventions and Additional Protocols. They are designed to prevent involvement of humanitarian organizations in the conflict in any way, as well as to protect against misappropriation or misuse of assistance.



Photo by Sara Sosiak

Principles of Humanitarian Action

*Humanity
Impartiality
Neutrality
Independence*

¹⁰² *Ibid.*

¹⁰³ Jean S. Pictet ed., *Commentary: Convention (II) Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, (Geneva: International Committee of the Red Cross, 1960), 68-69.

¹⁰⁴ Sandoz, et. al. *Commentary on the Additional Protocols*, 819.

¹⁰⁵ See, e.g., United Nations General Assembly Resolution 46/182 (1991) and United Nations General Assembly Resolution 58/114 (2003).

¹⁰⁶ See, e.g., "The Seven Fundamental Principles," The International Red Cross and Red Crescent Societies, <http://www.ifrc.org/en/who-we-are/vision-and-mission/the-seven-fundamental-principles/>.

¹⁰⁷ See, e.g., "23 Principles and Good Practice of Humanitarian Donorship," Good Humanitarian Donorship, <http://www.goodhumanitariandonorship.org/gns/principles-good-practice-ghd/overview.aspx>.

D. Engagement with Non-state Armed Groups

IHL is pragmatic, acknowledging that humanitarian assistance undertaken for the benefit of the civilian population will require engagement of various sorts with the parties to the conflict. Although Additional Protocol II requires only the consent of the state, the Commentary to the treaty text states that it is “self-evident that a humanitarian organization cannot operate without the consent of the party concerned.”¹⁰⁸ An expert has described such negotiations with a non-state armed group, usually an activity essential to establish safe and predictable humanitarian operations, as “not an objective but a necessary means of attempting to achieve as effectively as possible the objectives set by the principle of humanity.”¹⁰⁹ Such engagement with a DTO, however, risks violating counterterrorism measures. Such engagement is critical to gaining access and undertaking operations. In an amicus brief before the Supreme Court in the *Holder v. Humanitarian Law Project* case, a number of NGOs argued “[p]rovision of humanitarian aid often requires working with and providing expert advice and technical assistance to local actors.”¹¹⁰ The *amici* note that these activities adhere “strictly to certain universal principles of humanitarian assistance . . . requir[ing] all providers of aid to draw sharp lines between humanitarian activities which they support, and military activities, which they do not.”¹¹¹ Such necessary—but limited—engagement is not prohibited by IHL. In fact, it is widely accepted as necessary to ensure humanitarian access that is safe and predictable.

In addition to establishing the right of initiative for humanitarian organizations, Common Article Three also calls for efforts by the parties to “bring into force, by means of special agreements, all or part of the other provisions of the present Convention.”¹¹² Doing so would presumably provide greater protection to the civilian population. Thus, explicit and implicit in Common Article Three is the idea that engagement with a non-state armed group is necessary within the framework of IHL in attempts to protect the civilian population from the effects of armed conflict. The extraordinarily broad scope of U.S. counterterrorism measures, however, prohibits a great deal of this engagement.

¹⁰⁸ Naz K. Modirzadeh, Dustin Lewis and Claude Bruderlein, “Humanitarian Engagement Under Counter-terrorism: A Conflict of norms and the Emerging Policy Landscape,” *International Review of the Red Cross* 93, no. 4 (2011).

¹⁰⁹ Sandoz, “*Droit* or *Devoir d’ingérence*.”

¹¹⁰ Holder v. HLP, Brief of Amicus Curiae of the Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, the Institute for Conflict Analysis and Resolution at George Mason University, the Kroc Institute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation in Support of Humanitarian Law Project, et al., November 23, 2009, 25-6.

¹¹¹ Holder v. HLP, Brief of Amicus Curiae of the Carter Center, Christian Peacemaker Teams, Grassroots International, Human Rights Watch, International Crisis Group, the Institute for Conflict Analysis and Resolution at George Mason University, the Kroc Institute for International Peace Studies at Notre Dame University, Operation USA, and Peace Appeal Foundation in Support of Humanitarian Law Project, et al., November 23, 2009, pp. 25-26.

¹¹² Fourth Geneva Convention, article 3.

Dialogue with State and Non-state Actors



Photo by Håkan Dahlström.

"In order to spare civilians the effects of hostilities, obtain access to those in need and ensure that aid workers can operate safely, humanitarian actors must have consistent and sustained dialogue with all parties to conflict, State and non-State. Moreover, while engagement with non-State armed groups will not always result in improved protection, the absence of systematic engagement will almost certainly mean more, not fewer, civilian casualties in current conflicts."

United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, paragraph 40.

E. Requirement of State Consent

This right of initiative bumps up against state sovereignty.¹¹³ Although the provisions in IHL regarding humanitarian access and assistance have been described as a "progressive 'erosion' of the preserve of national sovereignty in favor of humanitarian action," sovereignty is still very much reflected in the Geneva Conventions and Additional Protocols.¹¹⁴ For instance, the Commentary to the Fourth Geneva Convention states that though humanitarian activities may be of a broad range, they must be "compatible with the sovereignty and security of the State in question."¹¹⁵ Furthermore, in situations of international armed conflict, where the civilian population is "not adequately supplied" with food, clothing, bedding, medical supplies, means of shelter, and other supplies essential to their survival, the state is called upon to allow relief

¹¹³ The Commentary to the Geneva Conventions acknowledges this explicitly, stating "[a]ll these humanitarian activities are subject to one final condition – the consent of the Parties to the conflict. This condition is obviously harsh but it might almost be said to be self-evident." Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 98.

¹¹⁴ Sandoz, "'Droit' or 'Devoir d'ingérence.'"

¹¹⁵ Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, 98.

actions—which are impartial, non-discriminatory, and humanitarian—to take place.¹¹⁶ These operations are, however, “subject to the agreement” of the state.¹¹⁷

The Commentary to Additional Protocol II reaffirms the requirement of state consent for access. Although the right of initiative provided for in Common Article Three covers offers by humanitarian organizations to both states and non-state armed groups that are parties to the conflict, Additional Protocol II requires consent only from the state. Despite the treaty requiring only state consent, as a practical matter, humanitarian organizations that are granted access to an area will require the consent of any group in control of the territory through which they wish to pass, as well as control over the territory in which they intend to operate. Additional Protocol II goes on to assert that when offers are made by humanitarian and impartial organizations, states can refuse consent only for valid reasons, and consent should not be withheld arbitrarily.¹¹⁸ The Commentary asserts that if the survival of the civilian population is at stake, state consent must be granted to humanitarian and impartial organizations.¹¹⁹ The 26th International Conference of the Red Cross and Red Crescent reaffirmed this, stating that all parties to a conflict are obligated to “accept, under the conditions prescribed by international humanitarian law, impartial humanitarian relief operations for the civilian population when it lacks supplies essential to its survival.”¹²⁰

In circumstances where the survival of the civilian population is threatened, there is a clear obligation on the part of the state to allow access to humanitarian and impartial organizations offering their services.¹²¹ This is based in part on the prohibition of the use of starvation as a method of combat.¹²² Refusal by a state to grant access to an organization fulfilling the requirements laid out in IHL when the civilian population is in danger of starvation would amount to a prohibited method of warfare. A similar argument may be made using the elements of crimes against humanity laid out in Article 7 of the Rome Statute, which is the treaty that established the International Criminal Court. Refusing to grant consent under such circumstances could amount to extermination, defined as including “the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.”¹²³

¹¹⁶ Additional Protocol I, article 69.

¹¹⁷ See, e.g., Additional Protocol II, article 18.

¹¹⁸ Sandoz, et. al. *Commentary on the Additional Protocols*.

¹¹⁹ See Rule 55 from Jean-Marie Henckaerts, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict,” *International Review of the Red Cross* 87 (2005): 203. Additionally, the prohibition against starvation as a method of warfare lends additional support to the argument that access may not be denied in cases where the civilian population is in dire need. See, e.g., Additional Protocol II, article 14.

¹²⁰ Henckaerts, “Study on Customary International Humanitarian Law,” (citing) 26th International Conference of the Red Cross and Red Crescent, Res. II (cited in Vol. II, Ch. 17, § 533).

¹²¹ See, e.g., Sandoz, et. al. *Commentary on the Additional Protocols*. 1479.

¹²² See, e.g., Additional Protocol II, article 14.

¹²³ *Rome Statute of the International Criminal Court* (Geneva: International Criminal Court, 2002), article 7(2)(b).

F. Limits on Authority of the State to Regulate Access

Closely linked to state consent is the right of the state to regulate the modalities of access. States may exercise control over relief actions undertaken on their territory. The principles of humanitarian action are intended to ensure that vis-à-vis the beneficiaries, the assistance only goes to those members of the civilian population who are in need, with those most vulnerable given priority. Additionally, the principles provide assurance to state authorities that there will be no prohibited distribution of the assistance to those outside the intended beneficiary population. Lastly, the principles provide guarantees to the donor that the assistance will not serve any purpose other than that for which it is intended.¹²⁴

"International relief actions are based on fundamental conditions which provide every guarantee of non-intervention: i.e., that they are "of an exclusively humanitarian and impartial nature and [...] are conducted without any adverse distinction."

Pictet, ed., *Commentary: Additional Protocol II to the Geneva Conventions*,

Once a state has granted access to a humanitarian organization, the state must cooperate. The state must facilitate the rapid transit of relief consignments and ensure the safety of convoys.¹²⁵ There may be political or security concerns on the part of state. IHL provides the state with flexibility to address such concerns. Measures tailored to address the concern can include searching relief consignments, supervising delivery, arranging transits in accordance with specific timetables, and requiring specific itineraries for convoys.¹²⁶ Any regulation by the state, however, should not amount to "willfully impeding relief supplies."¹²⁷ Although the treaty text regulating non-international armed conflict does not expressly prohibit this, the prohibition of willfully impeding relief supplies is enshrined in the rules applicable to international armed conflict, and is widely thought to reflect customary international law applicable to both international and non-international armed conflicts.¹²⁸

¹²⁴ Sandoz, et. al. *Commentary on the Additional Protocols*, 1480.

¹²⁵ *Ibid.*

¹²⁶ *Ibid. See also*, Henckaerts, "Study on Customary International Humanitarian Law," Rule 55.

¹²⁷ Henckaerts, "Study on Customary International Humanitarian Law."

¹²⁸ *Ibid.*

Chapter V: Additional International Humanitarian Law Obligations and Considerations

Current U.S. counterterrorism measures are often in contradiction with the right of initiative, carved out under IHL, and the necessity of engagement to facilitate access recognized in the legal framework. The result is to place impartial humanitarian organizations operating in non-international armed conflicts in untenable positions because their actions in accordance with the fundamental principles and rules of IHL may still violate U.S. rules.

A. Provision of Medical Assistance

There are IHL rules that deal specifically with the treatment of wounded or sick individuals. Common Article Three states "the wounded and sick shall be collected and cared for."¹²⁹ It does not elaborate as to who can or must provide the medical assistance. It can be understood, however, as establishing an obligation for any party to the conflict. The outer limits of an affirmative responsibility during armed conflict to assist all those wounded and sick may be open to discussion, but what is clear is that a state may not erect barriers that make such activity by humanitarian organizations unnecessarily difficult or illegal. The counterterrorism measures of the United States, particularly the material support statute, prohibit the provision of medical assistance to any member of a DTO who is sick or wounded.¹³⁰ Such a proscription is not only contrary to the language found in Common Article Three, but also contravenes the language found in Additional Protocol II that states: "[a]ll the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected . . . There shall be no distinction among them founded on any grounds other than medical ones."¹³¹ Further evidence of the balance already struck by IHL in terms of affirming every individual's right to receive medical assistance, is the prohibition of punishing anyone for "carry[ing] out medical activities compatible with medical ethics, regardless of the person benefiting therefrom."¹³² Current U.S. law prohibits the provision of any medical assistance to members of a DTO, and at least one court has drawn a clear line between the provision of medicine that is exempted from the material support statute and the provision of medical assistance that is prohibited by the material support statute.¹³³ Such a strict reading has resulted in an incredible incongruity where "it is legal to give someone a pill, but illegal to provide clean water for swallowing it."¹³⁴

B. Protections Afforded Staff of Humanitarian Organizations

States are also required to ensure the freedom of movement of authorized humanitarian personnel. The movement required to exercise their functions may only be impeded if imperative military or security concerns demand it. Such restriction may only be temporary.¹³⁵

¹²⁹ Geneva Conventions, article 3.

¹³⁰ 18 U.S.C. 2339(B).

¹³¹ Additional Protocol II, article 7.

¹³² Additional Protocol II, article 10.

¹³³ See, e.g., *United States v. Sabir*, No. 07-1968-cr (2d Cir. February 4, 2011).

¹³⁴ "Material Support and the Need for a Sensible Humanitarian Exemption," *Charity and Security Network*, July 7, 2010, http://www.charityandsecurity.org/analysis/material_support_law

¹³⁵ Henckaerts, "Study on Customary International Humanitarian Law," Rule 56.

Such an obligation does not, however, infringe on the right of a state to ensure that humanitarian staff are undertaking the appropriate work in accordance with the terms of their presence in the country. In non-international armed conflict this obligation is rooted in customary international law. The current U.S. counterterrorism measures restrict the ability of humanitarian professionals to undertake assistance activities in certain conflicts. In addition to contravening the freedom of movement provided for in IHL, the U.S. measures are contrary to the language found in several U.N. Security Council Resolutions.¹³⁶ For instance, in a 2009 Security Council Resolution on the Protection of Civilians in Armed Conflict, the Council stressed the "importance for all parties to armed conflict to cooperate with humanitarian personnel in order to allow and facilitate access to civilian populations affected by armed conflict."¹³⁷

C. Obligations of Third States

Additional Protocol I, applicable to international armed conflict, requires third states, that are not a party to the armed conflict, to "allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel" subject to state consent.¹³⁸ Additional Protocol II does not contain a similar statement, but state practice has developed to suggest that such an obligation exists on the part of a third state. For instance, a UN Security Council Resolution adopted in 2000 on protection of civilians in armed conflicts called upon "all parties concerned, including neighboring states, to cooperate fully" in providing access for humanitarian personnel.¹³⁹ Additionally, the Guiding Principles on Humanitarian Assistance adopted by the UN General Assembly in 1991 emphasize that "[s]tates in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance."¹⁴⁰

Under Common Article One, states are required to "undertake to respect and to ensure respect for the present Convention in all circumstances."¹⁴¹ This is significant because it can be seen as establishing an obligation for a state, that is not a party to the armed conflict, to ensure that its actions do not facilitate a party to the conflict violating IHL. Thus, in cases where the basic needs of the civilian population are unfulfilled, there may be an argument based on Common Article One that a third state is obligated not to act in a way that compromises or impedes the ability of a party to the conflict to address the needs of its population. Currently, the counterterrorism regulations of the U.S., in part because of their broad scope and extraterritorial reach, may impede humanitarian organizations and states from working together to facilitate humanitarian assistance to the civilian population in need.

¹³⁶ For instance, the U.S. supported calls for all parties involved to provide humanitarian personnel with unimpeded access to those in need in Security Council Resolutions 1778 (2007), 1772 (2007), 1756 (2007).

¹³⁷ UN Security Council Resolution 1894 (2009).

¹³⁸ Additional Protocol I, article 70(2).

¹³⁹ UN Security Council Resolution 1296 (2000).

¹⁴⁰ "Strengthening of the Coordination of Humanitarian Emergency Assistance of the United Nations," UN General Assembly Resolution, December 19, 1991.

¹⁴¹ Geneva Conventions, article 1.

...The UN Secretary-General also urged Member States to "consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for . . . humanitarian purposes . . ."

The United Nations has also recognized the role states can play in engaging with armed groups to enhance compliance by the groups with IHL. The UN Secretary-General in 2009 called for a "comprehensive approach" aimed at improving respect for IHL. Recognizing the deleterious impact on a civilian population of overbroad regulations, the UN Secretary-General also urged Member States to "consider the potential humanitarian consequences of their legal and policy initiatives and to avoid introducing measures that have the effect of inhibiting humanitarian actors in their efforts to engage armed groups for . . . humanitarian purposes..."¹⁴²

The U.S. State Department has recognized the importance of such complementarity. In the mission statement of its Bureau of Population, Refugees, and Migration, it states: "The mission of the Bureau...is to provide protection, ease suffering, and resolve the plight of persecuted and uprooted people around the world on behalf of the American people by providing life-sustaining assistance, working through multilateral systems to build global partnerships, promoting best practices in humanitarian response, and ensuring that humanitarian principles are thoroughly integrated into U.S. foreign and national security policy."¹⁴³

D. The Role of UN Security Council Resolutions

Resolutions of the United Nations Security Council have provided important sanction regime carve-outs for humanitarian relief. Such a tendency reflects an acknowledgment of the need to account for humanitarian operations while ensuring security concerns are adequately addressed. As a member of the UN Security Council, the U.S. has been actively involved in crafting and passing resolutions that facilitate the safe delivery of humanitarian assistance to populations in need and condemning restrictions on humanitarian access. For example, Security Council Resolution 1261, passed in 1999, calls on all parties to armed conflicts "to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflicts."¹⁴⁴ Similarly, in a 2004 Resolution in which the Security Council acted under Chapter VII, the Council called on the Sudanese government to facilitate international relief for the humanitarian disaster, thereby lifting "all restrictions that might hinder the provision of humanitarian assistance and access to the affected populations."¹⁴⁵

In 2008, the Security Council created a humanitarian exemption from its sanctions regime as applied to Somalia. SC Resolution 1844 called on Member States to freeze the funds, financial assets, and economic resources of individuals and entities that:

¹⁴² United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, paragraph 56, 57.

¹⁴³ "What We Do," U.S. Department of State, Bureau of Population, Refugees, and Migration, <http://www.state.gov/j/prm/c25756.htm>

¹⁴⁴ United Nations Security Council Resolution 1261, (1999).

¹⁴⁵ United Nations Security Council Resolution 1556, (2004): paragraph 1.

- Obstruct the delivery of humanitarian assistance to Somalia;
- Obstruct access to, or distribution of humanitarian assistance in Somalia; and/or
- Provide support to acts that threaten the peace, security or stability of Somalia.¹⁴⁶

In a follow-up Security Council Resolution, the Council underscored "the importance of humanitarian aid operations," exempted from the sanctions for a period of twelve months (recently renewed) "the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia."¹⁴⁷ Although these Resolutions address humanitarian access and assistance in specific situations, they also represent a growing trend in exempting truly humanitarian and impartial operations from sanctions regimes and other counterterrorism measures.

E. International Human Rights Law

International Human Rights Law (IHRL) provides a framework of legal norms addressing the way in which individuals shall be treated by states. Unlike IHL, which applies only during situations of armed conflict, IHRL generally applies at all times, subject to some qualification in situations of armed conflict. States have adopted various positions regarding the applicability of human rights law to situations of armed conflict and occupation. States also have adopted varying positions regarding whether human rights obligations apply extraterritorially. The U.S. position has been that its human rights obligations do not apply extraterritorially, though in recent months the Obama administration may have signaled a potential shift in this position.¹⁴⁸

The U.S. approach to its human rights obligations does not, however, obviate a discussion as to the impact of counterterrorism regulations on human rights. The scope of the U.S. counterterrorism regulations may actually impede the ability of another state to ensure humanitarian assistance for its population. For instance, U.S. counterterrorism regulations may deter NGOs from working in FARC-controlled areas of Colombia. Although civilians may be in need, and the Colombian government has human rights obligations vis-à-vis its citizens, it may be difficult for the Colombian government to ensure the needs of its population are met if NGOs are restricted in their activities in certain areas of the country. Due to the purported broad scope of U.S. counterterrorism regulations, and their extraterritorial reach, they could have a chilling effect on the operations of NGOs in Colombia under such circumstances.

¹⁴⁶ United Nations Security Council Resolution 1844, (2008).

¹⁴⁷ United Nations Security Council Resolution 1916, (2010): paragraph 5.

¹⁴⁸ See Fourth Periodic Report of the United States of America to the United Nations Committee on Human Rights Concerning the International Covenant on Civil and Political Rights, December 30, 2011, section 505. <http://www.state.gov/j/drl/rls/179781.htm> The United States in its prior appearances before the Committee has articulated the position that article 2(1) would apply only to individuals who were both within the territory of a State Party and within that State Party's jurisdiction. The United States is mindful that in General Comment 31 (2004) the Committee presented the view that "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." The United States is also aware of the jurisprudence of the International Court of Justice ("ICJ"), which has found the ICCPR "applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory," as well as positions taken by other States Parties."

Although this report focuses on the contradictions in U.S. legal obligations under IHL and U.S. domestic counterterrorism regulations, a related discussion of the relationship between U.S. counterterrorism regulations and human rights law—both in and outside of armed conflict—would contribute to the broader discussion of the ways in which international law and states' counterterrorism regulations relate.

Part 3: The Need to Reconcile U.S. Counterterrorism Measures with International Legal Principles and Obligations

Overview

Protecting humanitarian relief for civilians is a key tenet of international humanitarian law (IHL). Part 3 of this report explains how U.S. counterterrorism measures contradict a number of international legal obligations and principles. It provides concrete examples of this conflict, and suggests ways in which these contradictions can be reconciled.

The rules and principles of IHL provide the framework for humanitarian access and assistance during armed conflict. They reflect a balance of interests, as well as a sufficient flexibility to accommodate conditions in contemporary conflicts. These include:

- The right of initiative on the part of humanitarian and impartial organizations;
- The responsibility of the state to address the needs of its population, and in the event it is unwilling or unable to do so, it should grant access to humanitarian and impartial organizations;
- The restriction on states' prerogative to deny access, prohibiting them from doing so for arbitrary or capricious reasons; and
- The significance of humanity, impartiality, neutrality, and independence as fundamental operational principles of humanitarian organizations.

U.S. counterterrorism measures, however, do not take these principles into account. Instead, they effectively exacerbate the suffering of civilians in need by making it difficult or impossible for NGOs to gain access to them in areas where designated terrorist organizations (DTOs) operate or control local institutions.

Currently, there is no effective escape valve for the pressure this contradiction puts on NGOs. Although there is a licensing process that allows the Department of the Treasury to make exceptions, it is slow, does not operate effectively, and does not include criteria reflective of IHL. Such processes essentially make humanitarian aid the exception, rather than the rule.

The principles of IHL provide a proven basis for making practical changes to harmonize the needs of security and the humanitarian imperative. To be aligned with international obligations, U.S. counterterrorism laws and policies must, at a minimum:

1. Respect the right of initiative for impartial humanitarian organizations, particularly in situations of non-international armed conflicts;
2. Accommodate the operational challenges of operating in areas that may be controlled by DTOs or where DTOs may be present; and
3. Respect the neutrality and independence of humanitarian actors.

This approach is also a practical one. Contemporary armed conflicts require regular, strategic engagement with non-state actors.¹⁴⁹ The need to work with and through non-state actors on the ground has been widely recognized, including in UN reports and resolutions.

UN Secretary-General, Report of the Secretary-General on the Protection of Civilians in Armed Conflict (2009)

"At the absolute minimum, it is critical that Member States support, or at least do not impede, efforts by humanitarian organizations to engage armed groups in order to seek improved protection for civilians — even those groups that are proscribed in some national legislation. Engagement through training or the conclusion of special agreements can provide entry points for dialogue on more specific concerns, such as humanitarian access, protection of humanitarian workers and sexual violence. Of particular relevance to the Security Council, such dialogue can also in some instances contribute to confidence-building between parties which can lead, in time, to the cessation of hostilities and the restoration of peace and security."

United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, paragraph 45.

While the U.S. government, both military and civilian, struggles to quickly build its capacity for assistance operations in conflict zones, U.S. law prevents non-governmental organizations from providing the very same aid that the government deems a priority. After the devastating tsunami in 2008, Sri Lankans often could not get necessary aid from U.S. NGOs.¹⁵⁰ In Gaza, NGOs like Mercy Corps could not feed Palestinians. KARAMAH, a U.S. Muslim charity, could not provide backpacks to children who were displaced by the Pakistan flood for fear of criminal prosecution. These tragedies have been well-documented in news coverage¹⁵¹ and in reports such as OMB Watch and Grantmakers Without Borders' *Collateral Damage: How the War on Terror Hurts Charities, Foundations and the People They Serve* and the ACLU's *Blocking Faith, Freezing Charity*.¹⁵²

The current position of the Obama Administration is that the U.S. continues to be engaged in a non-international armed conflict with Al Qaeda, the Taliban, and associated forces. The U.S. Supreme Court has held that at a minimum, Common Article 3¹⁵³ applies to U.S. conduct against Al Qaeda in Afghanistan.¹⁵⁴ As a matter of official policy, the U.S. military continues to apply the

¹⁴⁹ United Nations, *Report of the Secretary-General on the Protection of Civilians in Armed Conflict*, paragraph 52, ("Whether engagement is sought with armed groups in Afghanistan, Colombia, the Democratic Republic of the Congo, the occupied Palestinian territories, Pakistan, Somalia, the Sudan, Uganda, Yemen or elsewhere, experience shows that lives can be saved by engaging armed groups in order to seek compliance with international humanitarian law in their combat operations and general conduct, gain safe access for humanitarian purposes and dissuade them from using certain types of weapons.")

¹⁵⁰ Ahilan T. Arulanantham, "'A Hungry Child Knows No Politics': A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism," *American Constitution Society for Law and Politics* (June 2008).

¹⁵¹ See, Stephanie Strom, "Small Charities Abroad Feel Pinch of U.S. War on Terror," *New York Times*, August 5, 2003.

¹⁵² See, Guinane et. al., *Collateral Damage*. See also, ACLU, *Blocking Faith Freezing Charity: Chilling Muslim Charitable Giving in the War on Terrorism Financing*, (Washington DC: American Civil Liberties Union, 2009).

¹⁵³ Common Article 3.

¹⁵⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

highest Geneva Convention standards (those for international armed conflict and military occupation), even during non-international conflicts.¹⁵⁵ Thus, it would be consistent with U.S. military policy and practice to apply the standards of international armed conflict to humanitarian operations as well. Additionally, the logic of IHL suggests analogizing in situations of non-international armed conflict to the international armed conflict rules applicable to humanitarian access and assistance. The aim of IHL is to protect civilians and alleviate suffering during conflict. The needs of civilians in international and non-international armed conflict are often equally as dire. There is no reason the rules under the international armed conflict framework could not—and should not—be used to undergird the more sparse framework established for non-international armed conflicts.

Nations like the U.S. are required under Common Article I to respect and ensure respect for the Geneva Conventions, even when not a party to an armed conflict. This should include refraining from acting in such a way that jeopardizes and impedes urgently needed humanitarian assistance.

It seems clear that the Obama Administration, like the Bush Administration before it, conceives of the material support statute and the antiterrorist financing sanctions as tactical tools in the armed conflict with Al Qaeda, the Taliban, and associated forces.¹⁵⁶ As such, their validity must be judged from the perspective of IHL. Although much attention has been paid to the legality of the use of force in counterterrorism operations, very little has been said about the use of other methods employed pursuant to this armed conflict, including interference with the delivery of humanitarian aid and economic sanctions levied against NGOs.

The U.S. counterterrorism approach, which is often a bar to humanitarian assistance to civilians in non-international armed conflict situations, is specifically addressed in IHL. Military necessity and considerations of humanity have already been carefully balanced, and security needs already accommodated, in establishing the circumstances under which humanitarian assistance may be offered to civilians by humanitarian and impartial organizations. Nations like the U.S. are required under Common Article I to respect and ensure respect for the Geneva Conventions, even when not a party to an armed conflict. This should include refraining from acting in such a way that jeopardizes and impedes urgently needed humanitarian assistance. As a nation bound by international law, the U.S. must ensure that its domestic laws do not compromise its ability to act in accordance with its international obligations.

¹⁵⁵ "Department of Defense Directive, NUMBER 2311.01E" United States Department of Defense, May 9, 2006, paragraph 4.1, <http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf>.

¹⁵⁶ IHL scholar Amichai Cohen describes this type of situation, where economic sanctions are clearly used "not as an alternative to the application of military pressure, but as a supplement to the use of force." To Cohen's way of thinking, economic sanctions in this case would be judged primarily by IHL; IHRL might apply as a compliment to IHL "when no specific norm exists under IHL." An interesting corollary to this discussion of economic sanctions as a method of war governed by IHL is the Pentagon's recent decision to consider certain cyber-attacks to be acts of war. This controversial discussion of hacking as a method of waging war, as a military tactic, similarly challenges assumptions about who is a civilian and who is a combatant.

Chapter VI

How the Material Support Statute and Economic Sanctions Block Access to Civilians in Need

Because it is illegal under the material support statute and OFAC regulations for NGOs to engage in any transaction with a DTO, NGOs often cannot gain access to civilians who are living or trapped in territories DTOs control. 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 severity of penalties for violating these laws, even when delivering life-saving aid in full compliance with IHL, creates significant barriers and delays to delivering aid to vulnerable civilians in these areas.

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. For instance, to obtain permits, pay road tolls, or share technical advice. In addition, members of a DTO may derive some 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.

The on-the-ground impact of U.S. counterterrorism measures in areas where DTOs are present limits access to civilians in need and makes it difficult to form necessary partnerships. The Treasury Department's licensing process does not provide an adequate or effective means of addressing these access problems.

A. U.S. Counterterrorism Measures Conflict with Basic International Humanitarian Law

Under U.S. law, aid operations may not be undertaken by NGOs if doing so involves engagement or activity prohibited by U.S. counterterrorism regulations. These prohibitions apply to all U.S. persons and groups. The extra-territorial jurisdiction provisions of the material support law extend the prohibitions globally, complicating operations of foreign NGOs with American ties. As discussed in Chapter I, these prohibitions are absolute, regardless of purpose or intent.

The protection of civilians is the foundation of IHL, and the significance of humanitarian access and assistance is a critical component of this. The approach of IHL is a pragmatic one, acknowledging that the cost of delivering urgently needed humanitarian assistance to civilians may result, under certain conditions, in some marginal indirect benefit to a DTO. Because the nature of the assistance is purely humanitarian, and not military, there is little chance that any nominal gain would actually be of any significance. Thus, the type and character of the activity considered by IHL already reflects both security and humanitarian concerns.

The impact of U.S. counterterrorism regulations on humanitarian operations was described in a 2008 article about emergency tsunami relief efforts by American Civil Liberties Union attorney Ahilan Arulanantham. He explained that “[a]s with civil war and disaster situations around the globe . . . providing humanitarian aid to the most needy people in Sri Lanka almost inevitably requires working in areas controlled by, and dealing directly with, a designated terrorist group.” Arulanantham observed that U.S. counterterrorism measures do not make critical distinctions between impartial and partial assistance efforts, nor do the measures distinguish between terrorist front groups and legitimate NGOs. Consequently, U.S. measures “create an environment in which the President can eviscerate these protections for non-combatants, placing the United States in violation of international law.”¹⁵⁷

The framework of access and assistance contemplates delivery of assistance only to civilians. U.S. counterterrorism measures largely ignore this fundamental distinction, as they represent a general determination that prohibition of various modes of engagement with DTOs trumps humanitarian needs of civilians. The need for—as well as the purpose of—such assistance must be considered. If it were, then U.S. regulations could permit the limited engagement necessary to gain access and deliver assistance to civilians in need.

NGOs Could Not Drill Wells for Villages in Somalia

One international NGO informed CSN that, as the hunger crisis developed in Somalia in 2009, some U.S.-based NGOs were working with USAID on guidelines to implement programs there. At one point in the negotiation, USAID proposed monitoring requirements to implement OFAC licensed programs, so that a USAID funded a program drilling wells, there would be a requirement to monitor the wells so that if a member of al Shabaab drank from the well, the NGO would have to report it to the U.S. government. That was impossible to implement, so the NGOs were unable to proceed. This is an example of the extreme measures the USG might request in connection with getting permission to respond in conflict/sanctioned areas of the world. This broad reading of the material support law denied civilians in an entire village a basic necessity, based solely on the listed group’s presence in the region.

B. Barriers to Partnering with Local Charities Impede Humanitarian Access

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 are not recognized by U.S. security laws. An NGO can be subject to sanctions or charged with material support if the government later determines that a local partner is “owned or controlled by” a listed

¹⁵⁷ Arulanantham, *A Hungry Child Knows No Politics*.

organization.¹⁵⁸ The Treasury Department makes that clear in the Introduction to its *Voluntary Guidelines*, noting that complete adherence to them offers no legal protection from Treasury sanctions.¹⁵⁹ It says:

[A]dherence to these Guidelines does not excuse any person (individual or entity) from compliance with any local, state, or federal law or regulation, nor does it release any person from or constitute a legal defense against any civil or criminal liability for violating any such law or regulation. In particular, adherence to these Guidelines shall not be construed to preclude any criminal charge, civil fine, or other action by Treasury or the Department of Justice against persons who engage in prohibited transactions with persons designated pursuant to the Antiterrorism and Effective Death Penalty Act of 1996, as amended, or with those that are designated under the criteria defining prohibited persons in the relevant Executive orders issued pursuant to statute, such as the International Emergency Economic Powers Act, as amended.

The challenges of working with local partners are best illustrated by the uncertainty arising from the government's prosecution of the Holy Land Foundation (HLF). The U.S. prosecuted HLF for providing aid through local charities in Gaza that were not on terrorist lists, but which the government said were controlled by Hamas, which is a listed organization. The government was not required to prove that HLF knew or even should have known that these local charities were controlled by Hamas, even though they have never been put on any public terrorist list.¹⁶⁰ This interpretation of the law was not considered in the appeal.¹⁶¹ As a result, it appears that checking the terrorist lists will not insulate a charity from criminal sanctions if the U.S. government later disagrees with the results of their due diligence investigation of a local partner. Since NGOs cannot access secret lists used by the government, the risk of being prosecuted for working with local partners in conflict zones where DTOs are active is significant.

C. USAID's No Contact Policy

The "material support" prohibition, both in AEDPA and EO 13224, has been interpreted strictly by the United States Agency for International Development (USAID), which issued Gaza and West Bank Mission Order 18 on June 21, 2007.¹⁶² The context was that Hamas, designated as a FTO by the Department of State, had won the 2006 election and taken power in Gaza. NGOs receiving USAID grants and contracts were told that contact with either private Palestinians or

¹⁵⁸ This appears to be a classic *ex post facto* application of the law, as the government's determination that the group was controlled by a terrorist organization comes *after* the contact.

¹⁵⁹ "Introduction to Treasury's Updated Anti-Terrorist Financing Guidelines," Department of Treasury, last modified December 1, 2010, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities-intro.aspx>

¹⁶⁰ *U.S. v. El Mezain, et. al.*, Fifth Circuit Court of Appeals, No 09-10560, Oct. 26, 2010 "Amicus Brief of Charities, Foundations, Conflict Resolution Groups and Constitutional Rights Organizations," http://www.charityandsecurity.org/system/files/Charities_Amicus_Brief.pdf

¹⁶¹ The 2008 convictions of the Holy Land Foundation (HLF) and five of its leaders were upheld by the Fifth Circuit Court of Appeals on Dec. 7, 2011. Because HLF was unrepresented the trial judge appointed an attorney to represent it on appeal. The appeals court dismissed HLF's appeal for lack of jurisdiction, saying it "was unauthorized and thus invalid, thereby depriving us of jurisdiction." *United States v. El-Mezain*.

¹⁶² Ronald W. Breen, "Contact Policy for the Palestinian Authority," USAID, June 21, 2007, <http://www.usaid.gov/wbg/misc/2007-WBG-18.pdf>.

public officials was only allowed if “they are not affiliated with a designated terrorist organization (DTO).” The notice goes on to define “contact” as “any meeting, telephone conversation, or other communication, whether oral or written.” As a practical matter, this bars groups 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 result is that since Hamas controls the education ministry in Gaza, NGOs have had problems serving children in public schools. The general counsel for one large NGO told us about the effects of the “no contact policy” in Gaza. “We were not allowed...to coordinate with the public health organization or the public school systems in order to implement programs, which is (sic) where they need to be...”¹⁶³ Although the organization could apply for a license to carry out the program, the application process for the license typically requires six to nine months for approval. During that time children devastated by the violence that is a regular part of their daily lives go without these critical services.



Photo by Andreas H. Lunde

[In Gaza], "We were not allowed...to coordinate with the public health organization or the public school systems in order to implement programs, which is [sic] where they need to be..."

-General Counsel for a large U.S. NGO

D. The Licensing Process Is Ineffective as a Means of Access

At first glance, it may appear that Treasury’s licensing regulations provide an adequate escape valve for humanitarian access that would otherwise be prohibited under material support and embargo laws. These procedures, described in Chapter II, allow Treasury to permit otherwise prohibited transactions. A closer look, however, shows that the licensing system is ill-suited to the needs of NGOs trying to operate in armed conflict. This is a result of both the structure of the regulations themselves and a stated government view that distribution of funds may pose a threat to national security.¹⁶⁴ However, license denials and delays by Treasury, for any reason

¹⁶³ Interview with the General Council of a large international NGO, (Charity and Security Network, Washington DC).

¹⁶⁴ Guinane et. al., *Collateral Damage*, 63-4.

other than an imminent security threat, interfere with legitimate activities of NGOs. As a blanket policy, it runs counter to and ignores the balance struck by the IHL framework regulating access and assistance.

InterAction, an association of nearly 200 international NGOs, has called for reforms (see text box). Treasury has denied license requests from U.S. charities that have been shut down and had their assets frozen to release their funds to other charities, even for Hurricane Katrina relief programs.

i. Persistent Problems with the Licensing Process Hamper Aid, Disaster Response.

NGOs that wish to provide aid in areas controlled by designated organizations have attempted to use the licensing process as a way to distinguish their programs from support for terrorist groups and to provide legal protection against being shut down by Treasury. The results are far from satisfactory.

In March 2009, problems with the licensing process for aid to people in Gaza was the subject of a conference call between several chief executive officers of NGOs providing aid there and George Mitchell, U.S. special envoy for Middle East peace. The NGOs spoke about their efforts to provide food, shelter, medical care, and other basics resources to those in need. An April follow-up letter¹⁶⁵ from InterAction noted some improvements but said that, overall, "for personnel the process remains unpredictable and time consuming, hindering the ability of NGOs to ramp up their programs in the face of overwhelming needs." The letter noted that unreasonable documentation and time requirements for medical shipments remain, and that there were "persistent difficulties" with getting permission to ship supplies needed to repair homes, schools, and clinics.

The letter also noted that InterAction members who were applying for licenses had run into delays because Treasury referred them for review by the State Department: "Our members will need these licenses in order to provide assistance on the scale necessary to halt the ongoing decline in the physical and mental health of Gaza's civilian population."

Despite these efforts, problems with the licensing system have persisted. InterAction's *Foreign Assistance Briefing Book*,¹⁶⁶ published in January 2011, cited licensing problems as an example of regulations that hinder government and NGO partnerships.

¹⁶⁵ Letter from Samuel A. Worthington, President and CEO of InterAction, to Hon. George Mitchell, U.S Special Envoy for Middle East Peace, April 8, 2009, <http://www.interaction.org/sites/default/files/1/LETTERS/2009-04-08%20Mitchell%20Letter.pdf>.

¹⁶⁶ *Foreign Assistance Briefing Book: critical problems, recommendations and actions for the 112th Congress and Obama administration*, (Washington DC: InterAction, 2011), http://www.interaction.org/sites/default/files/2011%20InterAction%20Foreign%20Assistance%20Briefing%20Book_Complete_0.pdf.

InterAction's Foreign Assistance Briefing Book, January 2011

Section 2, Government Civil Society Partnership

"Examples of regulations that hinder partnership abound. The Department of the Treasury's Office of Foreign Assets Control (OFAC) registration and licensing guidelines/procedures are complex and cause delays in programming by subjecting common technology items (e.g., laptop computers loaded with Microsoft Windows software) to a requirement of prior licensing. This prior licensing requirement involves time consuming multi-agency review before the technology can be deployed to certain countries where foreign assistance is being rendered. For example, in a recent emergency food aid program funded by USAID in North Korea, grantees had to wait nearly a month for an OFAC license covering ubiquitous technology items including simple flash drives and Microsoft Office, Microsoft SQL Server, and Adobe Acrobat software. Providers needed these items to enable the Commodity Tracking System that was essential to the administration of the emergency food aid program.

In addition, these procedures hinder disaster response efforts, which typically last for one to five years. Often OFAC licenses have to be renewed every three months and typically are not approved until the last minute. Therefore NGO organizations have to prepare both to close down the program and to keep it going at the same time.

Similarly, the Department of Commerce's Bureau of Industry and Security licensing requirements are geared toward commercial transactions and not to organizations conducting humanitarian programs. They fail, therefore, to take into account the unique characteristics of NGOs."

ii. Treasury Denies Licenses to Release Frozen Funds of Charities for Aid

Treasury has shut down nine U.S. charities, freezing an estimated \$8 million in funds donated for humanitarian purposes.¹⁶⁷ Many of these charities have requested licenses for the release of the funds to other charities and, in one case, to the UN, so they could be spent for humanitarian purposes. Treasury has denied all of these applications, often after prolonged delays between the time the application is submitted and the decision.

For example, in 2002, the Benevolence International Foundation asked that its funds be transferred to a children's hospital in Tajikistan and the Charity Women's Hospital in Daghestan, with safeguards to ensure safe delivery of the funds.¹⁶⁸ In 2004, the Holy Land Foundation asked that \$50,000 be transferred to the Palestine Children's Relief Fund. In 2006, KindHearts for Charitable Humanitarian Development asked that its funds be transferred to the UN, USAID (a

¹⁶⁷ Treasury says there is approximately \$3 million in currently frozen funds, but this does not include the \$5 million of the Holy Land Foundation's assets, which are have been forfeited to the government as a result of a criminal conviction for material support, now under appeal in the Fifth Circuit Court of Appeals.

¹⁶⁸ John Roth, Douglas Greenburg and Serena Wille, *National Commission on Terrorist Attacks Upon the United States, Monograph on Terrorist Financing: Staff Report to the Commission*, (Washington DC: National Commission on Terrorist Attacks Upon the United States), 101, http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

U.S. government agency), or an NGO, with priority given to refugees of the 2005 Pakistani earthquake, since most of the funds had been earmarked for that purpose.¹⁶⁹ Treasury denied all of these requests.

There is no appeal process if such requests are denied, and there is no provision in the law for the frozen funds to ever be released. Treasury has said it is holding the funds in case victims of terrorism sue for civil damages, but only one such suit has been filed. In a letter to KindHearts, Treasury said that "blocked funds are not licensed for release except under limited and compelling circumstances consistent with the national security, economic and foreign policy of the United States. Therefore, your [KindHearts] request to fund relief efforts in Pakistan from blocked funds is denied."¹⁷⁰

In other words, Treasury took the position that humanitarian relief is not a compelling need or consistent with national security. This is not only illogical (studies and polls show a more positive view of the U.S. after relief has been provided in foreign disaster areas)¹⁷¹ but is contrary to the balance struck by IHL between security concerns and humanitarian considerations.

The case of the Islamic American Relief Agency (IARA-USA) raised a new barrier to release of frozen funds for services to civilians in need. After being shut down, IARA-USA repeatedly requested that its funds be released for humanitarian and disaster aid, including assistance for victims of Hurricane Katrina and the 2005 Pakistan earthquake. After two years, Treasury responded in a June 29, 2006, letter that repeated its position that release of funds is not in the national interest, but then raised a new barrier, saying:

OFAC's current policy to deny requests to release blocked funds is consistent with the congressional intent underlying section 201(a) of the Terrorism Risk Insurance Act of 2002, Public Law 107-297. Therefore, your request to fund relief efforts in Zaire, Niger or in the wake of Hurricane Katrina from blocked assets is denied.¹⁷²

This is a misapplication of the Terrorism Risk Insurance Act (TRIA), which does not authorize funds to be held where no lawsuits have been filed or judgments rendered. Passed in 2002 and renewed in December 2007,¹⁷³ TRIA is intended to reduce economic risks and consequences related to terrorism by restoring insurance capacity to the marketplace.¹⁷⁴ Although Section 201 allows blocked assets to be used to pay judgments from litigation "against a terrorist party," only one of the designated organizations, the Holy Land Foundation, has such a judgment against it. There is no pending litigation against any other U.S. charity that has been shut down.

¹⁶⁹ Letter from Barbara C. Hammerle, Acting Director, Office of Foreign Assets Control to Jihad Smaili, Esq. Council to KindHearts for Charitable Humanitarian Development Inc., March 23, 2006.

¹⁷⁰ *Ibid.* In May 2012 Treasury agreed to a settlement that included distribution of funds to a list of approved charities.

¹⁷¹ "New Polls throughout Muslim World: Humanitarian Leadership by U.S. Remains Positive," Terror Free Tomorrow, Inc., 2006 <http://www.terrortomorrow.org/upimagesft/IRans%20Neighbors%20Poll%20Report.pdf>.

¹⁷² June 29, 2006 letter from Office of Foreign Assets Control to IARA-USA, on file with Charity & Security Network

¹⁷³ *Terrorism Risk Insurance Reauthorization Act of 2007*, HR 2761, was signed by President George W. Bush on Dec. 26, 2007.

¹⁷⁴ "The Business of Terrorism: TRIA," *Florida Bar Journal* 77, (2003): 63

An examination of the *Congressional Record* does not reveal any evidence that Congress intended blocked funds to be held based only on the potential for litigation.¹⁷⁵

In addition, in 2003 the U.S. Court of Appeals for the Second Circuit ruled in *Smith v. Federal Reserve Bank of New York*¹⁷⁶ that:

The language of section 201 cannot reasonably be read to mandate that terrorist assets be blocked in perpetuity. It states simply that blocked assets "shall be subject to execution or attachment in aid of execution." We believe that the plain meaning of that language is to give terrorist victims who actually receive favorable judgments a right to execute against assets that would otherwise be blocked. Thus, although the statute applies broadly to "every case in which a person has obtained a judgment," it confers no entitlement on victims who have not yet obtained judgments. Neither does it guarantee that any blocked assets will in fact be available when a particular victim seeks to execute on a judgment.¹⁷⁷

Although that case involved victims of terrorism who were seeking to satisfy judgments against assets of the Republic of Iraq, the same principle holds in the case of frozen charitable funds.

¹⁷⁵ Sahar Aziz, "Review of Legislative History Shows Treasury's Position on Frozen Funds Without Basis," *Charity and Security Network*, June 15, 2011, http://www.charityandsecurity.org/analysis/leg_history_frozen_funds.

¹⁷⁶ *Smith v. Federal Reserve Bank of New York*, 346 F.3d 264 (2d Cir. 2003).

¹⁷⁷ *Ibid.*, 271 (emphasis added).

Chapter VII

Limited Humanitarian Exemptions Are Barriers to Helping Civilians

Chapter I describes the way in which U.S. law imposes criminal sanctions for providing humanitarian aid that involves a designated terrorist organization (DTO), exempting only religious materials and medicine. Chapter II describes the way in which Executive Order 13224 suspends the traditional humanitarian exemption contained in U.S. embargo laws. These extremely narrow exemptions are contrary to U.S. international obligations, as described in Chapters III and IV. By strictly limiting humanitarian exemptions in counterterrorism policies, U.S. law and policy effectively create barriers to NGO access to civilians in need and can result in discriminatory aid criteria.

A. The United States' limited exemption imposes a permanent, blanket ban when IHL allows only temporary restrictions

Common Article Three, applicable to non-international conflicts, allows relief societies to offer their services with the intent of alleviating the needs of civilians suffering in armed conflict.¹⁷⁸ The Commentary to Additional Protocol II states that is impossible to draw up an "exhaustive list of criteria" indicating when a population is "suffering undue hardship." One can, however, look to the usual standards of living of the population and the particular, and often urgent, needs provoked or exacerbated by the conflict. The Commentary adopts a broad understanding of what amounts to basic necessities to provide to the civilians, highlighting especially the "medical requirements" that are covered under the "very general term 'medical supplies.'"¹⁷⁹

Assistance under this article is understood as "complementary" to efforts of the state.¹⁸⁰ It should be provided when "the responsible authorities can no longer meet the basic necessities of the civilian population whose survival is in jeopardy."¹⁸¹ The organization providing the assistance must be humanitarian in nature, and must base distribution on need alone. In other words, the assistance must be impartial and conducted without adverse distinction. Access is predicated on consent from the state; this consent, however, may not be withheld arbitrarily.¹⁸²

The framework of access and assistance presumes a degree of temporariness. It was established to address the pressing needs of citizens caught up in armed conflict. It was not intended to extend beyond the conflict, nor was it crafted to provide for a means of intervening in the conflict. In other words, it is a regime applicable in exceptional and temporary circumstances and, as such, strikes a balance between military concerns and humanitarian considerations by ensuring that the framework is restrictive in its scope and prioritizes the principles of humanity and impartiality. The U.S. counterterrorism measures, however, impose a permanent and inflexible ban on everything but medicine and religious materials.

¹⁷⁸ Common Article 3.

¹⁷⁹ Jean Pictet, ed., *Commentary: Additional Protocol II to the Geneva Conventions*, (Geneva: International Committee of the Red Cross): 1479, <http://www.icrc.org/ihl.nsf/COM/475-760024?OpenDocument>

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Ibid.*

A Hungry Child Knows No Politics

Prior to 2001 the U.S. had a long-standing policy of nondiscrimination in delivery of humanitarian aid. The article "A Hungry Child Knows No Politics: A Proposal for Reform of the Laws Governing Humanitarian Relief and 'Material Support' of Terrorism," by Ahilan Arulanantham, notes:

It was the late President Ronald Reagan who courageously declared that "a hungry child knows no politics," in order to justify his decision to send food aid to the Communist dictatorship in Ethiopia at the height of the Cold War. Although he no doubt believed that defeating the communist regime in that country was important to our national security, he was not willing to forego feeding starving civilians on that basis. Like most Americans, President Reagan would probably be quite shocked to learn that our current government has cast aside his teaching and actually criminalized humanitarian relief to victims of war and natural disaster in the name of the war on terror.

The Commentary addresses the practical application of getting aid to civilians living under control of a DTO. It explicitly contemplates that relief societies be provided the opportunity to address and remedy any political or security objections to allowing aid flows when their programs are "carried out with great care and precision as to technical detail..."¹⁸³ The types of conditions that nations may impose on NGOs involve logistics such as timetable and itinerary arrangements and checking convoys.¹⁸⁴ Through its restrictive approach, U.S. law makes it exceptionally difficult for NGOs to work out such logistical details. U.S. law does not consider the degree of care and precision undertaken to ensure that aid reaches only the intended civilian population. In the Introduction of its *Anti-Terrorist Guidelines: Voluntary Best-Practices for U.S. Based Charities*,¹⁸⁵ the Department of the Treasury has made it clear that no amount of due diligence provides legal protection and that strict liability is imposed on NGOs.

It must be noted that the purpose of a humanitarian exemption in the current domestic counterterrorism framework would not be to aid terrorist organizations, but rather, to ensure that civilians under their control do not suffer unnecessarily. To remedy the discrepancy between U.S. counterterrorism measures and international law, a humanitarian exemption under domestic law should include, at a minimum, the following:

- Care of the wounded and sick, including medicine, medical services, and hospital stores;
- Supplies essential to survival, such as water, foodstuffs, clothing, shelter, and public utility services;

¹⁸³ Jean Pictet, ed., *Commentary: Additional Protocol II to the Geneva Conventions*, (Geneva: International Committee of the Red Cross): p. 1480, <http://www.icrc.org/ihl.nsf/COM/475-750999?OpenDocument>.

¹⁸⁴ *Ibid.*

¹⁸⁵ "Introduction to Treasury's Updated Anti-Terrorist Financing Guidelines," Department of Treasury, last updated December 1, 2010, <http://www.treasury.gov/resource-center/terrorist-illicit-finance/Pages/protecting-charities-intro.aspx>

- Objects necessary for religious worship;
- Facilitation of communications among family members; and
- Orphanages and similar facilities and education for children under the age of 15.

B. Exemptions Under International Law Are Broader Than Those Provided by U.S. Measures

Humanitarian exemptions are well-recognized international legal mechanisms to accommodate security concerns without compromising or jeopardizing entire humanitarian operations. The U.S. has supported the use of broad humanitarian exemptions to UN economic sanctions regimes in various contexts, notably Darfur and Somalia.¹⁸⁶ For example, binding Security Council Resolution 1556 (2004) forbids UN members from selling or supplying materials to all militia members in Darfur. But Paragraph 9 of this Resolution exempts "supplies of non-lethal military equipment intended solely for humanitarian, human rights monitoring or protective use, and related technical training and assistance."

The U.S. as one of the five permanent members of the UN Security Council has veto power over Security Council Resolutions, but has approved several involving humanitarian exemptions. In 2010 the Security Council expanded a humanitarian-based carve-out for a sanctions regime applicable to Somalia. In a Resolution in which the Security Council condemned the politicization, misuse, and misappropriation of humanitarian assistance, it established an exemption for "funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance."¹⁸⁷ This expanded on the existing carve-out for "financial assets or economic resources that have been determined . . . to be necessary for basic expenses, including payment for foodstuffs, rent or mortgage, medicines and medical treatment, taxes. . ."¹⁸⁸ Moreover, the travel ban instituted as part of the sanctions regime contains a humanitarian carve-out, exempting (on a case-by-case basis) such travel that "is justified on the grounds of humanitarian need, including religious obligation."¹⁸⁹ The existence of these substantial humanitarian carve-outs proves that an effective approach that contains broad exemptions for purely humanitarian and impartial assistance is not only workable but internationally legitimate. Despite U.S. support for this exemption, NGOs operating in accordance with the UN carve-outs may still contravene U.S. domestic counterterrorism measures, as they do not reflect the approach adopted by the UN.

C. Fungibility: The Flawed Justifications for the Narrow U.S. Humanitarian Exemption

Proponents of a broad definition of material support argue that it is necessary to avoid indirectly aiding terrorist groups.

The original provision in the material support statute, passed in 1994, exempted "humanitarian assistance to persons not directly involved" in terrorism. This language generally reflects the

¹⁸⁶ UN Security Council Resolution 1556 (2004).

¹⁸⁷ UN Security Council Resolution 1916 (2010).

¹⁸⁸ UN Security Council Resolution 1844 (2008).

¹⁸⁹ UN Security Council Resolution 1844 (2008), section 2.

balance struck by IHL in terms of carving out space for humanitarian operations. In 1996, however, following the Oklahoma City bombing the previous year, the statute was amended to limit the exemption to medicine and religious materials. Congressional "findings of fact" supporting the narrow material support statute indicate that Congress believed that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct."

This is often referred to as the "fungibility argument." The U.S. government has reasserted it often, including its defense of the breadth of the material support statute in *Holder v. Humanitarian Law Project*.¹⁹⁰ In that case, the Department of Justice argued that any contribution to a foreign terrorist organization frees up resources for that organization's other activities, including its violent and unlawful ones.

Carried to its logical extreme, the fungibility line of argument would preclude ever providing aid to people in regions where terrorist groups operate. After all, if the people a group is assisting are people that a DTO would otherwise have helped, the effort of the humanitarian organization has saved the terrorist group resources that it would otherwise have spent.

Congress has never investigated the factual basis for its sweeping claims about fungibility, either at the time it amended the law or since. It has never made a single finding of fact demonstrating how often these hypothetical problems occur, what factors are involved, or how fungibility or legitimization can be prevented or minimized. References to the "fact" of fungibility trace back to a single entry in the *Congressional Record* that does not include any evidence.¹⁹¹ The only hearing held on the matter when the bill was amended did not bring forth any specific examples to support the claim.

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 FTOs, either directly or indirectly. Thus, the significance of the principles of humanity, neutrality, and impartiality are reaffirmed.

i. The NGO Sector's Accountability Standards Help Prevent Indirect Benefits to Armed Groups

Major NGOs have developed and adopted various governance and accountability standards, including those specifically tailored to international work (see text box). Furthermore, U.S. law

¹⁹⁰ *Holder v. Humanitarian Law Project*.

¹⁹¹ The Charity & Security Network's research found that references to the "fact" of fungibility in numerous judicial opinions, including Chief Justice John Roberts's opinion in *Holder v. Humanitarian Law Project* (HLP). This and other opinions either cite the Congressional Record (H.R. Rep. No. 104-383, at p. 43 and 81, 1995) or other sources that rely on it. These statements contain no factual information about fungibility and do not cite any sources. The June 13, 1995 hearing on the legislation, H.R. 1701 in the 104th Congress, before the House Judiciary Committee had only one reference to fungibility (witness Ruth Lansner), and that was a categorical statement that was not supported by factual allegations or references to research. The 1998 Declaration of Kenneth R. McKune, Associate Coordinator for Counterterrorism in the Department of State in the HLP litigation similarly relied on the Congressional findings and contained no references to research or specific facts.

and IRS regulations impose very high financial and reporting requirements upon NGOs that help obviate the risks of fungibility.

Examples of Standards for Humanitarian Organizations

- The International Red Cross and Red Crescent Movement's *Principles of Conduct in Disaster Response Programmes*
- *The Do No Harm Handbook: The Framework for Analyzing the Impact of Assistance on Conflict*, a project of the Collaborative for Development Action, Inc. and CDA Collaborative Learning Projects, November 2004
- *InterAction's Private Voluntary Organization (PVO) Standards*, 1992, updated January 2011.
- Humanitarian Accountability Partnership
- Transparency International's *Preventing Corruption in Humanitarian Operations Handbook of Good Practices*, 2010
- The Sphere Project's *Humanitarian Charter and Minimum Standards in Humanitarian Response*, 2011

As part of the ongoing efforts to ensure oversight and accountability, the NGO sector has also developed practices and tools to guard against any incidental benefit aid provision may have for armed groups. The book, *Do No Harm: How Aid Can Support Peace – or War*, first published in 1999¹⁹² and updated in 2004, introduced a seven-step "Analytical Framework" that allows NGOs to map conflict interactions so programs can be planned, monitored, and evaluated in a way that alerts NGOs to problems and facilitates solutions.

The handbook notes two resource transfer concerns that are incorporated into the fungibility argument. First, that assistance can act as a "substitute for local resources that would have been used to meet civilian needs and, thus, free these up to be used in support of war. There is a political substitution effect that is equally important...As the assistance agencies take on support of non-war aspects of life, such leaders can increasingly abdicate responsibility for these activities." Second, it noted what it calls "legitimization effects," noting that "Assistance legitimizes some people and some actions and weakens or side-lines others."¹⁹³

To address these concerns, the 23-page handbook provides detailed guidance on how to carry out the seven-step "Analytical Framework." It emphasizes that "Experience has shown that there are always alternative ways of doing what our assistance is mandated to do...we can identify alternative ways of how to do what we are mandated to do, avoiding negative impact."

¹⁹² Mary B. Anderson, *Do No Harm: How Aid Can Support Peace – or War*, (Lynne Rienner Publications, 1999).

¹⁹³ *Ibid.*, 11.

ii. UN Protocols Set Standards for Negotiating Humanitarian Access with Armed Groups

As conflict around the world is driven more and more by non-state entities, problems associated with gaining humanitarian access to carry out programs in conflict areas have grown.

Recognizing the need for a structured approach to negotiating humanitarian access, in 2006 the UN published *Humanitarian Negotiations with Armed Groups: A Manual for Practitioners*.¹⁹⁴ The 87-page document defines the concept of “humanitarian negotiations” as opposed to political ones and provides a step-by-step approach to preparation, negotiating, implementing, and monitoring the results. Although such negotiations generally do not have physical components, some elements may still risk falling within the fungibility argument per the expansive interpretation of the material support statute adopted by the U.S. Supreme Court.

It says, “Humanitarian negotiations are a tool to enable, facilitate and sustain humanitarian action, and therefore they must be undertaken in accordance with the three core principles of humanity, neutrality and impartiality that underpin all humanitarian action.” When these principles are adhered to, humanitarian negotiations “do not in any way confer legitimacy or recognition on armed groups, nor do they mean that the humanitarian negotiators support the views of an armed group.” Instead, humanitarian negotiators are “civilians engaged in managing, coordinating and providing humanitarian assistance and protection, in order to assist and protect vulnerable populations, preserve humanitarian space and promote respect for international law.”¹⁹⁵

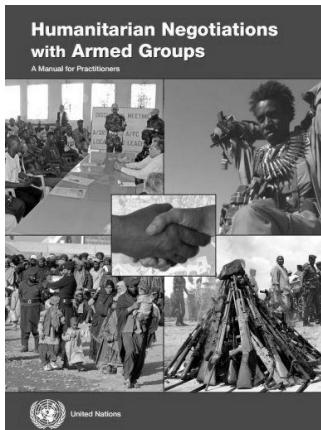
The manual’s standards and practices are applicable to all armed groups, including terrorist organizations. In contrast to U.S. material support and embargo laws, which prohibit humanitarian negotiations when the group is on a U.S. terrorist list, the manual says when “negotiating with an armed group is deemed a humanitarian necessity, then the designation of that group as a ‘terrorist’ group by some States or institutions should not automatically preclude negotiations with the group. As with negotiations with all armed groups, negotiations with those that employ terror tactics must focus solely on humanitarian issues and not on the political demands or aspirations of the armed group.”

“Humanitarian negotiations are a tool to enable, facilitate and sustain humanitarian action, and therefore they must be undertaken in accordance with the three core principles of humanity, neutrality and impartiality that underpin all humanitarian action.” When these principles are adhered to, humanitarian negotiations “do not in any way confer legitimacy or recognition on armed groups, nor do they mean that the humanitarian negotiators support the views of an armed group.”

¹⁹⁴ Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: A Manual & Guidelines for Practitioners*, (New York: United Nations, 2006), <http://ochaonline.un.org/humanitariannegotiations/index.htm>. See also, Gerard McHugh and Manuel Bessler, *Humanitarian Negotiations with Armed Groups: Manual for Practitioners*, (New York: United Nations, 2006), <http://ochaonline.un.org/humanitariannegotiations/Documents/Guidelines.pdf>.

¹⁹⁵ *Ibid.*, Chapter 3 Section 3.2

An additional resource was published in 2011. The UN's Office for the Coordination of Humanitarian Affairs published *To Stay and Deliver: Good practice for humanitarians in complex security environments*.¹⁹⁶ This manual further develops the field of best practices and standards for humanitarian groups who must deal with armed groups to gain access to civilians and to carry out their programs. The problems U.S. law creates are reflected in the finding that some host and donor governments "have created unfavorable conditions and outright constraints to the forging of secure humanitarian access...The undermining of humanitarian principles presents more than merely theoretical or legal problems; it creates practical impediments to access, acceptance, and security for humanitarian operations."¹⁹⁷ It recommends that nations "[r]efrain from enacting legislation and policies which undermine humanitarian engagement with all parties to the conflict, including non-state armed groups, essential to access all affected populations. Existing policies which seek to restrict such engagement should be reconsidered in light of the safeguards established by the various professional guidelines."¹⁹⁸



UN OCHA: *Humanitarian Negotiations with Armed Groups*

More information on humanitarian negotiations can be found in *Humanitarian Negotiations with Armed Groups*, published in 2006 by the UN's Office for the Coordination of Humanitarian Assistance.

D. International Humanitarian Law Does Not Allow Fungibility Concerns to Categorically Block All Aid

IHL does not warrant denial or suspension of humanitarian access on hypothetical assertions of fungibility. Rather, as this report thoroughly documents in Chapter IV, IHL *only* permits a state to temporarily, and under certain, narrow conditions, restrict access to civilians in need.

The most direct international law support for the fungibility argument comes from Article 23 of the Fourth Geneva Convention. Even though applicable in situations of international armed conflict, a clear analogy may be drawn to non-international armed conflict, in which the general

¹⁹⁶ Jan Egeland, Adele Harmer and Abby Stoddard, *To Stay and Deliver: Good Practice for Humanitarians in Complex Security Environments*, (New York: United Nations Office for the Coordination of Humanitarian Affairs, 2011), http://ochaen.unocha.org/p/Documents/Stay_and_Deliver.pdf

¹⁹⁷ *Ibid.*, 46.

¹⁹⁸ *Ibid.*, 49.

principles are equally relevant. Article 23 addresses the requirement that the adversary state provide for civilians suffering under a blockade (a particular tool of warfare). The article mandates that, even during blockades, nations must allow the free passage of medical and hospital consignments and objects necessary for religious worship. Also mandated for free passage are essential foodstuffs, clothing, and "tonics" only for children under age 15 and expectant mothers, even if the recipients of this aid are citizens of the enemy, as long as this aid is *intended* for civilians.¹⁹⁹ A nation may only constrain the flow of these articles, however, if it believes either that "the consignments may be diverted from their destination," or that "a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods."²⁰⁰ Even these constraints must be temporary and not be arbitrarily imposed.

The object of blockades is to "place the adverse party in a state of complete economic and financial isolation." They do, however, often result in suffering of the civilian population as a whole. In response to use of the blockade during World War II, the ICRC fought for legal protections for certain categories of vulnerable populations from their effects. Article 23 is the result of that effort. "The right to free passage means that the articles and material in question may not be regarded as war contraband and cannot therefore be seized," the ICRC explains. But the conditions upon exercise of this right reflect considerations of military necessity.²⁰¹

As to the fear that such humanitarian aid might be misappropriated by the enemy, the ICRC makes it clear that "[a] doubt as to the destination of consignments would not be sufficient reason for refusing them free passage." Importantly, "the fears of the Power imposing the blockade must be based on serious grounds, i.e. they must have been inspired by the knowledge of certain definite facts."²⁰² As previously noted, Congress has offered no such facts to support its claims about fungibility.

With respect to the "definite advantage" that may accrue to the enemy from the small universe of humanitarian aid contemplated by this Article, the ICRC explains that, while any amount of material resources may benefit the recipient in some manner, the principles underlying the whole framework prevent states from relying on such nominal benefit "as a pretext for refusing to authorize any free passage of goods." Rather, the ICRC reaffirms the significance of a definite advantage accruing to the other side, and concludes that the respect for humanitarian access to civilians will depend largely on how nations make use of their discretion, and "[i]t is to be hoped that they will use those powers in full awareness of their responsibilities."²⁰³

¹⁹⁹ Fourth Geneva Convention, article 23.

²⁰⁰ *Ibid.*

²⁰¹ Pictet, ed., *Commentary: Convention (IV) Relative to the Protection of Civilian Persons in Time of War*, article 23.

²⁰² *Ibid.*

²⁰³ *Ibid.*

Chapter VIII

U.S. Counterterrorism Rules Violate Key Principles of Humanitarian Action

U.S. counterterrorism measures appear to disregard, and in some cases seriously compromise, humanitarian principles. This jeopardizes the distribution of assistance to those who need it most. Rather than aid being distributed in accordance with the principles of humanity, impartiality, and neutrality, U.S. security policy in some cases risks compromising the ability of humanitarian organizations to operate in an impartial and neutral manner. Maintaining a clear distinction between the role and function of humanitarian actors from those of the state or the military is a major factor in creating an operating environment in which humanitarian organizations can conduct their assistance efforts both safely and effectively. U.S. counterterrorism measures essentially make humanitarian operations instruments of foreign policy. In so doing these measures compromise these organizations and their operations, at times injecting discriminatory criteria into the delivery of humanitarian assistance.

Examples of unequal treatment of civilian beneficiaries in conflict zones are not hard to find. By disallowing NGOs from drilling wells in Somalia, the U.S. government's policies had the practical effect of discriminating against entire villages because they had the misfortune to find themselves in areas controlled by al-Shabaab. Humanitarian organizations are uniquely situated in that they operate in strict accordance with the principles of impartiality, neutrality and independence. These are compromised when U.S. counterterrorism measures dictate which population an organization can provide assistance to. Any restrictions beyond those already established by the principles of humanitarian action risk compromising the organization's ability to operate in accordance with these fundamental principles. In the aftermath of the 2005 Pakistan flood, an international NGO worker described how counterterrorism rules affected civilians:

Food was not distributed to Al-Rashid Trust. They would come to coordination meetings but we didn't interact too much. Al-Rashid had their own little bit of the camp that was cordoned off and they did their own thing. At the end we interacted with them a lot to develop an incentive system for IDPs (Internally Displaced Persons) to return home... We couldn't give USG funded supplies to Al-Rashid Trust—we were very conscious of this—although I didn't really care as everyone needed help. Al-Rashid Trust knew what was going on and I was embarrassed and felt guilty. The Al-Rashid Trust staff were being pressured by their camp dwellers and asked why they weren't getting the full package that others were getting.²⁰⁴

To bring U.S. security policy into alignment with these principles, the U.S. government must revisit strategies that militarize aid operations and U.S. foreign assistance programs. This results in discriminatory aid delivery that not only contradicts the fundamental principles of impartiality, but also risks compromising the neutrality of NGOs.

²⁰⁴ Andrew Wilder, *Perceptions of the Pakistan Earthquake Response: Humanitarian Agenda 2015 Pakistan Country Study*, (Medford, MA: Tufts University Feinstein International Center, 2008), <http://www.eisf.eu/resources/library/Pakistan-Earthquake-Response.pdf>.

A. The Militarization of Aid and NGO Independence

Responding to ever widening and increasingly ambiguous mandates, military actors have steadily expanded their humanitarian and reconstruction missions. This is demonstrated by the emphasis on development and other aid projects in places such as Afghanistan and Iraq. Still, while military leadership's commitment to "winning the peace" has become a key part of any successful military strategy, it has a cost. InterAction 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.²⁰⁵

The increase in military relief operations has made it more difficult for NGOs to retain their neutrality as well as their independence from the government. By definition, humanitarian aid must be needs-based and provided without expecting anything in return. This runs counter to military objectives that typically limit assistance to areas secured by force or in exchange for information or political support.²⁰⁶ Military actors should seek to avoid operations or activities that compromise the independence or safety of humanitarian actors. NGOs and their work should never be considered as "force multipliers" by military leadership. To the greatest extent possible, military operations should be conducted in a manner that respects the humanitarian operating environment, and humanitarian groups should ensure that their outward appearance could not be perceived as associated with the military. Similarly, NGOs should avoid relying on military escorts or military support in their operations, so as to avoid compromising their neutrality. Should humanitarian assistance be, or perceive to be, serving purposes other than the well-being of the population, then the assistance, the aid providers, and the beneficiaries may become targets of attacks.²⁰⁷

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Concerns about this effect lead to a Feb. 21, 2012 letter to the head of the CIA from InterAction, the largest alliance of U.S.-based humanitarian and international development non-governmental organizations (NGOs), protesting its use of a vaccination campaign in 2011 as cover for collecting intelligence information in Pakistan. "The CIA's use of the cover of humanitarian activity for this purpose casts doubt on the intentions and integrity of all

²⁰⁵ InterAction, *Foreign Assistance Briefing Book*, (Washington DC: InterAction, 2011): section 16, <http://www.interaction.org/document/2011-interaction-foreign-assistance-briefing-book>.

²⁰⁶ Egeland et. al., *To Stay and Deliver*, 36.

²⁰⁷ InterAction, *Foreign Assistance Briefing Book*, section 16.

humanitarian actors in Pakistan," the letter said.²⁰⁸ U.S. Defense Secretary Leon Panetta confirmed that the CIA had launched the fake vaccination campaign in an interview on January 27, 2012.

Samuel Worthington, InterAction's executive director, noted that since reports of the CIA campaign surfaced last year, "we have seen continued erosion of U.S. NGOs' ability to deliver critical humanitarian programs in Pakistan and an uptick in targeted violence against humanitarian workers. I fear CIA's activities in Pakistan and the perception that U.S. NGOs have ties with intelligence efforts may have contributed to these alarming developments." InterAction, whose members include International Rescue Committee, Mercy Corps, and Relief International, said, "The CIA-led immunization campaign compromises the perception of U.S. NGOs as independent actors focused on a common good, and ... jeopardizes the lives of humanitarian aid workers."

Dangers of the *Civilian-Military Cooperation Policy*

This problem surfaced in a July 2008 plan outlined by USAID and the Department of Defense (DoD) that would require humanitarian groups to collaborate with the military when working in the same area. The *Civilian-Military Cooperation Policy*¹ says USAID will "cooperate with DoD in joint planning, assessment and evaluation, training, implementation, and communication in all aspects of foreign assistance activities where both organizations are operating, and where civilian-military cooperation will advance USG foreign policy."

This plan has been called "potentially lethal" by critics, which include some of the largest charitable organizations, such as InterAction, CARE, and International Relief and Development. Elizabeth Ferris, a senior fellow at the Brookings Institution, warns that a close relationship between the military and humanitarian groups will open the door for attacks on NGOs. Ferris says:

Once insurgent groups (or governments in some situations) perceive that a humanitarian organization is acting to pursue military or political objectives, that organization loses the protection it had by virtue of respect for humanitarian principles. If it is known (or suspected) that a humanitarian NGO is not only treating wounded kids in an insurgent area, but is also passing on information about that area to military officials, the NGO usually loses its protection from all sides.

Virginia M. Moncrieff, "Potentially Lethal: Increased Relationship between Military and Aid," *Huffington Post*, December 22, 2008.

²⁰⁸ Letter from Samuel Worthington, President, InterAction to Leon Panetta, Director, Central Intelligence Agency, Feb. 21, 2012, <http://www.mcclatchydc.com/2012/03/02/140644/letter-to-gen-petraeus-from-interaction.html>

B. Infringements on neutrality and aid worker safety

Neutrality is a cornerstone of humanitarian assistance. 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. Humanitarian relief operations in conflict zones are increasingly being attacked by armed groups because of real or perceived association with governments' foreign policy agendas. In 2008, 260 humanitarian aid workers were killed, kidnapped, or seriously injured in violent attacks around the world. It was the highest number of incidents since the UK-based ODI began tracking attacks on humanitarian aid workers in 1997.²⁰⁹ ODI found the percentage of politically motivated attacks rose from 29 in 2003 to nearly 50 in 2008. In Afghanistan, political motivation is believed to be the driving force behind at least 65 percent of attacks on aid workers.

In countries such as Afghanistan, Sudan, and Somalia, the increase of politically motivated killings has forced aid groups and agencies to interrupt critical humanitarian relief efforts that affect the lives of millions. To reduce the attacks on aid workers and restore the humanitarian chain, NGOs must be able to maintain their neutrality, remain independent of military or political influence, and deliver aid in an impartial manner.

Current U.S. rules require aid workers, including local Somalis, to inform U.S. officials each time that aid is unintentionally usurped by the terrorist group al-Shabaab. An aid worker in the country warned that these requirements "could make us and our people look like spies" and could jeopardize the security of the aid workers.²¹⁰ Examples of the danger this creates abound. Amnesty International says the "[i]nsurgents frequently target aid workers" in Pakistan, "accusing them of spying or collaborating" with the government.²¹¹ Attacks that killed six members of World Vision's staff near the Pakistani border with Afghanistan in March 2010 forced the interruption of an ongoing relief campaign in response to the 2005 earthquake.²¹² On April 7, 2009, three female workers and a driver for a USAID-funded organization, Rise International, were killed by unidentified gunmen in the same region.

To slow this trend, several humanitarian and security groups, including the ICRC and European Interagency Security Forum (EISF) have called on aid groups to take care to preserve their independence from outside forces, and be impartial in their relief efforts. EISF urges NGOs

²⁰⁹ Abby Stoddard, Adele Harmer, Victoria DiDomenico, "Providing Aid in Insecure Environments: 2009 Update," *Humanitarian Policy Group* 34, (2009), <http://www.odi.org.uk/resources/download/3250.pdf>.

²¹⁰ Jeffery Gettleman, "UN Criticizes U.S. Restrictions on Aid in Somalia," *New York Times*, February 17, 2010, <http://www.nytimes.com/2010/02/18/world/africa/18somalia.html>.

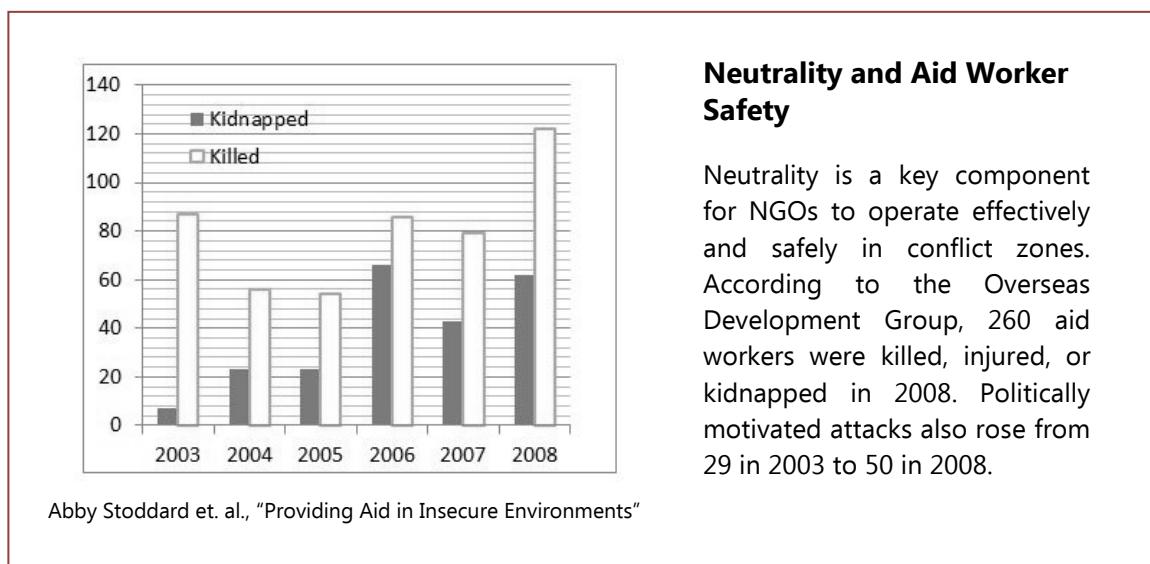
²¹¹ "Attack on Pakistani Humanitarian Workers 'Major Setback' to Human Rights," *Amnesty International*, March 12, 2010. <http://www.amnesty.org/en/news-and-updates/attack-pakistani-humanitarian-workers-major-setback-human-rights-2010-03-12>.

²¹² Dean Owen, "World Vision: Pakistan Attack 'Brutal and Senseless,'" *World Vision*, March 10, 2010, <http://www.worldvision.org/content.nsf/about/20100310-pakistan-attack>.

working in conflict zones to operate in ways distinctly separate from military development strategies because it will become "hard to convince skeptical observers that those providing aid are really 'neutral' or 'impartial'."²¹³ In addition to mitigating risk factors by anticipating dangers, the ICRC recommends that NGOs operating in dangerous locations project "an unchanging and coherent image" based on the core humanitarian principles, including humanity, neutrality, and independence.²¹⁴ In 2009, CARE published a policy paper²¹⁵ guiding their relations with military forces, saying that "blurred lines between humanitarian and military actors may undermine aid agencies' acceptance among local populations and parties to the conflict as well as increase the level of insecurity."

ODI concluded that "[i]f the greater portion of international humanitarian aid organizations were able to achieve independence and project an image of neutrality this would surely enhance operational security and benefit humanitarian action as a whole."²¹⁶

Underscoring these recommendations, a December 2009 report²¹⁷ from the Afghanistan NGO Safety Office (ANSO) found that the issue of NGO neutrality was the determining factor in most targeted attacks and abductions conducted by Taliban and other armed groups across the country. "Neutrality and local acceptance, not the military or counter-insurgency," the report found, "have become the dominant factors of security for NGOs." As evidence, ANSO said the majority of the 59 NGO staff abducted by insurgents in 2009 was released unharmed after local sources vouched for their impartiality. This is why government rules that pressure NGOs away from a neutral position are so problematic.



Neutrality and Aid Worker Safety

Neutrality is a key component for NGOs to operate effectively and safely in conflict zones. According to the Overseas Development Group, 260 aid workers were killed, injured, or kidnapped in 2008. Politically motivated attacks also rose from 29 in 2003 to 50 in 2008.

²¹³ Koenraad Van Brabant, *Managing Aid Agency Security in an Evolving World: The Larger Challenge*, (European Interagency Security Forum, 2010), http://www.eisf.eu/resources/library/EISF_Agency_Security_December2010.pdf.

²¹⁴ Patrick Brugger, "ICRC Operational Security: Staff Safety in Armed Conflict and International Violence," *International Review of the Red Cross Documents and Reports* 91, no. 874 (2009), <http://eisf.eu/resources/library/irrc-874-Brugger%20%281%29.pdf>.

²¹⁵ "Policy Framework for CARE International's Relations with Military Forces," CARE, <http://www.care-international.org/CIVMIL-Policy/policy-framework-for-care-internationals-relations-with-military-forces.html>

²¹⁶ <http://www.odi.org.uk/resources/download/3250.pdf>.

²¹⁷ "Security Q2 Report 2011 Summary," Afghan NGO Safety Office, 2011, <http://www.afqnsos.org/2008%20week/THE%20ANSO%20REPORT%20%2816-31%20December%202009%29.pdf>.

The effect of the overly-restrictive U.S. counterterrorism measures is twofold. The measures effectively decrease the number of humanitarian actors who can, or will, operate in environments in which DTOs are present. They also establish conditions that push NGOs to cooperate with the government. Some have labeled this a strategy of "cooption" adopted by the government.²¹⁸ They describe it as the government utilizing regulation—ostensibly aimed at preventing any diversion of assistance or potential legitimization of DTOs—to actually incorporate humanitarian actors into the security and reconstruction agenda of the state.²¹⁹ Through this approach, the state benefits from the access humanitarians have to communities, allowing state and military officials a unique, and prized, entry point. It is exactly this type of cooptation, or instrumentalization, that the humanitarian principles guard against. As explained above, ensuring neutrality and independence of humanitarian actors is critical to their ability to gain predictable and safe access, as a means to provide assistance in an impartial manner. The scope of their action is limited precisely to ensure that their relief operations are not compromised or coopted. The current counterterrorism regulations risk seriously compromising these operational principles.

C. USAID's Partner Vetting System: Using NGOs for Intelligence Gathering

USAID's Partner Vetting System (PVS) is a prime example of misdirected national security programs that fundamentally 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. Rather than creating a safe distance from government, PVS puts NGOs in the position of gathering intelligence 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 2012.²²⁰ NGO experts say this type of activity will discourage local charitable groups from working with U.S. NGOs and strain aid delivery mechanisms, noting that NGOs cannot function effectively if they cannot form partnerships with other NGOs.²²¹

In addition to intruding into neutral NGO space with PVS, USAID has been unresponsive to complaints that the program creates unnecessary and potentially dangerous barriers for humanitarian groups. This failure to acknowledge the harsh realities NGOs face while working in conflict zones or failed states demonstrates a disturbing lack of understanding on the part of USAID. And, as Samantha Power, now director of Multilateral Affairs on the National Security Council has noted, it also fails to acknowledge that "United Nations officials and aid workers who choose to work in conflict zones have always exposed themselves to banditry, crime and

²¹⁸ See, e.g., Program on Humanitarian Policy and Conflict Research, Harvard University, Working Paper, "Humanitarian Action under Scrutiny: Criminalizing Humanitarian Engagement" (February 2011): 28

<http://c0186748.cdn1.cloudfiles.rackspacecloud.com/HPCR%20CHE%202011.pdf>

²¹⁹ *Ibid.*

²²⁰ "Status Report: Partner Vetting System (PVS) Pilot Program," USAID, 2011,

<http://www.charityandsecurity.org/system/files/PVS%20PUBLIC%20Mtg%20STATUS%20REPORT%2009082011%20FINAL.pdf>.

²²¹ Brian Majewski, Panel discussion, *The Dilemma for U.S. NGOs: Counterterrorism Laws vs. the Humanitarian Imperative*, (Charity and Security Network, Washington D.C., June 1, 2009).

violence. But the assaults, kidnappings and killings of humanitarians have more than doubled in the past five years—precisely when independent humanitarian, reconstruction and development assistance has been urgently needed in places like Afghanistan and Iraq.²²²

D. Treasury's Proposed "Alternative Distribution Mechanisms" Violates Neutrality

On August 1, 2008, the Americans for Charity in Palestine (ACP), a 501(c)(3) organization founded by Palestinian American Dr. Ziad Asali, signed a Memorandum of Understanding (MOU) with USAID to ensure that all recipients of ACP donations are fully vetted and approved by USAID. According to a USAID press release, the MOU launched "a public-private partnership aimed at expanding U.S. private donor assistance to Palestinians in the West Bank and Gaza."²²³

Treasury officials' remarks indicate they believe this is a potential solution to the barriers U.S. laws create to humanitarian aid delivery. "We wanted to be able to go to the donors and say, if you donate to this entity you don't have to worry about someone accusing you of terrorism," Dr. Asali said.²²⁴ In reality, the agreement grants authority to the government to control private charitable donations raised for humanitarian purposes in the Middle East. It fundamentally blurs the line between public and private missions.

Although the plan's details, including the contents of the MOU, were not made public, the USAID press release described the agreement as "a secure and efficient means of transferring charitable donations from individuals and entities in the U.S. to USAID-managed programs for the Palestinians."²²⁵ USAID's intention to control the funds and the programs was further clarified in remarks made by Treasury Deputy Secretary Robert M. Kimmitt.²²⁶ Speaking at the Iftar dinner on September 25, 2008, Kimmitt said ACP "raises funds from the American charitable sector and donor communities and transfers these funds to USAID in order to finance specific projects...that USAID is administering in the Palestinian Territories."

The MOU is the first such agreement between USAID and any private organization, and it was described by former USAID Administrator Henrietta Fore as a "historic step." Since the announcement, the U.S. government has heavily promoted the agreement as a way to direct humanitarian aid to Palestine without violating U.S. counterterrorism measures. At the first congressional oversight hearing since 9/11 on the impact of anti-terrorist financing enforcement policies on the U.S. charitable sector, Deputy Assistant Secretary for Terrorist Financing and Financial Crimes Daniel Glaser praised the USAID-ACP deal and recommended exploring similar

²²² Samantha Power, "For Terrorists, a War on Aid Groups," *New York Times*, August 19, 2008.

²²³ "USAID Partners with Charity to Expand Assistance for Palestinians," USAID, August 1, 2008, http://www.usaid.gov/press/releases/2008/pr080801_1.html.

²²⁴ Laurie Goodstein, "U.S. Muslims Taken Aback by a Charity's Conviction," *New York Times*, November 25, 2008, <http://www.nytimes.com/2008/11/26/us/26charity.html>.

²²⁵ "USAID Partners with Charity" USAID.

²²⁶ "Explanation and Implications of USAID and American Charities for Palestine (ACP) Pilot," *Charity and Security Network*, October 15, 2008, http://www.charityandsecurity.org/background/Explanation_Implications_USAID_American_Charities_Palestine_Pilot

agreements.²²⁷ In addition, on August 15, 2008, Treasury Assistant Secretary for Terrorist Financing Patrick O'Brien told a group of Muslim charities:

In some circumstances, effectively and safely operating in regions where there are known terrorist activities may require creating alternative distribution means. Essentially, this type of partnership allows individual U.S. donors to tap into the government resources and distribution networks, thereby leveraging counterterrorism mechanisms only available to the government. The aim is straightforward—to provide a safe and effective way for individuals to contribute to critical regions where aid is desperately needed, such as the West Bank and Gaza...It is our hope that this type of collaboration will take root and serve as a model for other areas of concern as well as encompass other funding streams including that of the international community.

O'Brien and the other Treasury officials wrongly, and lamentably, assume that independent aid distribution mechanisms, operated through civil society, are not as "safe" or "effective" as those provided by the government. The type of agreement championed by them raises significant concerns and questions for the independence of the nonprofit sector. What are the safeguards in place to ensure that donations are used for their purely humanitarian purpose? How are beneficiaries selected or screened in an impartial manner? Are there standards to determine the effectiveness of the aid operations? The perspective of the government has thus far been devoid of any critical acknowledgment that such policies are a serious infringement—not only in terms of the neutrality and independence of humanitarian organizations, but also on the right of individuals to provide charitable donations to such organizations. Minimizing or precluding humanitarian organizations from the equation, as Treasury appears to be trying to do, upsets the foundational balance struck by IHL and significantly jeopardizes the receipt of basic assistance by those urgently in need. Not surprisingly, U.S. NGOs have rejected the ACP model, and it has not expanded.

²²⁷ Daniel L. Glaser, Deputy Assistant Secretary, Terrorist Financing and Financial Crimes, U.S. Department of the Treasury, (Testimony, House Committee on Financial Services Subcommittee on Oversight and Investigations, May 26, 2010)
<http://www.treasury.gov/resource-center/terrorist-illicit-finance/Documents/FINAL%20GLASER%20TESTIMONY%20ON%20CHARITIES%205-26-2010%20edited%20PDF.pdf>

Conclusion

The inescapable conclusion of our analysis is that the space established by international humanitarian law to facilitate humanitarian efforts in situations of armed conflict 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 lopsided rules have severely curtailed the ability of humanitarian NGOs to provide desperately needed assistance to the civilian population.

Going forward, the U.S. should re-assess both the material support prohibition and the process for listing charities and freezing their funds, and 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 humanitarian law and international human rights law, both developed and agreed to by the U.S., should guide this task.

Case Study: In Somalia the Material Support Prohibition Exacerbates Access Problems for Famine Relief Efforts

Somalia has no central government. It has experienced 20 years of continuous internal armed conflict, leaving over one million people dead, 1.5 million internally displaced, and, as of January 2010, nearly 71 percent of its population under-nourished.²²⁸ Al-Shabaab, a listed terrorist group, controls the southern provinces.

On July 20, 2011, the UN declared an official famine in two regions of Somalia controlled by al-Shabaab, and in September 2011, it declared famine in a third province. A U.S. official testified at an August 3, 2011 Senate hearing that the declaration "was not made lightly and truly reflects the dire conditions of the people in Somalia. It's based on nutrition and mortality surveys, data that's been verified by the CDC. And on the basis of that, we estimate that in the last 90 days, 29,000 Somali children have died. This is nearly four percent of the children in Southern Somalia." She also said that access is "the primary obstacle to relief efforts." The areas controlled by al-Shabaab are home to 2.2 of the 3.7 million Somalis affected by the famine.²²⁹



Photo by United Nations

A combination of drought and more than twenty years of continuous conflict in Somalia contributed to a severe humanitarian crisis in 2011 that has left one million dead and 1.5 million internally displaced. U.S. material support laws have impeded aid to a large area of southern Somalia which is controlled by the terrorist group al-Shabaab.

How did things get so bad? What role has the U.S. played?

A long drought in the Horn of Africa contributed to a food crisis for the entire region. In Somalia drought relief has been hampered by al-Shabaab restrictions on NGOs and U.S. material support laws, which prohibit most, if not all, interaction with al-Shabaab, even to access civilians in areas it controls.

Until the fall of 2009, the U.S. was the largest contributor to the UN World Food Programme (WFP). Between February 2007 and March 2008, it gave more than \$319 million in assistance through the United States Agency for International Development (USAID) and its NGO grantees.

²²⁸ "Conflict Displaces 63,000 Civilians in Southern Somalia so Far this Year," *UNHCR*, January 19, 2010, <http://www.unhcr.org/4b55ccf76.html>.

²²⁹ Nancy Lindborg, USAID Assistant Administrator for the Bureau of Democracy, Conflict, and Humanitarian Assistance, (Testimony, Committee on Foreign Affairs Subcommittee on African Affairs, August 3, 2011).

But by late 2009, at least \$50 million in USAID funds was held back while the State Department sought "confirmation from the Department of Treasury that it 'will not seek enforcement action against United States government employees, grantees and contractors' if 'accidental, unintentional or incidental benefits' of aid go to al-Shabaab."²³⁰ Treasury responded by saying any transactions with al-Shabaab "were prohibited, but that it would not prosecute American aid officials if they acted in 'good faith.'" This was only partially helpful to NGOs, since a promise not to prosecute is not binding.

The delay was already causing problems, according to an August 2009 report from the UN Office for the Coordination of Humanitarian Affairs (OCHA).²³¹ Al-Shabaab made matters worse. In November 2009 it started demanding monthly "security" fees from NGOs and the WFP in order to operate in areas under their control. Their December 2009 attacks on humanitarian aid agencies and demands for payments forced the UN World Food Programme (WFP) to suspend food distribution, cancelling plans to feed nearly 2.8 million Somalis, or nearly 40 percent of the entire population.²³² *The New York Times* reported that "United Nations officials say they have no choice but to work with local Shabab commanders to distribute critically needed aid."²³³ But the strict interpretation of the material support prohibition made such engagement illegal for U.S. NGOs and aid officials.

In late 2009, the UN drafted a set of conditions for NGOs delivering aid to avoid diversion to al-Shabaab but reached an impasse with the U.S. over what the language should be. No formal agreement was finalized, and the situation remained at an impasse as the humanitarian crisis worsened.

USAID, through its Famine Early Warning System, or FEWSNET, predicted an impending crisis in August 2010. By the summer of 2011, NGOs were calling for a new policy, as it was difficult or impossible to get licenses from Treasury to carry out relief efforts. For example, on July 29, 2011, the International Rescue Committee called on the administration to "Remove legal barriers to providing aid inside Somalia. Private aid agencies have had to leave areas of Southern Somalia where al-Shabaab, an organization identified as a terrorist group, is in control, or risk violating U.S. anti-terrorism provisions. A waiver is needed for relief agencies to return to this drought-stricken area. The UN has exempted humanitarian agencies from sanctions against al-Shabaab; in line with this policy, the Obama Administration should issue such a waiver immediately."²³⁴

²³⁰ "U.S. Delays Somalia Aid, Fears Terror Ties," *UPI*, October 2, 2009, http://www.upi.com/Top_News/2009/10/02/U.S.-delays-Somalia-aid-fears-terror-ties/UPI-83141254483945/.

²³¹ United Nations, *Locked In: The Humanitarian impact of Two Years of Blockade on the Gaza Strip* (Office for the Coordination of Humanitarian Affairs, 2009).

http://www.ochaopt.org/documents/Ocha_opt_Gaza_impact_of_two_years_of_blockade_August_2009_english.pdf.

²³² Scott Baldauf, "UN Suspends Food Aid to Southern Somalia," *Christian Science Monitor*, January, 5, 2010, <http://www.csmonitor.com/World/Africa/2010/0106/UN-suspends-food-aid-to-southern-Somalia>

²³³ Jeffrey Gettleman, "U.S. Delays Somalia Aid, Fearing It Is Feeding Terrorists," *New York Times*, October 1, 2009, <http://www.nytimes.com/2009/10/02/world/africa/02somalia.html?pagewanted=1&r=2>.

²³⁴ George Rupp, "7 Ways the U.S. Can Fight Drought in Africa," *International Rescue Committee*, July 29, 2011 <http://www.rescue.org/blog/7-ways-us-can-fight-drought-africa>.

On August 2, 2011, the U.S. Department of State announced that U.S. NGOs providing famine relief in al-Shabaab-controlled areas would not be prosecuted for material support violation *if* they act in good faith to reach victims of the famine.²³⁵ But on August 4, 2011, Treasury limited the scope of the new policy in a Frequently Asked Questions document that states that only U.S. government agencies and their grantees benefit from it.²³⁶ The statement said that Treasury will not make such groups the focus of its economic sanctions enforcement, but made no mention of whether the Department of Justice, which oversees criminal prosecutions, takes the same view.

InterAction, as association of NGOs, requested a General License from Treasury, which would allow all groups, not just government grantees, to operate under the new policy. Senators John Kerry and Chris Coons endorsed this request in an August 8, 2011 statement. In November 2011 Treasury rejected the request, saying the situation in Somalia "does not lend itself to a broad general license" because al-Shabaab has threatened and carried out violent attacks against innocents and aid workers.²³⁷ Treasury said it would give priority consideration to applications by individual NGOs that apply for specific licenses to work in al-Shabaab-controlled territories. However, this process has a reputation for inefficient, lengthy, and burdensome response from Treasury's Office of Foreign Assets Control. A General License would have eliminated the need for this process for NGOs that stay within the terms in the license.

There is interest in a solution to the kind of problems the material support law caused in Somalia on both sides of the aisle in Congress. Sen. Patrick Leahy, chair of the Senate Judiciary Committee, wrote to Secretary of State Clinton and Attorney General Holder on August 3, 2011, expressing concern about the impact of the material support prohibition, saying:

In addition to taking immediate action with respect to aid to Somalia, and in order to address the broader impact of current law, I urge you to facilitate a dialogue between relevant executive branch agencies and affected organizations and individuals. The result of this dialogue should be the release of a set of guidelines that remove the uncertainty with the scope of the material support law, and the establishment a process by which actors may seek exemptions.²³⁸

After hearing testimony at a September 8, 2011 hearing, Rep. Chris Smith (R-NC) said, "I plan on introducing legislation that would make clear that humanitarian organizations would be excluded from USA Patriot Act concerns, which is obviously what is so important here."²³⁹

²³⁵ "State Department Announces New Policy to Allow Famine Aid in Somalia, Treasury Releases Limited Guidance, *Charity and Security Network*, August 4, 2011, <http://www.charityandsecurity.org/news/State%20Announces%20New%20Policy%20to%20Allow%20Famine%20Aid%20in%20Somalia>

²³⁶ "Frequently Asked Question Regarding Private Relief Efforts in Somalia," OFAC, August 4, 2011, http://www.charityandsecurity.org/system/files/somalia_faq.pdf

²³⁷ Letter, Dept. of Treasury to Samuel Worthington, President and CEO, InterAction, Nov. 10, 2011. Available online at <http://www.charityandsecurity.org/system/files/Somalia%20General%20License%20Denial.gif>

²³⁸ Letter from Senator Patrick Leahy to Hillary Clinton, Secretary of State and Eric Holder, Attorney General, (August 3, 2011), <http://leahy.senate.gov/imo/media/doc/080311LeahyToHolderClinton-SomaliaAidRelief.pdf>.

²³⁹ "House Members Push for more NGO Access to Somalia," *The Charity and Security Network*, October 4, 2011, <http://www.charityandsecurity.org/node/649>.

Appendix I: Key International Humanitarian Law Treaties

- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
- Geneva Conventions (1949)
 - Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
 - Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
 - Convention (III) relative to the Treatment of Prisoners of War
 - Convention (IV) relative to the Protection of Civilian Persons in Time of War
- Additional Protocols to Geneva Convention (1977, 2005)
 - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),
 - Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),
 - Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III)
- Weapons Conventions (e.g., Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects. Geneva, 10 October 1980)

Appendix II: Relevant United Nations Resolutions

Security Council Resolutions:

Security Council Resolution 1456 (Jan. 20, 2003) This declaration of the Security Council on combating terrorism emphasizes that nations “must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.”

Security Council Resolution 1556 (July 30, 2004) Paragraph 9 called on the Sudanese government to facilitate international relief for the humanitarian disaster there by lifting “all restrictions that might hinder the provision of humanitarian assistance and access to the affected populations.” It also included a humanitarian exemption to the ban on the sale or supply of goods to all militia members in Darfur, allowing “non-lethal military equipment intended solely for humanitarian, human rights monitoring or protective use, and related technical training and assistance.”

Security Council Resolution 1844 (November 20, 2008) created a humanitarian exemption from its antiterrorist financing sanctions with respect to Somalia. It called for the economic sanctions against individuals and entities designated for:

- obstructing the delivery of humanitarian assistance to Somalia
- Or the access to, or distribution of humanitarian assistance in Somalia
- Providing support to acts that threaten the peace, security, or stability of Somalia.

It also specifically mandated that the economic sanctions did not apply to funds, assets, or economic resources that are necessary for food, rent, medicines or medical treatment, taxes, insurance premiums, public utility fees, or for the payments of legal services.

SC Resolution 1844 required that UN members prevent entry into or transit through their territory of these designated individuals. This, too, contained a humanitarian carve-out. Travel would not be restricted where the Committee determined, on a case-by-case basis, that such travel “is justified on the grounds of humanitarian need, including religious obligation.”

Security Council Resolution 1916 (March 19, 2010) underscored “the importance of humanitarian aid operations,” and expanded the carve-out for funding humanitarian aid in Somalia. For twelve months, members’ obligation to freeze these funds shall not apply to “the payment of funds, other financial assets or economic resources necessary to ensure the timely delivery of urgently needed humanitarian assistance in Somalia.” Moreover, Resolution 1916 declared that the embargo program extending as far back as 1992 would not apply to “supplies and technical assistance by international, regional and sub-regional organizations.”

General Assembly Resolutions:

General Assembly Resolution 60/288 "United Nations Global Counter-Terrorism Strategy" (September 20, 2006): This document specifically resolves:

"...3. To recognize that international cooperation and any measures that we undertake to prevent and combat terrorism must comply with our obligations under international law, including the Charter of the United Nations and relevant international conventions and protocols, in particular human rights law, refugee law and international humanitarian law."

General Assembly Resolution 62/152 "Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Freedoms" (March 6, 2008)

This Declaration grew out of the General Assembly's "[g]rave[] concern[]" that "in some instances, national security and counterterrorism legislation and other measures have been misused to target human rights defenders or have hindered their work and safety in a manner contrary to international law." It specifically emphasizes the important role that civil society organizations play in the "promotion and protection of all human rights and fundamental freedoms for all" and in "supporting efforts to strengthen peace and development, through dialogue, openness, participation and justice, including by monitoring, reporting on and contributing to the promotion and protection of human rights." Ultimately, it "[u]rges States to ensure that any measures to combat terrorism and preserve national security comply with their obligations under international law, in particular under international human rights law, and do not hinder the work and safety of individuals, groups and organs of society engaged in promoting and defending human rights."

General Assembly Resolution 64/168 Protection of human rights and fundamental freedoms while countering terrorism (Jan. 22, 2010) After reaffirming the Universal Declaration of Human Rights, the document "[s]tress[es] that all measures used in the fight against terrorism...must be in compliance with the obligations of States under international law, including international human rights, refugee and humanitarian law."

United Nations Human Rights Council

Human Rights Council Resolution 13/26 titled, Protection of human rights and fundamental freedoms while countering terrorism (April 15, 2010): This Resolution "Calls upon States to ensure that any measure taken to counter terrorism complies with international law, in particular international human rights, refugee and humanitarian law."



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