

Proscription Problems: The Practical Implications of Terrorist Lists on Diplomacy and Peacebuilding in Nepal

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Abstract

The U.S.' ability to positively impact peace agreements between governments and armed groups has been complicated by the use of a variety of terrorist blacklists. In the aftermath of Nepal's civil war, the Unified Communist Party of Nepal's (Maoist) terrorist designation impeded the U.S. approach to conflict management. The recent U.S. Supreme Court case *Holder v. Humanitarian Law Project* formalized the legal incoherence governing peacebuilding organizations' engagement with proscribed armed groups. A U.S. citizen or affiliated NGO who provides any service that can be construed as having monetary value—including providing advice, sharing expertise, or conducting a workshop on non-violence or international law—to a proscribed group is a potential target for prosecution. As a result, peacebuilding practitioners in the U.S. remain largely confused and frustrated by the Supreme Court's overly broad interpretation of existing legal restrictions. In Nepal, the prerogatives of counterterrorism impeded the U.S.' ability to analyze the likelihood that the Maoists could evolve into a legitimate political party, and prevented the U.S. from playing a more constructive role in Nepal's peace process. Nepal is illustrative of a challenge that governmental arbiters of peace processes face during the period after an insurgent group has committed to peace talks and entered the contested state's political process, but before it has agreed to disarm or reject violence. This paper clarifies the practical and legal obstacles that impede U.S. scholars and peacebuilding practitioners from initiating effective conflict mitigation—both in Nepal and in other fragile states—and proposes several options for U.S. government officials to address the concerns of affected parties through the provision of greater flexibility and legal clarity in the development and implementation of sanctions against proscribed armed groups.

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Introduction

U.S. officials in conflict-afflicted and post-conflict countries have generally chosen to ignore, isolate, or sanction non-state armed groups (NSAGs). Nepal's Maoists are one of the few insurgent forces to fight a state to a stalemate and then win a plurality of votes through an internationally monitored democratic election. Recent events in Nepal highlight the diplomatic challenges of relations with a country whose democratically elected government is led by a U.S.-sanctioned terrorist group.

U.S. officials sought to play a constructive role in Nepal's peace process in the short term and the consolidation of multiparty democracy in the long term, both of which hinged on the renunciation of violence by, and the disarmament of, the Unified Communist Party of Nepal (Maoist).¹ This study considers why the strategy employed by the U.S. in Nepal failed to change the intentions, capabilities, and behavior of the Maoists. The language and mindset of counterterrorism, which pre-dates the Global War on Terror, is an impediment to the U.S.' ability to analyze the likelihood that the Maoists could moderate and evolve into a legitimate political party. The U.S. experience in Nepal demonstrates how labeling a group as a terrorist entity and cutting off the possibility for engagement can become a self-fulfilling prophecy, neutralizing incentives for an armed group to undergo the difficult transformation to become a legitimate and nonviolent political party.

Nepal is illustrative of a challenge that governmental arbiters of peace processes face during the period in which an armed group previously labeled and legally defined as a "terrorist" group (in this case the Maoists) commit to peace talks, but have not yet agreed to disarm or reject violence. The terrorist group in transition emphasizes how far they have come, while skeptical U.S. officials focus on how much further they must go to warrant a reevaluation of their terrorist label. This misalignment of perceptions risks "poisoning the well" at critical stages of negotiations with armed groups.

This paper provides a brief overview of the conflict in Nepal and the main mechanisms of the peace process. It examines U.S. policy toward the Maoists, reviews the terrorist list system, and considers critiques of the U.S. proscription of the Maoists. The final section concludes with a series of lessons learned from Nepal's peace process.

A Grey Zone Between Winning and Losing the Peace

For over 200 years, Nepal existed as a feudal monarchy well insulated from foreign democratic trends, politically and socio-economically dominated largely by members of higher castes and specific ethnicities comprising around 29 percent of the population.² Systematic discrimination on the basis of ethnicity, caste, gender, and region inhibited personal advancement, access to government services, and access to justice.³ Fifty years of donor aid to one of the world's poorest countries has concentrated resources in Kathmandu, and often fails to reach intended beneficiaries in the periphery.

In 1990, a nascent pro-democracy movement fell short on promises of poverty reduction and economic development. Frustration and anger became endemic as

corruption and nepotism eroded the legitimacy of one weak government after another. In 1996, the Communist Party of Nepal (Maoist) coalesced from a number of small, leftist factions and launched a “People’s War.” For the first five years of the war, hostilities were largely confined to Maoist raids on remote police posts; it was not until November 2001 that the Royal Nepalese Army (RNA) mobilized to fight the Maoists.⁴ On June 1, 2001, Nepal’s crown prince massacred King Birendra and much of the Royal Family, exacerbating the country’s pervasive sense of insecurity.

Many marginalized communities held significant grievances against the ruling elite. This enabled the Maoists to cultivate a relatively fluid ideological platform that appropriated claims of regional and ethnic struggles against the central government and espoused a more generalized ideology of massive agrarian reform, land and wealth redistribution, and justice.⁵ The Maoists employed People’s Courts to address the burden of corruption that defined rural Nepalis’ interactions with the state,⁶ capitalizing on dissatisfaction with the failure of multiparty democracy to deliver material benefits and reduce corruption.⁷ At the apex of their power, the Maoists governed nearly 70 percent of the countryside through shadow district-level governments and courts that replaced or in some cases, provided for the first time, government services.⁸

The conflict killed more than 13,000 Nepalis. The majority of victims were civilians, and human rights violations by both the RNA and the Maoists were rampant. The war reached a turning point during the *Jana Andolan* (People’s Movement) of 2006, when thousands of Nepalis took to the streets to protest the monarchy’s reversion to authoritarianism. After a tense 17-day stand off, King Gyanendra issued a royal proclamation endorsing negotiations between an alliance of major political parties and the Maoists. These negotiations led to the Comprehensive Peace Accord (CPA) in November 2006.⁹ The CPA was extraordinarily ambitious, as were the dozen plus subsequent agreements addressing, amongst other things, the federal structure of the future Nepali state, security sector reform and the integration of the RNA and the Maoist People’s Liberation Army (PLA), transitional justice and human rights, social exclusion, land reform, the return of property seized during the conflict, the composition of the Constituent Assembly, and economic reform.

In April 2008, the Maoists surprised the international community by winning a plurality of parliamentary seats in Nepal’s first internationally monitored election.¹⁰ The Maoists became the third U.S.-sanctioned terrorist group to win a democratic election, after Lebanon’s Hezbollah and Palestine’s Hamas. Many observers have

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characterized Nepal's peace process as a success story. For a period of time, positive trends prevailed: active combat between the Nepalese Army (NA) and the Maoists did not reignite; the process was locally-owned and conducted through the framework of the CPA;¹¹ significant consensus existed that the monarchy should be replaced by a representative, democratic government; a coalition of parties invited the United Nations (UN) to facilitate a consent-based peace process with widespread popular support; and both parties respected a ceasefire, despite retaining access to weapons lockers. However, as the deadlock among the various factions continues, analysts have begun to question the sustainability of Nepal's fragile peace.

The international community's approach to engaging the Maoists has hinged on differing views of their long-term intentions. Those in favor of engaging the Maoists emphasize the significance of an insurgent army holding substantial territory who is willing to turn over its weapons and participate in a political process. Those who oppose engagement argue that Maoist political participation is a temporary tactic rather than a permanent shift away from violent armed struggle. The International Crisis Group largely supports the argument that the Maoist commitment to the peace process is genuine but has expressed concern that Maoist renunciations of violence and commitment to pluralism remain ambiguous.¹² Kanak Mani Dixit, Editor of *Himal SouthAsian*, insists that the Maoists have only abandoned revolution in a "tactical sense" and remain committed to a "chaos theory" that seeks to advance violent revolutionary goals by relentlessly weakening state institutions and polarizing Nepali society.¹³ Additionally, the Maoists have refused to dismantle the Young Communist League (YCL), a youth militia formed as an auxiliary force of the PLA that has reportedly killed over 20 people and kidnapped over 700 since the signing of the CPA.¹⁴ The Maoists have been accused of maintaining the YCL to intimidate opponents and influence the outcome of future elections, and official PLA cadres remain under close observation by the UN.¹⁵ In a recent interview, the United Nations Mission in Nepal's (UNMIN) former Special Representative to the Secretary General (SRSG) Ian Martin stated that whether the Maoists had made a, "real lasting strategic choice to operate within a multi-party framework or whether that is a tactical stage on the way to revolution," remained an unanswered question.¹⁶

Designating Terrorist Groups in the U.S.¹⁷

The U.S. utilizes terrorist lists to prevent terrorist financing and provide policy makers with tools to financially and symbolically sanction armed groups that have attacked or intend to attack American citizens and interests. In order to understand how the terrorist lists are an obstacle to effective peacemaking in Nepal, a brief review of their genesis, evolution, and application is necessary.

Executive Order 12947 in January 1995 gave birth to the contemporary U.S system for designating terrorist entities, followed closely by the U.S. Antiterrorism and Effective Death Penalty Act of 1996.¹⁸ The 1996 legislation provided the executive branch with the authority to create a definitive list of terrorist groups, the Foreign Terrorist

Organization (FTO) list. FTOs became part of a growing U.S. sanctions regime, joining rogue states and a category of groups and individuals known as Specially Designated Nationals (SDNs).¹⁹ Today, all FTOs are also classified as SDNs.

Representatives from the U.S. Departments of State, Justice, and Treasury, as well as the intelligence services, assign terrorist designations through a joint process. To make it onto the list, FTOs must be foreign organizations, actively engage in violent terrorist activities, and pose a threat to U.S. national security, economic interests, or simply individual citizens.²⁰

The Specially Designated Nationals and Blocked Persons List (SDN list) is a master list maintained by the Treasury Department's Office of Foreign Assets Control (OFAC), and is best understood as the primary means by which the U.S. government implements foreign policy through sanctions against both groups and individuals. It is the largest terrorist list, containing thousands of sanctioned individuals and entities.²¹ The SDN list contains the groups proscribed by the FTO, a second group of individuals known as Specially Designated Terrorists (SDTs), and a third group of individuals known as Specially Designated Global Terrorists (SDGTs).²² The Department of Treasury uses the SDN list—and only the SDN list—when pursuing the assets of individuals and groups, including charitable organizations, that are identified as supporters of terrorist groups.²³

The SDN list is different in form and content from the FTO list, which is managed by the Department of State; it can be distinguished from those lists administered by the Department of the Treasury because of the “symbolic, public role it plays as a tool of U.S. counterterrorism policy.”²⁴ Currently, forty-seven groups are designated as FTOs.²⁵ FTO designations are subject to judicial review and must be renewed every two years.²⁶

The 2001 USA Patriot Act empowered the Secretary of State to create the Terrorist Exclusion List (TEL), which primarily serves to prevent foreign nationals associated with a group on the TEL from entering the United States, and provides a legal pathway for forcible deportation if they are already in the U.S.²⁷ The TEL's designation criteria and process are broader and less rigorous than the FTO.²⁸ However, the TEL's intent is similar to that of the FTO list; it isolates and stigmatizes groups that are viewed as a threat to U.S. security, but not a serious enough threat to warrant an FTO-designation. Membership in a TEL-designated organization, as well as fundraising, recruiting, or providing material support for a TEL-designated organization are all grounds for exclusion or deportation.²⁹

Within the confusing world of U.S. terrorist lists, the Maoists are a unique case study. While they have been listed under the Terrorist Exclusion List and the Specially Designated Nationals and Blocked Persons list, they have never been included in the State Department's FTO list. A review of the last decade's U.S. Department of State *Patterns of Global Terrorism* reports demonstrates both the inconsistencies of the proscription process and the circumstances that contributed to the Maoists' proscription. The Maoists were not mentioned in the 2000 *Patterns of Global Terrorism* report, even

though their war against Nepal's government had been launched four years prior to its publication.³⁰ While the Maoists were referenced in the brief entry on Nepal in the 2001 report, the report did not identify them as an official terrorist organization. The report highlighted Maoist attacks on government officials, commercial enterprises, unarmed civilians, and international relief organizations; the murder of two U.S. embassy local employees; and bombings at a Coca Cola factory and bottling plant in which no one was

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injured.³¹ The 2002 *Patterns of Global Terrorism* report called the Maoist insurgency a "continuing threat to U.S. citizens and property in Nepal."³² The murder of two Embassy guards was interpreted as a serious escalation, and the Maoists' refusal to participate in the investigation surrounding these deaths continues to be a major element of the U.S. proscription policy today. Information on the Maoists in the subsequent *Patterns of Global Terrorism* reports (renamed *Country Reports on Terrorism* in 2004) repeated much of the rhetoric of the previous reports without providing a detailed description of increases or decreases in certain types of attacks.

rhetoric in Nepal following 9/11: "These terrorists, under the guise of Maoism...are fundamentally the same as terrorists elsewhere—be they members of the Shining Path, Abu Sayaf, the Khmer Rouge, or Al Qaeda."³³ James Moriarty, Malinowski's successor, continued to speak out against the Maoists in public speeches and interviews.

Following the terrorist attacks of 9/11, U.S. ambassadors in Nepal began to state publicly that the U.S. considered the fight against the Maoists to be part of the Global War on Terror. This statement made by Ambassador Michael Malinowski in February 2002 is emblematic of American

Secretary of State Colin Powell visited Kathmandu in 2002 in order to enlist the King's support in the U.S.-led Global War on Terror, and to reinforce American support of a coercive approach to the Maoists.³⁴ On October 31, 2003, the Department of State designated the Communist Party of Nepal (Maoist) as a terrorist organization under Executive Order 13224. The Department of State subsequently added the Maoists to the Terrorist Exclusion List and the Specially Designated Nationals and Blocked Persons list.

While the U.S. rationale for listing the Maoists as terrorists is well documented, the reasons why U.S. policymakers chose to place the Maoists on the TEL without a corresponding FTO designation is less clear. According to Matthew Levitt, "In some ways the FTO is more important because it is *the* list of foreign terrorist organizations. The treasury lists [including the TEL] aren't meant to be *the* list, but they are meant

to be a disruption tool, to name and shame, and to freeze funds and ban business transactions.”³⁵ It is possible that policymakers used the Maoists’ TEL designation as leverage, but did not want to classify the Maoists with the largely irreconcilable groups on the FTO list, such as al-Qaeda. The Maoist listing may not have withstood the FTO list’s more meticulous review process, as the Maoists were not a transnational organization, did not transport weapons or explosives across borders, and largely avoided targeting American citizens or western interests. In a recent interview, former Chief of Political Affairs for United Nations Mission in Nepal (UNMIN) John Norris argued that formally labeling the Maoists as a

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terrorist entity was necessary for the U.S. embassy to justify provocative and controversial decisions—such as providing additional training and weapons to the RNA and attempting to create civilian militias to fight the Maoists—during a period where the threat of terrorism produced heightened attention and resources from Washington.³⁶

U.S. Strategy: Conditional Recognition

Whatever the intent of the original policymakers, the nuances were largely lost within Nepal itself. The proscription of the Maoists, or the “terrorist tag,” as it is commonly known in Kathmandu, quickly emerged as a source of tension and confusion in U.S. relations with Nepal.

After the proscription of the Maoists in 2003, the terrorist label became the primary lens through which the U.S. perceived the conflict in Nepal and intervened to mitigate its effects. Thereafter, the U.S. pursued a strategy of conditional recognition; the Maoists would earn the right of contact with the Embassy through demonstrated behavior change. Former U.S. President Jimmy Carter publicly criticized the policy, and it became a source of tension in the U.S. embassy’s interactions with Nepal’s UN mission.³⁷ In an interview, former Special Representative of the United Nations Secretary General (SRSG) Ian Martin attributed the American application of the terrorist label to the reactive atmosphere following 9/11, where policymakers were unable to draw an important distinction between a terrorist group and a “political party that’s carrying out continued acts of violence and extortion.”³⁸

Once the terrorist label was in place, all “U.S. persons”—including U.S. citizens, permanent legal residents, corporations incorporated in the U.S., American NGOs, or foreign NGOs that have a presence in the U.S.³⁹—were barred from providing material support to a proscribed group or individual.⁴⁰ Members of the U.S. diplomatic community were not exempt. As a result, U.S. diplomats lost flexibility in their ability to consult or interact with the Maoists, even when limited consultation was determined to advance U.S. interests or the peace process. Absent direct contact with the Maoists, the

Embassy relied upon intermediaries for information and to communicate demands, both before and during the peace process. While U.S. officials may have determined privately that U.S. interests and Nepal's peace process would be better served by increased engagement, any relaxation of the Maoists' TEL designation would have signified tacit U.S. acceptance of Maoist conduct. Such a perceived change in U.S. policy would have had significant consequences in Kathmandu, lending more legitimacy to the Maoists and forcing the other political parties to reset their own considerations on how far to push the Maoists toward disarmament and other demands. As such, the U.S. showed no lenience to the Maoists following their decision to commit to the ceasefire and peace process. The Embassy did not immediately acknowledge this important transition with any tangible actions or symbolic gestures.

However, the election of the Maoists in 2008 and the arrival of Ambassador Nancy Powell provided new opportunities for American influence in Nepal's peace process. Following the election, Powell sought a waiver from the Office of Foreign Assets Control (OFAC) at the Department of Treasury (known as OFAC licenses) that "permit[s] a person or entity to engage in a transaction which otherwise would be prohibited."⁴¹ OFAC licenses enabled the Embassy to continue financial aid flows to the Government of Nepal so long as they did not issue contracts directly to the Maoists. While most aid went to NGOs, the OFAC waiver facilitated assistance that needed to be funneled through the government.⁴² Additionally, the waiver allowed diplomats and aid workers to be more engaged in the constitutional process, as well as with grassroots political organizations. Although the OFAC waiver was delayed—complicating these tentative early steps of U.S. engagement—Ambassador Powell used her official duties with Nepali ministries to establish contact with Maoist ministers, paving the way toward the first official U.S. contact with the Maoists and Maoist leader Pushpa Kamal Dahal, also known as Prachanda, in May 2008.⁴³ On the heels of Ambassador Powell's initiation of contact with the Maoists, Deputy Assistant Secretary of State Evan Feigenbaum met with key Maoist leaders and, although he refused to specify when the Maoists would be removed from the list, announced that the Embassy's contact policy had been revised.⁴⁴

The maintenance of the terrorist tag combined with the revision of the Embassy contact policy resulted in an iterative process of political theater, where Nepali journalists questioned visiting State Department officials on when and how the terrorist tag would be removed, and officials routinely responding with the same general demands: the Maoists needed to demonstrate their good faith by publicly renouncing violence and reigning in the YCL.⁴⁵ However, a concrete "road map" to legitimacy with specific criteria was not outlined publicly until January 2010⁴⁶—nearly four years after the end of hostilities—by U.S. Principal Deputy Assistant Secretary of State for South and Central Asian Affairs Patrick Moon.⁴⁷

As of April 2011, the Maoists remain on the Terrorist Exclusion List and the Specially Designated Nationals and Blocked Persons list. In an interview, the Maoists' legal advisor Khimlal Devkota insisted that the terrorist tag has not resulted in any

tangible effect on Nepal's domestic or regional politics, and U.S. efforts to isolate the Maoists have only amounted to giving them visa problems when they wanted to travel out of the country.⁴⁸

Critique of the U.S. Approach

Terrorist lists are an important element of U.S. counterterrorism policy. The lists coordinate and focus the efforts of various agencies to combat terrorism. There is no law that requires the lists to be complete aggregates of all groups engaged in terrorism; the lists are one of several policy tools employed by the U.S. to achieve certain goals.⁴⁹ According to Matthew Levitt of the Washington Institute for Near East Policy, the terrorist lists "...provide the government with a multifaceted arsenal of administrative, legal and political means of combating terrorism."⁵⁰ They bring legal clarity to efforts to identify and prosecute terrorists and provide a frame of reference by which those people and organizations who interact with proscribed groups—such as charities, humanitarian groups and peacebuilding groups—can determine which groups they can and cannot interact with and what type of conduct is impermissible.⁵¹ Additionally, the lists facilitate the complex process of cutting off a terrorist organization's access to funding and prevent their membership from entering the United States.⁵²

However, the policy of proscription has many critics both inside and outside of Nepal. Georgetown University's Paul Pillar is one of the few scholars to have extensively studied the impact of terrorist lists on the U.S.' ability to balance counterterrorism with conflict management. He has criticized the lists for stressing, "uniformity rather than variation, and for being too bureaucratic and slow to "respond to the changes in the gallery of international terrorists."⁵³ All of the groups on the terrorist lists are violent, but some are more violent. All of the groups are dangerous, but some are more dangerous. The lists force the U.S. to adopt a uniform policy that disregards the variety among terrorist entities (size, location, religious or ideological affiliation, level of sophistication) and the likelihood that different groups will respond to incentives and engagement in different ways. According to Oxford University's Audrey Kurth Cronin, the FTO list is "...overly mechanistic, restrictive and inflexible, especially in an area of foreign policy that requires flexibility."⁵⁴ Human Rights Watch's Joanne Mariner goes further, insisting that several of the groups appeared on the FTO as political concessions to countries that supported the U.S. war in Iraq.⁵⁵

Several criticisms of U.S. proscription policy are especially relevant to the case of Nepal. The employment of the terrorist tag isolated the U.S. from the peace process and increased the likelihood that Embassy officials would misread Maoist intentions and capabilities. The obstacles created by the proscription of the Maoists in Nepal demonstrate the ways that the terror lists often impede effective U.S. participation in peace processes when one party is considered a terrorist entity (with whom the U.S. does not negotiate) rather than a non-state armed group (with whom the U.S. might negotiate). In Nepal, the U.S. was absent from the table when it needed to be present, leaving a vacuum that was filled by India, the United Nations, and other outside actors.

Former Nepal country director of the National Democratic Institute (NDI), Dominic Cardy, described the terrorist lists as a “blunt instrument” in Nepal that “limited the U.S.’ effectiveness in the early days of the peace process,” and “stopped engagement that might have been more effective—if the Maoists were spoken to at a senior level by an Ambassador early in the peace process then things could have moved forward.”⁵⁶

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According to John Norris of UNMIN, the U.S.’ inability to adapt to Nepal’s rapidly evolving political dynamics stemmed from both a fundamental misperception of the Maoists and an inability to distinguish Nepal from the broader Global War on Terror.⁵⁷ This perception inevitably colored the Embassy’s approach, cost them future credibility during negotiations, and contributed to Maoist suspicion of U.S. intentions. Norris attributed U.S. missteps to the Embassy’s lack of understanding of a peace process’ “natural give and take” that comes from hands-on experience navigating a country through a post-conflict period.⁵⁸ In proscribing the Maoists, the U.S. lost a crucial early opportunity to strengthen the pragmatists within the Maoist leadership and isolate the elements that opposed negotiations and nonviolent political contestation.⁵⁹ Engagement would have enabled the U.S. to understand the Maoists’ grievances and ideology, strategically employ modest concessions,

and officially express concerns about violence and human rights violations.

Beyond the consequences of the U.S.’ isolation from the peace process, the conditions imposed by the U.S. were too high and lacked gradations that could be objectively measured. According to Pillar, the efficacy of U.S. efforts to shape the preferences of terrorist groups “depends on U.S. willingness to change [sanctions] when the behavior that was the reason for enacting them in the first place has changed.”⁶⁰ The peacebuilding consortium, Conciliation Resources, similarly encourages governments to link lifting or suspending sanctions with the group’s “demonstrable good faith engagement in processes to resolve conflict and implement agreements.”⁶¹ Yet U.S. policy did not adapt to the Maoists’ decision to participate in elections.

The U.S. has also been criticized for the lack of transparency in the designation process itself, especially the process by which a group can be removed from the terrorist lists. In an interview, Dr. Duman Thapa of the Asian Studies Center for Peace and Conflict Transformation (ASPECT) expressed his frustration with the U.S. embassy’s creation of conditions for the Maoists without a corresponding mechanism to measure their compliance, as, “the scale of [Maoist] violence has reduced dramatically [over the last several years].”⁶² Without clearly articulated benchmarks for compliance, forces

of moderation outside the immediate leadership circle cannot exert meaningful and informed pressure on their leaders.

Notwithstanding these critiques, various Nepali actors in politics, the media and civil society who were once skeptical of the terrorist tag have come to embrace it. In an interview, Former Finance Secretary and Peace Ministry Secretary Vidyadhar Mallik explained that the American “watch and see policy” has merits because it demands consistency from the Maoists, keeps a constant pressure on the group to “convert into a political party,” and “denounces violent actions not only by words but by deeds.”⁶³ Mallik explained that traditional Nepali political parties have urged the U.S. not to drop the terrorist tag, because doing so would prematurely send a message to Nepalis that the Maoists have completed their transition into a moderate, legitimate party. Mallik emphasized the moral authority of the U.S., who continuously denounced the Maoists when other Embassies chose to ignore or tolerate violence, extortions, and threats.

Practical Obstacles to Non-Governmental Peacebuilding Efforts

Complications related to terrorist designations have strained relations between U.S. embassies and the non-governmental practitioners of conflict resolution operating in fragile states. When a group is listed as an FTO or SDN, its property is considered “blocked.” A U.S. citizen or affiliated NGO cannot engage in a transaction that has a tangible or intangible economic value with a blocked group or individual.⁶⁴ In light of these restrictions, U.S. nationals and affiliated NGOs that interact with sanctioned groups for peacebuilding or humanitarian purposes must be extremely cautious.⁶⁵

The majority of U.S. terrorism material support statutes (18 U.S.C. 2339, 2339A, 2339B, 2339C, and 2339D) predating 9/11.⁶⁶ As originally construed, material support prosecutions were not meant to target “activities protected by the First Amendment, including humanitarian and political donations to the nonviolent activities of any persons or groups.”⁶⁷ However, since the 1996 Antiterrorism and Effective Death Penalty Act, the definition of material support has evolved to encompass an increasing number and type of activities, while the activities exempted from prosecution has narrowed.⁶⁸ Congress passed these material support statutes in order to make FTOs “radioactive.”⁶⁹

The statute of most concern to peacebuilding practitioners is 2339B, which criminalizes training (“instruction or teaching designed to impart a specific skill, as opposed to general knowledge”) and “expert advice or assistance” (“advice or assistance derived from scientific, technical or other specialized knowledge”).⁷⁰ According to Andrew Peterson of NYU’s Center on Law and Security, “the definition includes all tangible and intangible property, as well as any service; it is difficult to think of what it does not include.”⁷¹

U.S. regulations currently deem provision of any service that can be construed

as having monetary value—such as providing advice, sharing expertise, reviewing a contract, providing transportation costs—as a violation.⁷² The U.S. government considers advice provided by a peacebuilding NGO as having intangible economic value. The U.S. government similarly considers a peace agreement to which an NSAG is a party as a tangible good; if the NSAG is proscribed, the U.S. government considers the peace agreement to be its property and must be treated as frozen. Acting as a negotiator on the behalf of an SDN or holding meetings or conferences for a proscribed group is illegal.⁷³ For peacebuilding groups that view conducting

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workshops and promoting dialogue as critical elements of their work, these are highly sensitive issues. Providing lunch, transportation, or training can constitute material support for terrorism. The advice provided by peacebuilding organizations does “derive from scientific, technical, or other specialized knowledge,” which makes such advice illegal.⁷⁴ Should the Department of Justice be so inclined, the provider of these goods and services would be vulnerable to prosecution in a U.S. court.

The complications confronting peacebuilding organizations presented by these restrictions are at the heart of a recent U.S. Supreme Court decision, *Holder v. Humanitarian Law Project*, with significant ramifications for organizations and individuals who interact with armed groups proscribed by the U.S. government. The case originated when civil rights lawyer Ralph D. Fertig challenged the U.S. government’s definition of material support when it impeded his organization’s—the Humanitarian Law Project—ability to work advising the Kurdistan Workers Party (PKK) in Turkey shortly after the PKK was designated a terrorist entity in 1997. The Humanitarian Law Project’s brief to the Court sought to distinguish their intentions from those with violent aims: “[p]rovide training in the use of humanitarian and international law for the peaceful resolution of disputes, engage in political advocacy on behalf of the Kurds living in Turkey, and teach the PKK how to petition for relief before representative bodies like the United Nations.”⁷⁵

In several subsequent Ninth Circuit Court cases, the Humanitarian Law Project challenged the inclusion of “training” in the Antiterrorism and Effective Death Penalty Act and the “expert advice and assistance” language of the Patriot Act. In the former, the court found the term “training” “too nebulous to provide sufficient notice as to the activities proscribed by the statute;” in the latter, the court found that the “expert advice and assistance” language was “unconstitutionally vague,” and “chilled protected First Amendment activities.”⁷⁶ The Government appealed and in February 2010 the Supreme Court heard arguments on the constitutionality of the material support statute in *Holder v. Humanitarian Law Project*, No. 08-1498, and *Humanitarian Law Project v. Holder*, No. 09-89.⁷⁷

In a June 2010, 6-3 decision, the Supreme Court ruled that the First Amendment

does not protect groups or individuals who provide “expert advice or assistance” or “training” for pacific means to proscribed terrorist groups. Chief Justice John Roberts, who wrote the majority opinion, argued that the 2001 Patriot Act’s broad definition of material support to terrorism was necessary to block “aid that makes the attacks more likely to occur,” which reflected the belief that any work done in coordination with proscribed groups “serves to legitimize and further their terrorist means.”⁷⁸ The Court’s four dissenting judges argued that the decision draws a false analogy between humanitarian assistance—which has the potential to free up resources for the provision of weapons—and the advice and training provided by non-governmental groups like the Humanitarian Law Project, which does not result in resource diversion. The editorial boards of the New York Times, Washington Post, and Los Angeles Times denounced the majority decision, with the New York Times calling the prohibition “extremely vague.”⁷⁹

In conversations with several scholars and NGO officials involved in peacebuilding in Nepal, the general impression was that of frustration and confusion. Even before *Holder v. Humanitarian Law Project*, the lists catalyzed a self-cautioning conservatism in the peacebuilding community.⁸⁰ One scholar recounted being frozen out of project funding after American donors learned that he/she was working with the Maoists. Donors cited fears of being connected with financing terror. “U.S. law cuts Americans out of the dialogue process,” said one interviewee. Several interviewees explained that their work with the Maoists and with armed groups in general is dependent upon trust, which is hard-won and easily lost. The proscription of the Maoists complicated or categorically severed these personal relations. As a result, considerable institutional knowledge and communications channels were lost.

While the interviewees acknowledged that the OFAC waiver has enabled the Embassy to communicate with the Maoist leadership, they insisted that U.S. diplomats lack critical connections with the mid-level cadres and commanders, which limits their understanding of and influence upon Maoist decision-making. One interviewee recalled a conversation with a mid-level commander who was considering publicly challenging hardliners at a major meeting and advocating a more conciliatory approach to negotiations. The interviewee suspected that the commander was not yet committed to this course of action and was unsure of the strength of his arguments. However, the interviewee was unable to provide advice or encouragement, knowing full well that doing so could be interpreted by the Department of Justice as providing material support to a terrorist. “What they want is comparative knowledge. How were other groups successful in Latin America and South Africa? This is different

Even before Holder v. Humanitarian Law Project, the lists catalyzed a self-cautioning conservatism in the peacebuilding community.

than telling them how to build a bomb. You can't even give them advice on how to change their direction and move toward nonviolence."⁸¹ In one situation, members of a peacebuilding NGO who had been given permission by the Embassy to interact with the Maoists were advised to speak with a lilt, as if they are asking a question, in order to avoid the prohibition on giving advice, which could be interpreted as training.

Interviewees reported State Department and Justice Department lawyers giving contradictory information, or different officials within the same agency providing contradictory or vague guidance. Some officials appeared ignorant of the legal consequences of interacting with the Maoists, as well as the appropriate procedures in obtaining an OFAC waiver. One practitioner recounted being contracted by the State Department to conduct training workshops with the PLA without being offered an OFAC waiver. Another practitioner described being given permission to engage the Maoists on a particular issue by the Embassy, only to be told by his/her NGO—the implementing partner—not to make contact out of fear that the Embassy was not applying the law appropriately. Another NGO (not operating in Nepal) was approached by the State Department to provide legal advice to an SDN; yet when they requested an OFAC waiver, they were told that it was unnecessary, because the contact was in the interest of “peace” which is “intangible.” These anecdotes underscore arguments that the terrorist designation process fails to enhance legal clarity.

A widely quoted mantra among Americans who work with groups that appear on the U.S. terrorist lists is that one cannot have “tea with a terrorist.” This is the colloquial legal advice often provided by State Department lawyers. However, even if an NGO employee does opt to pay for a terrorist’s tea—or provide advice for the purpose of peacebuilding—it is unlikely that he/she will face prosecution by the Department of

The threat of reputational damage or criminal charges is enough to deter scholars and practitioners from pursuing work that they view as essential to their mandate and in the interest of sustainable peace.

Justice. OFAC decides the utility of prosecuting someone who has allegedly provided material support to a terrorist group and the Department of Justice has prosecutorial discretion; it is unlikely that either of these organizations would seek the arrest and prosecution of a hapless NGO employee for providing goods or services of minimal value to a member of a proscribed group for the purpose of peacebuilding. Since 2001, 23 percent of terrorism prosecutions in the U.S. have been material support cases guided by 2339B; 150 individuals have been prosecuted with a 70 percent conviction rate.⁸² However, of all the cases reviewed in a report on post-9/11 terrorist trials by NYU’s Center on Law and Security, none revolved around the provision of expert advice and assistance and/or training in the interest of peacebuilding. Nonetheless, the lack of prosecutions is of little comfort to the scholars

and organizations whose work necessitates some degree of interaction with proscribed armed groups. The threat of reputational damage or criminal charges is enough to deter scholars and practitioners from pursuing work that they view as essential to their mandate and in the interest of sustainable peace.

Despite suspicions of Maoist intentions, the U.S. still invests in peacebuilding in Nepal, funding the Nepal Transition to Peace Forum, the Ministry of Peace and Reconstruction, and several dozen district-level Local Peace Committees. However, certain restrictions guide the conduct of these initiatives, including strict compliance with OFAC regulations, prohibitions on offering advice or expertise, and an institutional bias against one-on-one meetings with the Maoists.⁸³ The U.S. peace initiatives only began to include the Maoists without restrictions in mid-2009 and—in a departure from local customs—no tea was offered to the Maoist participants.⁸⁴ The U.S. listing process excluded Maoists from aid flows—primarily through NDI—that supported training for political parties, and resources for voter and civic education during the crucial period before the 2008 elections and in its immediate aftermath.⁸⁵ As a result, Maoist parliamentarians viewed NDI as an extension of the U.S. embassy and refused to participate in workshops when invitations were finally proffered following OFAC attainment.⁸⁶ After a protracted period of hostility, the entreaties made by many U.S. NGOs following the issuance of the OFAC waiver were viewed by the Maoists as “too little, too late.”⁸⁷ It is impossible to measure how much more effective these initiatives could have been if they were launched without restrictions earlier in the peace process.

Recommendations for U.S. Policy: Reforming the Terrorist List System

The terrorist lists exist in a gray zone where law meets policy. A terrorist listing is much easier to do than to undo. The President, the Secretary of State, and the Congress have the power to remove a group from the lists at any time if the circumstances that compelled the U.S. to designate the group have changed or if such an action is in the interest of U.S. national security.⁸⁸ However, this power is rarely used. The investment of such grave authority in a single node of the government has created an institutional obstacle where the costs of de-listing a terrorist organization far outweigh the benefits for the decision-makers involved. The current system creates perverse incentives for listing a group and against de-listing a group. Taking responsibility for listing a group can boost a public official’s terror-fighting credentials, while de-listing a group could expose an official to accusations of being “soft on terror.”

The Maoists bear a significant share of the responsibility for their isolation from the U.S. They ignored a critical window of opportunity after their first meeting with high-level U.S. officials and failed to take advantage of the shift in U.S. policy. Further, Maoist abuses did not diminish after their democratic ascension.⁸⁹ Instead, they squandered an opportunity to demonstrate a genuine commitment to nonviolence and liberalism. Within the bureaucracy of the State Department, few mid-level officials will risk their careers on behalf of a group that they are not entirely certain is committed

to moderation and nonviolence. Advocates of engaging a proscribed armed group must demonstrate that the benefits of delisting outweigh the political benefits of a designation that placates either an allied government or a domestic constituency.

The U.S. should craft a more flexible and surgical designation process to fight terror while anticipating the potential for engaging armed groups inclined toward moderation and political participation.

The U.S. should craft a more flexible and surgical designation process to fight terror while anticipating the potential for engaging armed groups inclined toward moderation and political participation. This can be accomplished in several ways:

1. Clarify a Path to Legitimacy

The stigma of being labeled a terrorist movement by the United States may compel some armed groups to change paths. But without public information on how to be removed from a terror list, there is no incentive for groups to reform and no pathway for them to follow. The U.S. should clearly articulate a process—both words and actions measurable by benchmarks—that terrorist entities can follow to remove themselves from the web of terrorist lists. Often, demands are communicated to a group’s leadership through intermediaries; however, these guidelines often do not filter out beyond the inner circle. This information should be published on the State Department’s website and—to the

extent possible—be communicated directly to the proscribed group’s foot soldiers and constituency who can determine for themselves whether or not American demands are unreasonable.

2. Offer Probation for Groups in Transition

Terrorist lists should permit exemptions for groups that are involved in ongoing peace processes and create an opening to reduce sanctions in step with significant behavior change.⁹⁰ Groups that meet certain positive criteria, such as commitments to ceasefires, electoral success, or active involvement in peace accords should be offered some variation of probationary status as an incentive for continued constructive behavior. This sliding scale would have been useful in Nepal, where the Maoists could have been rewarded for their initial steps toward moderation and political participation, but without entirely removing the symbolic stigma of U.S. sanctions.

3. Consider Exemptions for Peacebuilding:

The 1996 Antiterrorism and Effective Death Penalty Act and subsequent statutes were intended to make terrorist groups “radioactive,” but they failed to anticipate the possibility that engagement of NSAGs by non-governmental peacebuilding organizations might be in the interests of the U.S. Groups and individuals should not be shunned, demonized, or prosecuted for promoting peaceful solutions to protracted

conflict. Congress could begin the needed reforms by amending the U.S. Antiterrorism and Effective Death Penalty Act of 1996.

OFAC should officially determine whether or not peacebuilding has a tangible or intangible economic value. The stronger argument favors an intangible status; peacebuilding can be distinguished from humanitarian support, since the services provided are not subject to diversion. The workshops, advice, and mediation training provided by peacebuilding NGOs cannot be diverted to give a military advantage to insurgents or free up resources for military spending in the same way that a humanitarian group's provision of food or social services might. Such reforms would be greatly bolstered with the support of a coalition of lawmakers in Congress willing to speak out on the potential benefits of having NGOs promote peace in fragile states where the U.S. cannot actively engage.

In the interim, OFAC should proactively open a direct channel to peacebuilding NGOs, providing clear instructions on the process of obtaining an OFAC waiver while facilitating and expediting specific requests. This can be accomplished by holding a series of consultations with relevant associations in Washington, D.C., such as the Alliance for Peacebuilding. For their part, peacebuilding organizations should revisit their monitoring and evaluation standards and demonstrate a higher level of due diligence and transparency in reporting their activities and interactions with NSAGs to OFAC.

Holder v. Humanitarian Law Project was a significant missed opportunity for the Supreme Court to provide legal clarity to peacebuilding practitioners. Advancing legal clarity will go a long way toward calming the fears of American and American-funded peacebuilding NGOs that have remained hesitant to engage proscribed NSAGs. Legal clarity was a primary motivation for the creation of the terrorist lists in 1996. The same principle should guide future reforms.

Endnotes

- 1 This paper will refer to the UCPN(M), its predecessor the Communist Party of Nepal (Maoist), and the People's Liberation Army (PLA) interchangeably as "the Maoists."
And, Robert Blake, "Friendship Between the U.S. and Nepal," Speech, Kathmandu, Nepal, June 13, 2009, <<http://www.state.gov/p/sca/rls/remarks/125070.htm>>.
- 2 Thomas Marks, *Insurgency in Nepal*, Rep. Strategic Studies Institute, 2003, 3.
- 3 Michael Hutt, ed, *Himalayan People's War: Nepal's Maoist Rebellion* (Bloomington, Indiana: Indiana UP, 2004), 17.
- 4 Bob Gersony, *Western Nepal Conflict Assessment: History & Dynamics of the Maoist Revolt*, Rep. Mercy Corps, October 1, 2003, 28.
- 5 Hutt, 103.
- 6 Hutt, 18.
- 7 Gersony, 40.

- 8 Karon Cochran-Budhathoki, *Security Sector Reform in Nepal: The Role of Civil Society*, Rep. (Washington, DC: U.S. Institute of Peace, December 2006).
- 9 These early stages of the peace process had a substantial degree of local ownership, with the UN and interested embassies playing at most a secondary role. Astrid Suhrke, "UN support for peacebuilding - Nepal as the exceptional case," Chr. Michelsen Institute, 2009, <<http://www.cmi.no/publications/file/3468-un-support-for-peacebuilding.pdf>>, 2.
- 10 A 2002 poll found that the Maoists would win only 10 percent of the seats in Parliament if they were allowed to compete in democratic elections (Rhode 2002).
- 11 In the course of Nepal's peace process and the dissolution of the Monarchy, the Royal Nepalese Army was renamed the Nepalese Army (NA). When describing events that take place before this event, the author will refer to them as the RNA.
- 12 International Crisis Group, *Nepal's Faltering Peace Process*, Asia Report No. 163, February 19, 2009, i.
- 13 Kanak Mani Dixit, "State of the Maoist State," *Himal South Asian Magazine*, May 2009.
- 14 Harald Olav Skar, *Between Boy Scouts and Paramilitary Storm Troops: The Young Communist League of Nepal*, Rep. no. 739, Norwegian Institute of International Affairs, 2008, <www.nupi.no/content/download/5330/68395/.../WP-739-Harald+Skar.pdf>, 6.
- 15 International Crisis Group, *Nepal's Faltering Peace Process*, Asia Report No. 163, February 19, 2009, 8.
- 16 Ian Martin, UNMIN Special Representative of the Secretary General, Personal interview, February 19, 2010.
- 17 Much of the material in this section is drawn from an off the record talk given by Susan Hutner, an associate in Davis Polk's Corporate Department and former official in the Treasury Department's Office of Foreign Assets Control (OFAC), at the U.S. Institute of Peace ("Anti-Terrorism Laws and Regulations: Implications for Mediators," part of the conference: Mediating Peace with Proscribed Armed Groups) on October, 27 2009, and a lengthy follow-up interview on April 25, 2010.
- 18 Paul Pillar, *Terrorism and U.S. Foreign Policy*, (Washington, D.C.: Brookings UP, 2001), 150.
And, Pursuant to section 219 of the Immigration and Nationality Act (8 U.S.C. 1101 et seq.), as amended under the Antiterrorism and Effective Death Penalty Act of 1996 (P.L. 104-132). Audrey Kurth Cronin, *CRS Report for Congress: The "FTO List" and Congress: Sanctioning Designated Foreign Terrorist Organizations*, Rep. no. RL32120, Congressional Research Service, 2003, 1.
- 19 The term SDN can be traced back to the Trading with the Enemy Act (1917) and the International Emergency Economic Powers Act (1977). Today, a wide assortment of violent armed groups, terrorist entities, individuals, criminal syndicates, and foreign corporations are classified as SDNs.
- 20 Pillar 2001, 150.
And, This criteria is guided by Title 22 of the U.S. Code, Section 2656f(d), which defines terrorism as: "Premeditated, politically motivated violence perpetrated against noncombatant targets by sub-national groups or clandestine agents, usually intended to influence an audience." Bruce Hoffman, "Rethinking Terrorism and Counterterrorism Since 9/11," *Studies in Conflict & Terrorism* 25.5 (2002), 38.
- 21 United States Department of the Treasury, Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons*, December 31, 2009, <<http://www.treas.gov/offices/enforcement/ofac/sdn/>>.

- 22 The Specially Designated Global Terrorists (SDGT) list is an additional list created by Presidential Executive Order 13224 in September 2001. Cronin 2003, 4.
- 23 Susan Hutner, Associate, Davis Polk LLC, Personal interview, April 25, 2010.
- 24 Cronin, 5.
- 25 United States. Department of State, Office of the Coordinator for Counterterrorism. *Foreign Terrorist Organization List Fact Sheet*, November 24, 2010. <<http://www.state.gov/s/ct/rls/other/des/123085.htm>>.
- 26 The FTO list does not include individual terrorists.
- 27 United States. Department of State, Office of the Coordinator for Counterterrorism, *Terrorist Exclusion List Fact Sheet*, November 15, 2002, <<http://www.state.gov/s/ct/rls/fs/2002/15222.htm>>.
- 28 Cronin 2003, 5.
- 29 While FTO designations are challengeable in U.S. courts, TEL designations are not. The Mujahedin-e Khalq (MEK), Liberation Tigers of Tamil Eelam (LTTE) and Turkish Kurdistan Worker's Party (PKK) have all argued (and lost) against their designation in U.S. courts (Cronin 2003, 10). No groups on the TEL list have attempted to overturn their TEL designations in U.S. courts.
- 30 United States, Department of State, *Patterns of Global Terrorism 2000*, 2001, 35.
- 31 United States, Department of State, *Patterns of Global Terrorism 2001*, May 2002, 11-12.
- 32 United States, Department of State, *Patterns of Global Terrorism 2002*, April 2003.
- 33 Gersony, 81.
- 34 Hutt, 197, 215.
And, While U.S. bilateral aid to Nepal provided by the 2001 Foreign Operations Appropriations Act (prior to the 9/11 attacks) was only \$.02 million, Nepal was provided \$29.5 million in the subsequent supplemental appropriations. Tamar Gabelnick and Matt Schroeder, "Guns R Us," *Bulletin of the Atomic Scientists*, January & February 2003: 38-39. Print.
- 35 Dr. Matthew Levitt, Director, Stein Program on Counterterrorism and Intelligence, Washington Institute for Near East Policy, Personal interview, September 25, 2009.
- 36 John Norris, UNMIN Chief of Political Affairs, Personal interview, April 2, 2011.
- 37 Prateek Pradhan, Narayan Wagle, Damakant Jayshi, and Dinesh Wagle. "Election Will End Conflict, Establish Republic: Carter," *Kathmandu Post* [Kathmandu], April 8, 2008.
- 38 Martin, 2010.
- 39 Foreign NGOs with offices in the U.S. present certain complications for the U.S. terrorist list system. Only the U.S. office of a foreign NGO is required to comply with U.S. law—the parent organization is not similarly bound. They are only considered a "U.S. person"—and required to comply with U.S. laws—to the extent that they have a presence in the U.S. On a related note, foreign NGOs that receive funding from a U.S. person (including the U.S. government) are not considered U.S. persons, but if these entities do not comply with U.S. sanctions, they risk losing their funding stream and/or putting the U.S. person who provided them with resources in violation of the sanctions.
- 40 Hutner, 2010.
- 41 United States, Department of the Treasury, Office of Foreign Assets Control, *Specially Designated Nationals and Blocked Persons*, December 31, 2009. <<http://www.treas.gov/offices/enforcement/ofac/sdn/>>.

- 42 The OFAC license authorized “activities with the Government of Nepal sponsored by US-AID or State notwithstanding any involvement of the Communist Party of Nepal-Maoist, which has been designated as a Specially Designated Terrorist group under Executive Orders 13224 and 13372” (OFAC License for Nepal 2007).
And, Ameet Dhakal and Damakant Jayshi, “Constitution-drafting Process Has Fallen Behind: Powell,” *My Republica*, July 4, 2009.
- 43 “US Envoy Meets Nepal Maoist Leader,” *Al Jazeera*, May 3, 2008. <<http://www.allvoices.com/s/event-396020/aHRocDovL2VuZ2xpc2guYWxqYXplZXJhLm5ldC9OUi9leGVyZX-MvNzg5Qzk5MDctRDNDQyooRjcwLTkiMTEtOTkzRDEyMoM2MzdBLmhobQ==>>.
- 44 Every U.S. Embassy has a country-specific contact policy that guides the conduct of diplomats, U.S. nationals and affiliated NGOs in their interactions with armed groups. The contact policy often compliments a terrorist designation. In some cases the contact policy will deter contact with groups that have not been officially sanctioned, while in others the contact policy allows Embassy officials to work with members of proscribed groups. A political advisor at the U.S. Embassy argued that the Embassy’s contact policy directs the application of the terrorist list, not the other way around. “The contact policy reinforces the legal restrictions in the two terrorist designations, but it is separate from them. In theory, the Maoists could be on the terrorist lists and we could still have contacts. Similarly, they could be off the lists, and we could have no contacts...I would say that contacts with the Maoists have been complicated by the Maoists’ behavior, not the TEL” (Martin interview, 2009).
And, Elise Labott, “Changing U.S. Terror Policy in Nepal,” *CNN.com*, May 29, 2008. <<http://edition.cnn.com/2008/WORLD/asiapcf/05/29/us.maoists/index.html>>.
- 45 Blake, 2009.
- 46 From *My Republica*: “According to sources, the conditions are A) renounce violence and terrorism, B) demonstrate commitment to the peace process, C) make the Maoist-aligned Young Communist League (YCL) renounce violence and orient it towards reform, and D) bring out the truth about the killing of two US Mission staffers in Kathmandu. Under category A, the Maoists will have to renounce violence not just in words, but also in their actions. Under category B, there are four items the Maoists will have to address: 1) The Maoists should actively participate in parliament and the constitution-making process. 2) They should hand over the murderers of Ramhari Shrestha to civilian authorities for legal action. Kathmandu-based businessman Shrestha was allegedly kidnapped and subsequently murdered by Maoist combatants at Shaktikhor cantonment in 2008. The prime accused in the case, Kali Babadur Kham, is currently a Maoist central committee member. 3) They should trace the guilty behind the Madi massacre and hand them over to the civilian authorities. 4) They should make public the status of 14 enforced disappearance cases committed by the Maoists between November 2002 and October 2004 in Bardiya district. As per this condition the Maoists will have to help the government in the criminal investigation of these cases and in taking legal action against the guilty so as to address the report of the OHCHR. Under category C, the party should make the YCL renounce violence and orient it towards reform. The US does not merely want the Maoists to do this in words, but also in actual practice. The YCL chief will have to publicly vow that the YCL is a purely political organization, and doesn’t adopt violent tactics. Even this will not be enough. The ICRC, the UN and independent political observers will verify if the YCL has really renounced violence and is reform-oriented. Under the fourth category, the US wants the Maoists to provide facts about the murder of two US Mission employees in Kathmandu as well as the bombing of the American Center in Kathmandu in 2004. Not only that, the US has demanded that the Maoists formally tell the National Human Rights Commission (NHRC) that the party was behind those incidents of violence, and compensate the kin of the victims.” (Basnet 2010)
- 47 Post B. Basnet, “US Terms for Taking Maoists off Terrorist List,” *My Republica*, January

- 20, 2010, <http://www.myrepublica.com/portal/index.php?action=news_details&news_id=14242>.
- 48 Khimlal Devkota, Legal Advisor to the UCPN(M), Personal interview, August 28, 2009.
- 49 Dr. Matthew Levitt, Director, Stein Program on Counterterrorism and Intelligence, Washington Institute for Near East Policy, Personal interview, September 25, 2009.
- 50 Matthew Levitt, *PolicyWatch: Navigating the U.S. Government's Terrorist Watch List*, Issue brief no. 585, Washington Institute of Near East Policy, 2001, 3.
- 51 Cronin 2003, 7.
- 52 Cronin 2003, 7.
- 53 Pillar 2001, 150-54.
- 54 Cronin 2003, 12.
- 55 Joanne Mariner, "Trivializing Terror," *CounterPunch*, May 31, 2003.
- 56 Dominic Cardy, Nepal country director of the National Democratic Institute, Telephone interview, August 31, 2009.
- 57 John Norris, UNMIN Chief of Political Affairs, Personal interview, February 25, 2010.
- 58 "You have a rebel group whose leadership does seem sincere about wanting to enter the mainstream. Yes, they want to maximize their share of the pie, yes they want to maximize their political influence and their gains which is not an unusual political calculation for any party or organization, but they need some help in bringing the cadre along with them. As a head of a rebel organization they are always vulnerable to criticism that they've compromised too much, that they are not hard-line enough... ..the approach was how do we direct and control the Maoists rather than how do we manage a process where both sides engage in a reasonable give and take and get to a better place." Norris, 2010.
- 59 Norris, 2010.
- 60 Paul Pillar, "Dealing with Terrorists," in Robert Art and Kenneth Waltz, eds., *The Use of Force*, 7th ed, (Maryland: Rowman and Littlefield, 2004), 474.
- 61 Conciliation Resources, *Incentives, Sanctions and Conditionality in Peacemaking*, Issue brief, London: 2008, 4.
- 62 Dr. Duman Thapa, Director of the Asian Studies Center for Peace and Conflict Transformation, Personal interview, August 11, 2009.
- 63 Vidyadhar Mallik, Former Finance Minister and Peace Ministry Secretary, Personal interview, August 10, 2009.
- 64 Hutner, 2010.
- 65 For the purposes of this paper, "affiliated NGOs" refers to domestic and international NGOs contracted to the USG or receiving funds from the USG.
- 66 New York University Center on Law and Security, Terrorist Trial Report Card: September 11, 2001-September 11, 2009, Rep. New York: January 2010, 48.
- 67 Andrew Peterson, "Addressing Tomorrow's Terrorists," *Journal of National Security Law and Policy* 2.2 (2008): 318, http://www.jnslp.com/read/vol2no2/03_Peterson_vol2no2.asp.
- 68 Peterson, 318.
- 69 Stephen I. Landman, *Holder v. Humanitarian Law Project*, Rep. Investigative Project on Terrorism, 2010, 10.

- 70 Peterson, 299.
- 71 Peterson, 299.
- 72 Hutner, 2010.
- 73 At the moment, it is unclear whether or not a conference in which a proscribed group or person is in attendance is illegal; the legality depends heavily upon the facts and circumstances surrounding the proscribed group/individual's participation. Hutner, 2009.
- 74 Landman, 6.
- 75 Landman, 2.
- 76 Peterson, 332.
- 77 Adam Liptak, "Right to Free Speech Collides With Fight Against Terror," *The New York Times*, February 10, 2010.
- 78 Lyle Denniston, "Partial U.S. victory on terrorism; Holder v. Humanitarian Law Project, Opinion recap," *SCOTUSblog*. June 21, 2010. Web. <<http://www.scotusblog.com/2010/06/tuesday-round-up-29/#more-21979>>.
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- 80 The interviewees referenced in this section asked that their identities remain confidential.
- 81 Anonymous.
- 82 Landman, 4, 5.
- 83 Bishnu Sapkota, Program Advisor, Asia Foundation Nepal, Personal interview, June 19, 2009.
- 84 Sapkota, 2009.
- 85 Norris, 2010.
- 86 John Norris, Personal interview, April 1, 2011.
- 87 Norris, 2011.
- 88 Cronin, 2.
- 89 Cardy, 2009.
- 90 Kristina Thorne, "Terrorist Lists and Humanitarian Assistance," *Humanitarian Exchange*, Humanitarian Practice Network, March 2007, <<http://www.odihpn.org/report.asp?id=2874>>, 7.