

Input to Special Rapporteur on protecting human rights while countering terrorism:

Report on the Interface between International Human Rights and International Humanitarian Law in Counter-Terrorism Regulation: Assessing legal and institutional dimensions

The Charity & Security Network greatly appreciates the Special Rapporteur's efforts to bring the General Assembly's attention to this often-overlooked issue. In our comments below we urge the UN to be more proactive in ensuring that counterterrorism (CT) measures comply with international human rights (IHRL), humanitarian (IHL) and refugee law (IRL). The current balance struck between compelling CT concerns and these binding legal obligations comes down heavily in favor of the former.

These comments address:

- The interdependence between IHRL, IHL and counterterrorism in terms of free speech and association rights, including the challenges civil society experiences as a result of counterterrorism regulations.
- The need for consistent humanitarian exemptions that are based on IHL principles in UN and member state CT measures.
- The negative impact of sanctions programs on IHRL and IHL, including due process rights.

The concept of proportionality is essential in considering these issues. Too often CT measures impose broad, long-term restrictions that are not tailored to specific security concerns. As a result, they often infringe on human rights unnecessarily, contrary to the requirements of the International Covenant on Civil and Political Rights, Articles 19, 21 and 22,¹ or restrict humanitarian assistance contrary to IHL.²

These comments focus on UN Security Council Resolution 2462 and U.S. domestic CT law. In addition to requiring member states to adopt certain types of strict laws against counterterrorist financing, Resolution 2462 requires that this be done "in a manner consistent with their obligations under international law, including international humanitarian law, international human rights law and international refugee law"³ and "Urges States, when designing and applying measures to counter the financing of terrorism, to take into account the potential effect of those measures on exclusively humanitarian activities, including medical activities, that are carried out by impartial humanitarian actors in a manner consistent with international humanitarian law."⁴

¹ See the report of UN Special Rapporteur on freedoms of association and peaceful assembly, Maina Kiai, on Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development 23 April 2013 Available online at https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A.HRC.23.39_EN.pdf

² Sandoz, et. al. Commentary on the Additional Protocols, 1480. See also, Henckaerts, "Study on Customary International Humanitarian Law," Rule 55.

³ UNSC Res 2462 Operational Paragraph 5

⁴ UNSC Res. 2462 Operational Paragraph 24

U.S. law does not meet these standards, as described below. Given the U.S.'s assertion of extraterritorial jurisdiction in the broadly defined prohibition on material support of terrorism, the reach of its CT sanctions programs and its role in the global financial system, this failure to align CT measures with IHRL/IHL/IRL has serious, sometimes devastating global consequences. In implementing UNSC Res 2462, the UN must ensure that CT measures in all states are compliant with their binding legal obligations under IHRL/IHL/IRL.

1) The interdependence between IHRL, IHL and counterterrorism in terms of free speech and association rights, including the challenges civil society experiences as a result of counterterrorism regulations.

- *Implementation of UN Security Council Resolution 2462*

The letter of 2 June 2020 transmitting the UN's Counterterrorism Committee Executive Directorate (CTED) and Analytical Support and Sanctions Monitoring Team on implementation of UNSC Res. 2462 presented the results of a survey of member state implementation of the resolution after the first year.⁵ The results indicate that both the UN and member states need to pay closer attention to the resolution's requirements regarding compliance with IHRL and IHL and to take the impact of CT measures on humanitarian action into account.

The survey itself asked only two questions about humanitarian concerns (Questions 36 and 36) and only one about human rights (Question 31Id). In summarizing the responses regarding IHRL, the letter notes that fewer than 60 percent of states answered these questions, with even fewer describing concrete measures taken. **We wholeheartedly agree with the letter's conclusion that "There is a need for further research into States' practices in this area."**⁶

The responses on IHL demonstrated weak compliance with IHL, with the report stating that, "Only a few States have developed a specific response to the potential impact of the counter-financing of terrorism on exclusively humanitarian activities."⁷ The measures that have been taken are relatively weak, consisting of various forms of dialogue or general references that are not a substitute for legal protections for humanitarian actors. Only three states reported introducing humanitarian exemptions. The remaining states, nearly half (45 percent) of those responding, have no institutional framework to consider the effects CT measures have on principled humanitarian action.

Having approved Res. 2462, it is now essential that the UN prioritize guidance and resources regarding IHRL/IHL/IRL compliance in states' implementation.

- *The U.S. material support prohibition and other overly restrictive CT measures are inconsistent with IHRL and IHL*

⁵ Letter dated 3 June 2020 from the Chair of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism and the Chair of the Security Council Committee pursuant to resolutions 1267 (1999), 1989 (2011) and 2253 (2015) concerning Islamic State in Iraq and the Levant (Da'esh), Al-Qaida and associated individuals, groups, undertakings and entities addressed to the President of the Security Council S/2020/

⁶ Ibid, p. 20 paragraphs 73-74

⁷ Ibid p. 24, paragraphs 83-84

The U.S. counterterrorism framework is grounded in the prohibition on the material support of terrorism, which is so broadly defined that in some cases it is inconsistent with freedoms of association and expression and with IHL obligations.⁸ For example, it prevents humanitarian actors from engaging in a wide range of activities that involve listed terrorist groups, regardless of the purpose or intent behind such engagement.

After the Supreme Court's ruling 10 years ago in *Holder v. Humanitarian Law Project* the prohibition was applied to training, technical advice and assistance to listed groups even when intended to turn them away from violence. In 2010, the U.S. Supreme Court issued its ruling in *Holder v. Humanitarian Law Project*. Here, the court upheld the constitutionality of the material support statute's prohibition on 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.

Both aid delivery to civilians and peacebuilding projects usually necessitate some engagement with the group in control of territory, ranging from minimal operational contact to extensive. In the humanitarian sphere, this can include interaction to obtain permits or pay road tolls. It is possible that members of a designated terrorist organization (DTO) will 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.

Eight years after the publication of our report, *Safeguarding Humanitarianism in Armed Conflict: A Call for Reconciling International Legal Obligations and Counterterrorism Measures in the United States*,⁹ the U.S. still has not reconciled its counterterrorism measures with its obligations under humanitarian law.

In peacebuilding work, effective programming requires engagement with a listed group that is a party to the conflict or former fighters. In this respect U.S. counterterrorism laws have not kept pace with evolving challenges and new programmatic approaches to end conflict, reduce violence and build sustainable peace. Increasingly, this work is focused on former combatants and disarmament, demobilization and reintegration (DDR) programs. At the same time, who is and is not a former combatant is poorly defined, a cloud of doubt sits over the legality of this work.

2) The need for consistent humanitarian exemptions in UN and member state CT measures that are based on IHL principles.

Organizations that deliver humanitarian assistance need humanitarian exemptions in CT measures that use consistent, uniform language and are based on IHL principles. The current system varies based on factors that appear more related to political issues than humanitarian need.¹⁰

⁸ Antiterrorism and Effective Death Penalty Act (AEDPA), 18 U.S.C. § 2339B

⁹ <https://charityandsecurity.org/sites/default/files/Safeguarding%20Humanitarianism%20Final.pdf>

¹⁰ See King Modirzadeh and Lewis, "Understanding Humanitarian Exemptions: UN Security Council Sanctions and Principled Humanitarian Action for a discussion of issues relating to UN humanitarian exemptions." Harvard Law School Program on International Law and Armed Conflict, 2016 Available online at https://dash.harvard.edu/bitstream/handle/1/29998395/Understanding_Humanitarian_Exemptions_April_2016.pdf?sequence=1

The U.S. framework lacks adequate humanitarian exemptions. The material support statute has a very narrow humanitarian exception; only medicine and religious materials are permitted. Under a strict interpretation of the law, 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 are not included in the exemption.

Increasingly, the U.S. government has taken a zero-tolerance approach to material support. Additional restrictions, not contained in law, are now found in donor agreements. A provision known as the Lake Chad Basin Clause in USAID grant agreements for work in Nigeria extends the material support prohibition to beneficiaries who have been held captive by Boko Haram or ISIS. The provision states that grantees “must obtain the prior written approval of the USAID Agreement Officer before providing any assistance ... to individuals whom the Recipient affirmatively knows to have been formerly affiliated with Boko Haram or the Islamic State of Iraq and Syria (ISIS) – West Africa, as combatants or non-combatants.”¹¹ This restriction is so broad that assistance to kidnap victims could be delayed while the grantee seeks approval from USAID.

Counterterrorism sanctions are often imposed under authority of the International Emergency Economic Powers Act (IEEPA), which has a humanitarian exemption.¹² The exemption bars the president from blocking “donations of food, clothing and medicine, intended to be used to relieve human suffering,” unless the he or she determines that such donations would “seriously impair his ability to deal with any national emergency.”¹³ This national emergency exception has been routinely invoked in Executive Orders designating terrorist organizations since EO 13224 was signed by President George W. Bush on Sept. 24, 2001.¹⁴ This has effectively repealed the exemption. The cancellations have no time limit or criteria defining conditions that could restore the exemption.

3) The negative impact of sanctions programs on IHRL and IHL, including due process rights.

- *Sanctions and Comments to the Special Rapporteur on Coercive Measures*

A 2019 report by International Peace Institute examined the impact of sanctions, finding that although sanctions regimes are used with the assumption that they minimize harm, they actually can devastate civilian populations, particularly those that rely on humanitarian aid, including refugees and internally displaced persons. Sanctions regimes also affect humanitarian organizations’ ability to deliver aid on the basis of need alone and not be directed by the political objectives of sanctions programs. Among its conclusions, it noted that one reason problems with sanctions persist is that, “The UN provides very little guidance about how to navigate their own sanctions regimes despite, or perhaps because of them often being “ambiguous, legally incoherent, and sometimes even contradictory.”¹⁵

On 15 June 2020 the Charity & Security Network, Center for Economic Policy Research and American Friends Service Committee submitted comments to the UN Special Rapporteur on the negative impact

¹¹ See The New Humanitarian, Aid workers question USAID counter-terror clause in Nigeria, 5 November 2019 at <https://www.thenewhumanitarian.org/news-feature/2019/11/05/USAID-counter-terror-Nigeria-Boko-Haram>

¹² 50 U.S.C. §1702(b)(2)

¹³ 50 U.S.C. §1702(b)(2)

¹⁴ www.treasury.gov/resource-center/sanctions/Documents/13224.pdf

¹⁵ Alice DeBarre, “Making Sanctions Smarter: Safeguarding Humanitarian Action” December 2019. Available online at https://charityandsecurity.org/wp-content/uploads/2019/07/1912_Making-Sanctions-Smarter.pdf

of the unilateral coercive measures on the enjoyment of human rights that explain how U.S. sanctions impede human rights around the world, and specifically the ability of humanitarian organizations to respond effectively to the COVID pandemic. The comments explain how U.S. sanctions do not incorporate U.S. obligations under international humanitarian and human rights law and produce results inconsistent with several international agreements supporting economic development rights and the right to health. Numerous examples are provided. We refer you to the full text for details.¹⁶

- *Due Process Rights of U.S. Civil Society Organizations*

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, these powers were used to issue EO 13224. 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 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 an entity should be listed. Since then, nine U.S. charities have been shut down and had their assets frozen, while dozens of foreign charities have also been listed and had their assets frozen.

Under EO 13224, Treasury has the power to designate individuals and entities based on a “reasonable suspicion” that they have supported a terrorist organization. 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 2003, Treasury issued regulations allowing designated entities to seek administrative reconsideration of their designation and petition for release of seized property. These regulations, however, do not require that adequate notice of the reasons for designation be given, that the evidence against the charity be provided, or that the charity have a hearing. Rather, once a charity is listed, Treasury’s enforcement office need only provide it with the unclassified portion of the administrative record and the opportunity to provide responsive evidence in writing.

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.¹⁷ 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, requiring a warrant before seizure.

¹⁶ Available online at <https://charityandsecurity.org/news/nonprofits-submit-comments-to-un-special-rapporteur-on-impact-of-u-s-sanctions-on-human-rights/>

¹⁷ *Al Haramain Islamic Foundation Inc. v. U.S. Department of Treasury*, 9th Cir. 10-35032

