

**Input to the Honorable Fionnuala D. Ní Aoláin, Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism:**

**Report to the GA77 on the Impact of Counter-Terrorism on Peacemaking, Peacebuilding, Sustaining Peace, Conflict Prevention and Resolution, October 2022**

**8 July 2022**

The Charity & Security Network (C&SN) thanks the Special Rapporteur for the opportunity to submit input on the important topic of the impact of counter-terrorism measures, legislation, and normative frameworks, and how these often impede civil society efforts in regards to peacebuilding, humanitarian action, and human rights. Our mission is to promote and protect the ability of nonprofits to carry out effective programs that support peace and human rights, aid civilians in areas of disaster and armed conflict, and build democratic governance. Our members, located around the world, have cited counter-terrorism mechanisms as a major barrier to their ability to operate. Consequently, we are encouraged by the Special Rapporteur's interest in bringing this important topic forward to the 77<sup>th</sup> session of the General Assembly.

*Root Cause of Negative Impacts of Counter-terrorism on Peace: The United States Context*

In the United States (U.S.) context, the legal counter-terrorism (CT) framework, which dramatically expanded in the wake of 9/11, is the root cause of negative "impacts of counter-terrorism on peacemaking, peacebuilding, sustaining peace, conflict prevention and resolution" efforts and agendas. While the nature of conflict has changed significantly over the past 22 years, the U.S.' post-9/11 CT laws and policies have not only failed to adapt to these changes, but have created an increasingly restrictive environment for peacebuilding organizations working to end violent conflict and build sustainable peace.

*U.S. Legal CT Framework*

One of the most challenging and persistent issues is how broadly the material support clause, 18 U.S.C. § 2339A and §2339B, of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), is defined.<sup>1</sup> This is not surprising as the U.S. is distinct in having the "definition of material support [that] is the broadest among western democracies."<sup>2</sup> Under AEDPA, the U.S.' "primary prohibition on material support of terrorism", material support is prohibited to Secretary of State-designated Foreign Terrorist

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<sup>1</sup> Doyle, Charles. "Terrorist Material Support: An Overview of 18 U.S.C. §2339A and §2339B." Congressional Research Service. Dec. 8, 2016. <https://sgp.fas.org/crs/natsec/R41333.pdf>

<sup>2</sup> Charity & Security Network. "The Prohibition on Material Support and Its Impacts on Nonprofits." July 2019. <https://charityandsecurity.org/sites/default/files/material%20support%20issue%20brief%202019.pdf>

Organizations (FTOs).<sup>3</sup> Furthermore, the “humanitarian exemption” permissible under AEDPA in regards to engaging FTOs, applies only to the provision of religious materials and medicine, and prohibits training, services, technical assistance and advice, and personnel. While there is an AEDPA provision that makes an exception for certain prohibitions, such as providing an FTO with “expert advice,” “personnel,” and “training,” there is no process for securing this permission, which requires approval by the Secretary of State, in agreement with the Attorney General (AG). The Department of State (DOS) has never used this exception for peacebuilding programming.<sup>4</sup> Instead, the potential for peacebuilding activities and programming, including the vital work of providing peace negotiations and peace process support, are often thwarted.<sup>5</sup> Likewise, the broad stroke definition and the way the statute is constructed undermines U.S. legislation designed to promote and support peacebuilding and conflict prevention efforts, such as the Global Fragility Act (GFA).<sup>6</sup> Even with the U.S. Congress providing definitions for “expert advice and assistance,” “training,” and “personnel” in 2004,<sup>7</sup> in 2022, there remains a lack of clarity surrounding these definitions’ applicability to peacebuilding programs.<sup>8</sup> Despite peacebuilding organization’s commitment to Do No Harm and undertaking a risk-based approach (RBA) when engaging civilians living in FTO-controlled areas, the restrictive nature of the material support statute hampers engagement with these civilians, despite many not being affiliated with, or choosing to be under FTO-control.<sup>9</sup>

Though AEDPA remains the primary legal framework regarding material support to terrorism, additional U.S. legal measures complicate the matter further. For instance, Executive Orders (EOs) have no definition for material support, while immigration law and CT law have different material support definitions.<sup>10</sup> Despite EOs not defining material support, the majority of “terrorism-related Executive Orders (EOs) issued under sanctions authority under the International Emergency Economic Powers Act (IEEPA) include a “material support” prohibition.”<sup>11</sup> This leads to the AEDPA definition being the default,

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<sup>3</sup> Ibid.

<sup>4</sup> Alliance for Peacebuilding and the Charity & Security Network. “Preventing Peace: How ‘Material Support’ Laws Undermine Peacebuilding.” July 2021.  
<https://charityandsecurity.org/wp-content/uploads/2021/07/Preventing-Peace-How-Material-Support-Laws-Undermine-Peacebuilding.pdf>

<sup>5</sup> Charity & Security Network. “The Prohibition on Material Support and Its Impacts on Nonprofits.” July 2019.  
<https://charityandsecurity.org/sites/default/files/material%20support%20issue%20brief%202019.pdf>

<sup>6</sup> “Global Fragility Act of 2019.” U.S.C. Title V, Sec. 501. Dec. 16, 2019.  
<https://static1.squarespace.com/static/5db70e83fc0a966cf4cc42ea/t/5f6208ed4c84b42901596f35/1600260333957/BILLS-116HR1865SA-RCP116-44+%28GFA+ONLY%29.pdf>

<sup>7</sup> “Intelligence Reform and Terrorism Prevention Act of 2004.” Public Law 108–458. Dec. 17, 2004.  
[https://www.dni.gov/files/NCTC/documents/RelatedContent\\_documents/Intelligence\\_Reform\\_Act.pdf](https://www.dni.gov/files/NCTC/documents/RelatedContent_documents/Intelligence_Reform_Act.pdf)

<sup>8</sup> Alliance for Peacebuilding and the Charity & Security Network. “Preventing Peace: How ‘Material Support’ Laws Undermine Peacebuilding.” July 2021.  
<https://charityandsecurity.org/wp-content/uploads/2021/07/Preventing-Peace-How-Material-Support-Laws-Undermine-Peacebuilding.pdf>

<sup>9</sup> Alliance for Peacebuilding, Charity & Security Network, and InterAction. “Opportunity for the 117th Congress: Ensure the Material Support Statute Facilitates U.S. Humanitarian & Peacebuilding Priorities.” March 29, 2021. (Internal congressional memo).

<sup>10</sup> Charity & Security Network. “The Prohibition on Material Support and Its Impacts on Nonprofits.” July 2019.  
<https://charityandsecurity.org/sites/default/files/material%20support%20issue%20brief%202019.pdf>

<sup>11</sup> Alliance for Peacebuilding and the Charity & Security Network. “Preventing Peace: How ‘Material Support’ Laws Undermine Peacebuilding.” July 2021.

and has the unintended negative consequence of the challenges surrounding the material support definition within the criminal context being imposed within the sanctions context.<sup>12</sup> Lastly, the *Holder v Humanitarian Law Project (HLP)* 2010 U.S. Supreme Court ruling, in which the plaintiffs “challeng[ed] the constitutionality of provisions of the material support to terrorism law”, rejected this challenge and ruled that the material support prohibition encompasses “assistance,” “expert advice,” and “training.”<sup>13</sup> This outcome meant that a number of activities and engagement measures with designated terrorist groups are prohibited, “including attempts at peacebuilding and support for nonviolence.”<sup>14</sup>

#### *Negative Impacts of the U.S. Legal CT Framework*

Despite peacebuilding, humanitarian, and human rights non-profit organizations (NPOs) and charities identifying these issues, making concrete recommendations for changes, and raising them with stakeholders who hold the power to make these changes,<sup>15</sup> the 2010 *Holder v HLP* Supreme Court case is the last serious action taken on the material support statute. A 2011 declassified Department of Justice (DOJ) memo amounted to only a further lack of specificity, providing no assurances to peacebuilding organizations that their programming is “not subject to criminal liability.”<sup>16</sup> Furthermore, initiatives supported by the U.S. government (USG) to counter violent extremism (CVE) are prohibited from aiding individuals who have voluntarily left an FTO, barring an official disarmament, demobilization, and reintegration (DDR) process.<sup>17</sup>

#### *Peacebuilding Interrupted*

12 years on, peacebuilding and conflict prevention initiatives, DDR programs and processes, and the ability to engage with all parties to a conflict to have truly inclusive and equitable peace processes, all continue to suffer under this archaic architecture. Find below four country examples highlighting the impediments to peacebuilding programming this architecture causes:

1. *“In Nepal, the Maoists signed a peace agreement with and joined the government. However, [due to the material support prohibition](#), assistance could only be provided to individuals within the government unaffiliated with the Maoists, who were on the FTO list. As a result, U.S. government projects providing support to the government could only meet with non-Maoist government officials, making it logistically difficult to undertake whole-of-government training and activities and awkward to disinvite Maoist members of the government entities that the programs were supposed to benefit. It also created lopsided capacity within the government because only one*

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<https://charityandsecurity.org/wp-content/uploads/2021/07/Preventing-Peace-How-Material-Support-Laws-Undermine-Peacebuilding.pdf>

<sup>12</sup> Ibid.

<sup>13</sup> Charity & Security Network. “Holder v. Humanitarian Law Project.” Sept. 3, 2020.

<https://charityandsecurity.org/litigation/hlp/>

<sup>14</sup> Ibid.

<sup>15</sup> Charity & Security Network. “Proposals for new Congress and Biden-Harris Administration to Support and Facilitate Humanitarian and Peacebuilding Operations Through Nongovernmental Organizations.” January 2021.

[https://charityandsecurity.org/wp-content/uploads/2021/03/CSN-Transition-Memo\\_V4.pdf](https://charityandsecurity.org/wp-content/uploads/2021/03/CSN-Transition-Memo_V4.pdf)

<sup>16</sup> Alliance for Peacebuilding and the Charity & Security Network. “Preventing Peace: How ‘Material Support’ Laws Undermine Peacebuilding.” July 2021.

<https://charityandsecurity.org/wp-content/uploads/2021/07/Preventing-Peace-How-Material-Support-Laws-Undermine-Peacebuilding.pdf>

<sup>17</sup> Ibid.

portion of it could receive skill-building and training assistance. The Maoists were on their own, which inhibited the overall peaceful government transition and entrenched grievances.

2. **In Colombia**, the Revolutionary Armed Forces of Colombia (FARC) remain[ed] on the FTO list [until November 2021], although it demobilized pursuant to the [2016 peace agreement](#), which ended 52 years of conflict. However, [some members of FARC](#) rejected the agreement, rearmed, and formed “FARC dissident” groups. The material support prohibition effectively bar[red] U.S. peacebuilding organizations from lending their considerable expertise to the peace process and working with the dissident groups to bring them into the DDR and transition processes, and continue[d] to be a barrier [until the FTO designation was revoked] as more and more [FARC members join the government](#).
3. **In Nigeria**, when a number of the 276 Chibok girls kidnapped by Boko Haram in 2014 were rescued, the U.S. government [failed to support them](#) because there was [no official DDR process](#) in place. Individuals [kidnapped](#) by ISIS and other FTOs have faced a similar lack of support. Even after USAID began working with the Nigerian military in 2016 to support a national DDR program called Operation Safe Corridor, the material support prohibition remained a [major roadblock](#), delaying direct support by requiring extensive vetting and interagency coordination...
4. **In Sri Lanka**, an U.S.-funded [project to foster dialogue](#) among professionals, such as doctors and lawyers, was discontinued after the U.S. asked the program director Visaka Dharmadasa if she could certify that none of the participants were sympathetic to the [Liberation Tigers of Tamil Eelam] LTTE. Remarkably, the U.S. also asked her to certify that none of the tea houses she visited had ties to the LTTE. The justification for the requests was compliance with U.S. laws that prohibit dealing with the LTTE, an FTO. The NGO discontinued the program because they “[cannot clap from one hand](#).” This was the first time in 20 years the organization had to close a project halfway through implementation, even though the dialogue sought to stop violence and promote dialogue. Ms. Dharmadasa was [nominated](#) for a Nobel Peace Prize in 2005, and awarded InterAction’s Humanitarian Award in 2006, neither of which afforded her the benefit of the doubt in these interactions with the U.S. government in light of the material support prohibition.”<sup>18</sup>

As demonstrated in these examples, the U.S. CT architecture is not only preventing peacebuilding programming, but is actively impeding viable pathways to sustainable peace.

#### *Inclusive Peace Process Impediments*

A hallmark of building sustainable peace is meaningful inclusion in peace negotiations, peace agreements, peace processes, and subsequent post-conflict rebuilding. Conversely, parties who are excluded from peace processes often serve as spoilers to the process,<sup>19</sup> and even if a peace agreement is

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<sup>18</sup> Charity & Security Network. “The Prohibition on Material Support and Its Impacts on Nonprofits.” July 2019. <https://charityandsecurity.org/sites/default/files/material%20support%20issue%20brief%202019.pdf>

<sup>19</sup> Blaydes, Lisa, and Jannifer De Maio. “Spoiling the Peace? Peace Process Exclusivity and Political Violence in North-Central Africa.” *Civil Wars*. 12:1-2, 3-28. <https://www.tandfonline.com/doi/abs/10.1080/13698249.2010.484896?journalCode=fciv20>

reached, it is more likely to fail if not all actors are included in the process.<sup>20</sup> This means that the U.S.' CT architecture, with its restrictions to engaging with FTOs and potential for strict criminal liability and financial repercussions for doing so, is not only preventing peace processes' opportunity for success, but is dooming them to fail. Beyond creating nearly insurmountable barriers towards fostering a lasting peace, exclusion often fosters violence and further conflict:

*"...peace process exclusivity, that is negotiations between only some of the potential parties to a conflict, is more likely to breed violence than inclusive peace negotiations where all relevant groups have a seat at the bargaining table."*<sup>21</sup>

*"The exclusion of some rebel groups from peace negotiations can perpetuate civil war, rather than hastening a resolution."*<sup>22</sup>

*"...when armed groups are excluded from negotiations, they lack commitment to the process and agreements, remain with their unresolved grievances, and are motivated to use violence to reach their goals."*

The U.S.' CT architecture is in direct opposition to the fundamental tenets of creating a conducive environment for sustainable peace. As underscored in the Vision Statement by Ambassador Csaba Kőrösi, Director at the Office of the President of Hungary, Candidate for the 77<sup>th</sup> President of the UN General Assembly, "The window of opportunity to strike a better balance between securing short-term survival and longer-term stability is still open, but it is closing quickly as time is running out."<sup>23</sup>

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<sup>20</sup> United Nations Entity for Gender Equality and the Empowerment of Women. "Preventing Conflict, Transforming Justice, Securing the Peace: A Global Study on the Implementation of United Nations Security Council resolution 1325." Oct. 12, 2015.

<https://wps.unwomen.org/resources/fact-sheets/Fact-Sheet-and-Key-messages-Global-Study-EN.pdf>

<sup>21</sup> Blaydes, Lisa, and Jannifer De Maio. "Spoiling the Peace? Peace Process Exclusivity and Political Violence in North-Central Africa." *Civil Wars*. 12:1-2, 3-28.

<https://www.tandfonline.com/doi/abs/10.1080/13698249.2010.484896?journalCode=fciv20>

<sup>22</sup> Peace Science Digest. "Consequences of Excluding Armed Actors from Peace Negotiations." June 5, 2019.

<https://peacesciencedigest.org/consequences-of-excluding-armed-actors-from-peace-negotiations/>

<sup>23</sup> Kőrösi, Csaba. "Vision Statement by Ambassador Csaba Kőrösi, Director at the Office of the President of Hungary, Candidate for the 77th President of the UN General Assembly." Feb. 8, 2022.

<https://www.un.org/pga/76/wp-content/uploads/sites/101/2022/03/Vision-statement-1.pdf>